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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2006 WAIRC 03846

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS; THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH; THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH	APPELLANTS
	-and- BHP BILLITON IRON ORE PTY LTD	
		RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER S J KENNER COMMISSIONER J L HARRISON	
HEARD	TUESDAY, 24 JANUARY 2006, WEDNESDAY, 25 JANUARY 2006	
DELIVERED	MONDAY, 27 FEBRUARY 2006	
FILE NO.	FBA 19 OF 2005	
CITATION NO.	2006 WAIRC 03846	

CatchWords	Industrial Law (WA) – Appeal against decision of single Commissioner – Award variation application – Power of Commission to vary award – State Wage Fixing Principles – Duty to give reasons for decision – <i>Workplace Agreements Act 1993 (WA)</i> – <i>Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002</i> – State Wage Fixing Principles June 2004, 11(d) – <i>Industrial Relations Act 1979 (WA)</i> (as amended), s6, s6(ad), s6(ca), s7, s26, s29A, s36A, s36A(1), s37, s40, s40(1), s40(2), s49(2), s49(2a), s49(3), s49(6a) – <i>Workplace Agreements Act 1993 (WA)</i> , s4H, s4H(2), s4H(6) – <i>Labour Relations Reform Act 2002</i> , s31
Decision	Appeal upheld in part
Appearances	
Appellants	Mr D Schapper (of Counsel), by leave
Respondent	Mr H Dixon SC, by leave, and with him Ms G Archer (of Counsel), by leave

*Reasons for Decision***THE ACTING PRESIDENT:****Introduction**

1 This is an appeal against a decision of the Commission constituted by a single Commissioner made on 22 November 2005. The appeal is brought pursuant to s49(2) of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*).

2 The decision made by the Commission was to determine an application to vary an award which was filed on 29 March 2005. The award which was sought to be varied by the application was the *Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002* (the award).

3 The application sought one variation of the award which was minor. This was an amendment to delete the references to "CMETU" wherever appearing in Schedule 1 and Schedule 3 of the award. This part of the application, which was not opposed, was granted, with the replacement in the schedule of "CMETU" by "CFMEU".

4 The more substantial part of the application was to vary the award by bringing under the award three engine drivers who worked on a fly in/fly out (FIFO) basis and who formerly had their employment with the respondent regulated by workplace agreements (WPA's), and to insert the classifications of train controller, train co-ordinator, crew development officer (CDO) and rail supervisor within the award with designated salaries. The salaries which the appellants sought to have designated for at least the train controllers and the WPA/FIFO engine drivers would involve an increase in the salary of these employees.

5 With respect to the WPA employees, Schedule 3 to the application alleged as follows:-

"Those employees' wages are being significantly degraded by the Company [sic – the respondent] by reason of those employees' decision not to enter into an AWA. Protection of those employees by way of extension of the award to them is thus required as, in any event, it is arguable that the award applies to them anyway."

6 With respect to the train controllers, train co-ordinators, crew development officers and rail supervisors, Schedule 3 to the application alleged as follows:-

"Those rail employees employed in the other proposed classifications are not being paid in accordance with their true worth compared either to others with whom they work or having regard to the nature of their duties. Remediation of this situation by way of extending the application of the award to them is thus sought."

7 The relevant variations sought to the award were set out in paragraphs [3]-[7] of Schedule 2 to the application as follows:-

"3. At the end of Schedule I — Aggregate Wages **add** the following:

<i>Train Controller</i>	<i>\$138,829 per annum for an average 42 hour week worked as 4 panel continuous shift work</i>
<i>Train Co-Ordinator</i>	<i>\$138,829 per annum for an average 42 hour week worked as 4 panel continuous shift work</i>
<i>Crew Development Officer</i>	<i>\$145,140 per annum for an average 42 hour week worked as 4 panel continuous shift work</i>
<i>Rail Supervisor</i>	<i>\$157,760 per annum for an average 42 hour week worked as 4 panel continuous shift work</i>

4. At the end of Schedule III — Award Classifications **add** the following:

6. <i>Train controller</i>	<i>A person at this level will be competent to perform train control duties over all or any part of the Company's rail road</i>
7. <i>Train Co-Ordinator</i>	<i>A person at this level will be competent to co-ordinate train movements and organise all work at and around a junction within the Company's rail road</i>
8. <i>Crew Development Officer</i>	<i>A person at this level will be competent to instruct and develop the skills of engine drivers in all aspects of the operation of trains on the Company's rail road</i>
9. <i>Rail Supervisor</i>	<i>A person at this level will be competent to supervise all aspect of rail road operations on the whole of or any part of the Company's rail road</i>

5. **Add** new subparagraph (4a) to clause 11.— Hours of Work as follows:

(4a) *The ordinary hours of rail employees other than locomotive drivers shall be and (sic) average of 84 per fortnight which shall be worked in shifts of 12 hours on a continuous shift basis.*

6. **Add** a new subparagraph (13) to clause 12.— Annual Leave as follows:

(13) *Rail employees, other than locomotive drivers, shall be entitled to a loading of 25% payable when leave is taken.*

7. **Add** a new subparagraph (4) to clause 14. — Long Service Leave as follows:

(13) *Rail employees, other than locomotive drivers, shall be entitled to a loading of 20% payable when leave is taken."*

8 After a five day hearing in Port Hedland, the Commission reserved its decision. By its order on 22 November 2005, the Commission dismissed the application insofar as it sought the variation of the award by the addition of the new classifications.

Power to Vary Award

9 The power of the Commission to vary the award is provided by s40(1) of *the Act*. It was agreed by the parties to the appeal that, with respect to the award in question, s40 did not specify any criteria by which the Commission ought to decide whether or not to vary it. Both parties accepted that the power to vary an award is discretionary. It was also agreed that the award variation power of the Commission is subject to the requirements of s26 of *the Act* and should be exercised having regard to the purposes of *the Act* set out in s6. Other than that it was agreed that the Commission exercised a wide discretion in deciding whether or not to vary an award. If an application to vary an award sought to increase the salary or wages of an employee, it was agreed that the Commission should apply the State Wage Fixing Principles. More will be said about this aspect of the matter later in these reasons.

Principles in Deciding Appeal

10 Given that the decision appealed against was a discretionary decision, there are strict limits to the basis on which the Full Bench may allow an appeal. This is in part because of the nature of a discretionary decision which has been made by a decision-maker at first instance.

- 11 In *Coal and Allied Operations Pty Ltd v AIRC and Others* (2000) 203 CLR 194, Gleeson, Gaudron and Hayne JJ spoke of the exercise of a discretionary decision in the following way at paragraph [19]:-
- “In general terms, it refers to a decision-making process in which “no one [consideration] and no combination of [considerations] is necessarily determinative of the result” [Jago v District Court (NSW) (1989) 168 CLR 23 at 76, per Gaudron JJ]. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made.”*
- 12 At paragraph [21] their Honours stated that:-
- “Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process.” [See *Norbis v Norbis* (1986) 161 CLR 513 at 518-519, per Mason and Deane JJ].*
- 13 In the same paragraph their Honours quoted the well known passage from *House v The King* (1936) 55 CLR 499 at 504-505, in which in the joint judgment of Dixon, Evatt and McTiernan JJ, there were set out the types of errors which would permit an appeal court to allow an appeal against an order made in the exercise of a discretionary judgment. It is worth repeating this passage, which has been said in numerous decisions of the Full Bench to apply to appeals against discretionary decisions of the Commission at first instance. The passage is as follows:-
- “It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”*
- 14 Both parties to the appeal agreed that these principles applied to the present appeal.

Ground 1

- 15 This ground pleaded that the Commission had erred in failing to allow the appellants to amend the application on the first day of the hearing. The purpose of the application was to seek an amendment to the salary rates which the appellants sought to have inserted into the award for the classifications of train controller, train co-ordinator and crew development officer. The original application sought the amounts of \$138,829 per annum for both a train controller and train co-ordinator and \$145,140 per annum for a crew development officer. By the amendment application, the appellants sought to substitute the rate of \$155,000 for the positions of train controller and train co-ordinator and \$150,000 for the position of crew development officer.
- 16 The application to amend the claim was dismissed by the Commission on the day on which it was made and was also referred to in the final reasons of the Commission at paragraphs [10]-[14].
- 17 As pointed out by the respondent in its written submissions on the appeal, there are a number of difficulties with respect to this ground. For example, the decision to refuse the amendment application was a “*finding*” as defined in s7 of *the Act*, and therefore as to which s49(2a) of *the Act* applied. Additionally, the appeal against the decision not to allow the amendment application was not brought within 21 days of the date of the decision as required by s49(3) of *the Act*. Even more fundamentally, however, the decision of the Commission which was ultimately made on 22 November 2005 was to dismiss the substantive aspects of the application, including the insertion into the award of the classifications which were affected by the amendment application. The substantive dismissal of the application did not relate to the amendment application. As the Commission ultimately declined to vary the award by adding the classifications sought, there was no prejudice to the appellants in the non-granting of the amendment sought at first instance.
- 18 The appellants did not refer to this ground in its written submissions on the appeal and only faintly referred to the ground during oral submissions. It declined to abandon the ground, despite the above obstacles. The appellants submitted that it wanted to maintain the assertion that the higher award rates sought in the amendment application at first instance should apply, in the event that the Full Bench were to allow the appeal and determine for itself the award rates which should apply to the classifications sought.
- 19 On the basis of the lack of prejudice to the appellants referred to in paragraph [17] above, I do not think that the appeal should be allowed on this ground.

Ground 2

- 20 In the application before the Commission, the appellants submitted that s36A of *the Act* applied to the variation application. S36A reads as follows:-
- “36A. Application for award coverage for non-award employees**
- (1) *In any proceedings in which the Commission is considering the making of an award (“the new award”) that extends to employees to whom no award currently extends (“the employees”), the onus is on any party opposing the making of the new award to show that it would not be in the public interest.*
 - (2) *The Commission may make an interim award that extends to the employees pending the making of the new award.*
 - (3) *An interim award may be made if the Commission considers —*
 - (a) *that it would provide a fair basis for the application of the no-disadvantage test provided for by Part VID Division 6 Subdivision 1;*
 - (b) *that it would protect the existing wages and conditions of employment of the employees until the new award is made; or*
 - (c) *that it would be appropriate for any other reason.”*
- 21 The benefit of s36A applying to the application before the Commission was that the onus was then on the respondent to show that it would not be in the public interest to make the award variation sought.
- 22 The Commission did not accept that s36A applied to the variation application.
- 23 The Commission at paragraph [101] of its reasons said:-

“The section deals specifically with the making of a new award, not the amending of an existing award to insert new classifications. The onus of proof in the application must fall to the applicants, as per s.40 of the Act, to prove the merits of the claim.”

- 24 Ground 2 of the Notice of Appeal asserted the Commissioner erred in making this determination. In my opinion, the Commission was correct in deciding that s36A did not apply to the application before it. This was despite the fact that it was accepted by both parties to the appeal that none of the employees who were subject to the variation application were covered by the award. To this extent therefore they were employees to whom no award currently extended, as contemplated by s36A of *the Act*. (This was with the possible exception of the WPA/FIFO drivers as referred to later in these reasons).
- 25 Despite this, however, in my opinion, the language of s36A(1) is clear when it refers to the *“making of an award”*. As pointed out by the respondent, *the Act* in numerous places distinguishes between the concepts of and process for the making of an award and the variation of an award. (See, for example, the definition of vary in s7 of *the Act*, as well as s29A, s37 and s40).
- 26 In the construction of statutes, the role of decision-makers is to ascertain the intention of the legislature as manifested by the language used in the statute (*Wilson v Anderson and Others* (2002) 213 CLR 401 at [8]). With respect to s36A the language used is the *“making of an award”*. The making of an award, in *the Act*, is something different from the variation of an award to extend the coverage to employees not previously bound by the award. In my opinion, it must be taken that the use of the words in s36A was deliberate by the legislature and did not extend to an award variation application of the type which was before the Commission.
- 27 In my opinion, this ground of appeal should not be allowed. In coming to this conclusion I have had regard to the contents of the appellants’ outline of submissions at first instance at paragraphs [3]-[8] which were incorporated by reference into the appellants’ arguments on the appeal.

Grounds 3 and 4 – Train Controllers

- 28 Grounds 3 and 4 appealed against the decision at first instance to reject the application to vary the award to provide for a classification of train controllers with a specified salary. The claim with respect to the train controllers occupied most of the time of the hearing at first instance. The same applied with respect to the hearing of the appeal.
- 29 To understand the grounds of appeal, particularly as argued, it is necessary to consider in some greater detail the application before the Commission at first instance with respect to the train controllers and the reasons for decision of the Commission at first instance.
- 30 As stated earlier, the hearing took place over five days at Port Hedland. Both the appellants and the respondent called witnesses, tendered documents and made detailed written and oral submissions.
- 31 The witnesses who gave evidence for the appellants were:-
- (a) Mr Warren Johncock, who was a locomotive driver employed by the respondent.
 - (b) Mr Ross Ashton, who was a locomotive driver employed by the respondent and whose conditions of employment were governed by a WPA. Mr Ashton worked for the respondent on a FIFO basis.
 - (c) Mr Ashley James, who was a train controller employed by the respondent in the Port Hedland Yard.
 - (d) Mr Phillip Thompson, who was a train controller employed by the respondent.
 - (e) Mr Stephen Porter, who was a train controller employed by the respondent.
 - (f) Mr David Symons, who was a locomotive driver employed by the respondent.
 - (g) Mr Paul Gunovich, who was a FIFO locomotive driver employed by the respondent and subject to a WPA.
 - (h) Mr Trevor Emmitt, who was a train controller employed by the respondent.
 - (i) Mr Brent Kara, who was a train controller employed by the respondent.
- 32 The respondent called the following three employees as its witnesses:-
- (a) Mr Errol Goiack, who was the Superintendent Train Control Operations.
 - (b) Mr Leslie Punter, who was a Supervisor of Rail Transport and Acting Superintendent of Rail Operations.
 - (c) Mr Michael Hoare, who was a Principal Human Resources Adviser.
- 33 In its reasons for decision, at paragraphs [15]-[92], the Commission comprehensively summarised the evidence of each of the witnesses in turn. It was not argued on the appeal by either party that the Commission had erred in its summarising of the evidence of the witnesses.
- 34 I have earlier set out the basis of the application with respect to the train controllers, as filed in the Commission. This was elaborated upon in the written and oral submissions of the appellants to the Commission. These will be referred to shortly. Generally, however, it may be said that the appellants submitted that the train controller classification was required in the award to safeguard the conditions of employment of the train controllers in two respects. The first respect was the salary of the train controllers which was said to be inadequate. The second was that the conditions of employment that currently existed with respect to train controllers was inadequate insofar as it allowed insufficient time to take breaks during 12 hour shifts which had the consequence that the train controllers could not adequately take a meal or toilet break.
- 35 The train controllers operate control boards within the rail system of the respondent. There are three control boards. There is a control board for the Port Hedland yard, the Mt Newman rail line and the Yarrarie rail line. Each board is staffed by one train controller, except on afternoon shifts when the Newman and Yarrarie control boards are staffed by the one controller.
- 36 As described in the respondent’s position description for a train controller, the train controller *“is responsible for the planning, co-ordination and implementation of “on track” mainline and yard movements to ensure that railroad throughput plans and train schedules are met”*. They are to ensure the *“ongoing iron ore supply from the Mines to the Ports whilst providing for service train operations, track maintenance, signals and communications maintenance windows”*.
- 37 The train controller’s work is divided into five functional areas being traffic control, train control, train crew control (whilst on the mainline), motive power control and rolling stock control. Over-arching these *“five functional areas is the responsibility to apply, monitor and ensure adherence to the operating rules, regulations, procedures and instructions”* of the rail system.
- 38 The basis of the application with respect to the train controllers, by the appellants, was summarised in paragraphs [29]-[38] of the written submissions to the Commission at first instance. These are as follows:-

“29. Necessarily, train controllers work in very close co-operation with engine drivers as well as rail supervisors and rail co-ordinators. The train controller and engine driver are the 2 sides of the same coin. As with train controllers, engine drivers are required to make judgments to maximise the safe and efficient

operation of their train. Similarly, a small error by an engine driver can lead to collision/ derailment with catastrophic consequences. Whilst the engine driver is immediately responsible for the safe and efficient utilisation of his single train, the controller is overall responsible for the safe and efficient utilisation of all trains within his board.

30. The current wages of train controllers vary from individual to individual but fall broadly within the range of \$94,500 to \$119,000 per annum for a notional 42 hour week worked in 12 hour shifts of 4 on 4 off.
31. Increases over recent years have been limited to CPI but in the case of those controllers at the top of the range there has been no increase per se, rather there has been a one off payment which does not flow into leave payments or superannuation. These controllers are, in effect, trapped within a static wage range.
32. Further, whilst notional hours are 42, in fact, hours are more properly regarded as approximately 44 by reason of a half hour unpaid handover being worked in each shift. A handover is essential for the incoming controller to be familiarised with the then current state of play on the board before assuming responsibility for it.
33. The present wages of train controllers are significantly inadequate having regard to the nature and extent of their responsibilities. The nature and extent of those responsibilities are, at least, equivalent to those of the engine driver; alternatively, to those of the rail supervisor or CDO or rail co-ordinator. Properly seen, they are greater and more demanding than those of the engine driver or rail supervisor or CDO or rail co-ordinator. The rail co-ordinators work in conjunction with and under the direction of the controller. Accordingly, a properly struck rate of pay for controllers would exceed that of the engine driver and rail supervisor and CDO and rail co-ordinator. The award rate for a level 5 engine driver is \$144,238 per annum for a 48 hour week. The AWA rate for the rail co-ordinator is \$160,000+ per annum for a 48 hour week or \$150,000+ on the award. The staff rate for a CDO is \$147,700+ per annum for a 42 hour week or \$147,000 on the award. The rate for a rail supervisor exceeds all the above rates.
34. Varying the award to include train controllers will remedy the present unfairness of inadequate wages.
35. Further, there are features of the train controller's situation which require that the award apply to them.
36. The work demands placed on controllers have increased significantly over recent years. Those demands are intense and relentless and are continuing to increase.
37. At present, they have no entitlement to take a meal or crib break and BHP does not in fact allow for such breaks. They have no entitlement to a toilet break and in fact such breaks are often not taken when desired but only when the inevitable is about to occur.
38. The failure to provide breaks having regard to the workload is unreasonable per se. The unreasonableness is compounded by the requirement that controllers must maintain quite intense focus and concentration to perform their job to the necessary standard. Such focus and concentration cannot be maintained without adequate breaks in the course of the shift."
- 39 In counsel's opening submissions to the Commission it was said that "one central purpose of bringing this application to bring the train controllers under the Award is to require the company to pay a reasonable and fair sum to these people having regard to what it pays to all of the other people involved in the railway system and in particular, having regard to what the company pays to the people with whom the controllers work closely, namely, engine drivers and rail supervisors and co-ordinators" (page 25 of the transcript at first instance (TFI)). Submissions of a similar type, with some elaboration, were made at TFI 27 and 33.
- 40 In his closing submissions to the Commission at first instance, counsel for the appellants made a comparison between the work of the train controllers and those of engine drivers, for the purposes of Principle 11(d) of the Wage Fixing Principles. This will be referred to again later in these reasons. Counsel submitted at TFI 377 that "you are compelled to the conclusion that the value of the train controller exceeds that of the engine driver". The appellants also submitted that the value of the salary paid to train controllers was substantially less than that of the engine driver. Again this issue will be returned to later. The appellants' counsel then submitted that, in effect, the train controllers were being paid an unfair amount, having regard to other employees, who were not covered by the award, and specifically those other classifications of employees which the appellants sought to bring within the award. For example, at TFI 384 the appellants referred to the salary of the crew development officers and submitted that the train controllers' role had a greater impact on the company's operation and should be valued above that of the crew development officer. The appellants submitted that the salary paid to the train controller was not above that of crew development officer and that this was unfair and was a reason for the inclusion into the award of the train controller at a salary which would provide them with an appropriate increase and relativity to the crew development officer.
- 41 The respondent made the following written submissions to the Commission at first instance about the remuneration of the train controllers:-
- "Comparability of Remuneration*
- 52 *Train controllers perform responsible positions and are remunerated accordingly. Their remuneration takes into account the knowledge and accountability required for the position.*
- 53 *As with all staff members, train controllers' remuneration is set as part of an annual evaluation and review system designed to have a relationship with other comparable staff position (sic) and other comparable positions outside the respondent with regular increases by reference to a variety of organisational and other factors (including performance of the organisation as a whole and the impact of market forces on the remuneration of various positions) and individual performance.*
- 54 *The pay and conditions are reflective of the duties and skills required together with the hours and shift arrangements worked. The respondent rejects the notion of "unpaid hours".*
- 55 *Management has had discussions with the train controllers to address a new pay structure. The discussions have resulted in the production for consideration by the respondent of a revised pay structure to be considered and addressed in the annual salary review in September. If agreed to it will result in increases for a number of train controllers.*
- Level of remuneration*
- 56 *Not all train controllers are equipped to perform all the functions associated with the role. In particular, none of the train controllers are currently able to operate each of the separate boards, namely the Yard Board, the Newman Board or the Goldsworthy Board [sic – also known as the Yarrrie line board]. The levels of experience of train controllers also differ quite significantly.*

- 57 *By comparison to the staff remuneration which is set as with all staff members as part of an annual evaluation and review system (annual salary review system) with regular increases by reference to performance of the organisation (sic) market conditions as a whole and individual performance (including skill level), the level of remuneration sought to be proscribed in the Award by the applicants does not differentiate between train controllers of differing performance or skill.*
- 58 *The upper level of current of total remuneration (excluding superannuation) is \$122,500, not \$119,000 as asserted by the applicants.*
- 59 *It is not correct to imply that increases in the remuneration of train controllers have been determined solely on the basis of CPI increases. The increase in the amount of remuneration of train controllers is determined as part of the annual salary review system. Train controllers are not "in effect, trapped within a static wage range".*
- ...
- 64 *Furthermore, the train controller position is not comparable to the driver position. Train controllers are not locomotive drivers and locomotive driving skills are not a prerequisite for the position. Similarly, drivers are not train controllers and train controlling skills are not required for the position."*
- 42 It can therefore be seen that at first instance the respondent argued that the remuneration paid to the train controllers was not unfair by way of a comparison to other employees within the rail system, and, in particular, engine drivers.
- 43 At the hearing, the respondent did not provide any opening in detail because of the written submissions which had been filed. In closing, the respondent's counsel submitted that it was appropriate for the Commission to consider the train controllers' remuneration package and not simply the salary component as referred to by the appellants (TFI 415-416). This is an issue which will be returned to later.
- 44 The respondent's counsel referred to discussions which had taken place aimed at restructuring the career path for train controllers. There were meetings about this in November 2004 and April 2005. Reference was also made to the qualifications required to become a train controller which were lesser than some of the qualifications required for other jobs within the rail sector. The respondent's counsel submitted that the suggestion that train controllers were more important than others in operating the rail system should be rejected. It was submitted that it was "*an integrated operation. It is dependent on the input from many sources, many people, a great deal of expertise required across the board, judgments of a range of people*" (TFI 420).
- 45 It was also submitted that there had never been a recognised link between the terms and conditions of employment of the train controllers and the locomotive engine drivers (TFI 420).
- 46 It was also submitted that one of the factors which the Commission should bear in mind is "*the effect on others*" of the appellants' claim in relation to the train controllers (TFI 421).
- 47 Submissions were then made about the train controllers being rated by the respondent, relative to other staff including in relation to their responsibilities. Submissions were made about the level of responsibilities of supervisors as against the train controllers. Reference was made to the evidence of Mr Hoare and the fact that train controllers had been in receipt of a number of increases in their wages from August 2001 to September 2004 of approximately 17% (TFI 424).
- 48 Submissions were also made about the potential difficulties of including in the award what had always been regarded as a staff position.
- 49 The respondent's oral submissions about the remuneration of the train controllers concluded with the following paragraph:-
"In my respectful submission, in respect of train controllers, when one looks at all the benefits that are associated with the staff position, those identified in exhibit R5, but also sick leave and matters of that kind, the ability to get a bonus payment, those train controllers who are experienced are in the upper levels of the remuneration package compare very favourably with loco drivers at a level 5. It is true that the train controllers at the lower end of the scale don't compare as favourably, but they are generally persons who are of short employment, less experienced and in respect of whom there is clearly the ability to earn greater income in the manner in which the company is proposing that its progressive scales operate, and the applicants have not shown, in my submission, inequality between - and that was their prime focus - loco drivers and train controllers when one looks at the overall package situation." (TFI 427)
- 50 Reference to exhibit R5 will be made later in these reasons. The submissions at this point did not deal with the comparability of the train controllers to the other staff positions which were sought to be brought within the award.
- 51 The reasons for decision of the Commissioner with respect to train controllers commenced at paragraph [156]. In his earlier summary of the evidence, the Commissioner referred to evidence relevant to the remuneration and working conditions of the train controllers. For example, in his summary of Mr Goiack's evidence, the Commissioner at paragraph [62] referred to Mr Goiack's opinion that the train controllers and engine drivers held totally different positions.
- 52 Reference was also made at paragraph [63] to a discussion paper written by Mr Goiack which addressed the need to develop a career structure for the train controllers.
- 53 At paragraph [85] the Commissioner made reference to the evidence of Mr Hoare about the total remuneration package for train controllers which he set out in a document which was received as part of exhibit R5.
- 54 Reference was also made at paragraphs [86] and [87] to the evidence of Mr Hoare about his attendance at meetings in November 2004 and April 2005 concerning the development of a career structure for train controllers. There was also reference at paragraph [86] to the evidence of Mr Hoare about the way in which the respondent determines the remuneration of its non-award employees.
- 55 At paragraph [91] the Commissioner referred to evidence which had been given by Mr Hoare at TFI 351 in the following way:-
"Of the salary range difference between Controllers, CDOs and Supervisors he says that it is due to the different jobs, different Hay points and accountabilities and responsibilities. The Supervisors are the most important as they have more people responsibility, then the Rail Co-ordinators in Newman, the CDOs and finally Train Controllers."
- 56 At paragraphs [156]-[163] the Commissioner summarised the submissions made by the appellants about the inclusion of the train controllers within the award. At paragraph [156] the Commissioner referred to the submission of the appellants that there is "*an unfairness operating for these employees that should be corrected by the Commission in the form of incorporating them formally into the Award*". At paragraph [159] the Commissioner referred to the "*aim of bringing Train Controllers under the Award is to ensure they receive a fair level of pay in comparison to all those employees with whom they work*". At paragraph [160] the Commissioner referred to the submission that the respondent had placed a maximum salary cap on train

- controllers of \$122,500. At paragraph [161] the Commissioner referred to the argument that train controllers needed the protection of the award so that they would have sufficient breaks to go to the toilet or have a meal or a “crib” break.
- 57 At paragraphs [164]-[170] the Commissioner summarised the submissions made by the respondent about the train controllers. There was reference to the endeavours by the respondent to restructure career paths for train controllers, the reasons for an increase in workload for train controllers, the need for greater manpower to allow train controllers to take breaks, the qualifications required to become a train controller as compared to a locomotive driver, the relative responsibilities of the train controllers, and the submission that “*when all the terms and conditions of Train Controllers are assessed, those experienced controllers at the upper level compare favourably with engine drivers at Level 5*” (paragraph [170]). This involved a reference to exhibit R5 tendered through Mr Hoare about comparative remuneration packages.
- 58 The Commissioner’s discussion of the issues in relation to train controllers and his conclusions thereon took place between paragraphs [171] and [188] of his reasons.
- 59 At paragraph [173] the Commissioner referred to two themes contained in the evidence and submissions. The first was that the salary level of the train drivers was “*grossly inadequate when compared to other positions employed by BHPB, especially locomotive drivers. The complexity, workload and other requirements of the Train Controller’s job are far greater than that of at least the engine driver and the JBJ Co-ordinator. The Train Controller’s job incorporates both supervisory and planning requirements*”. (JBJ means Jimblebar Junction). The Commissioner then referred to the argument of the respondent that having regard to the market rates, job size and Hay point assessment, the respondent paid competitive salary rates for train controllers. Reference was made to the submission of the respondent that engine drivers worked more hours, worked away from home, and there were other allowances relevant to and which were different between the jobs of train controller and engine driver.
- 60 At paragraph [174] the Commissioner referred to the second theme, which was that the conditions under which the work of the train controllers is performed justified the increase in salary sought, and their inclusion into the award. The Commissioner summarised the submission of the appellants as follows:-
“*The salary is too low compared to others in the workplace, but also the salary is too low given the working conditions. Both the low salary and the disadvantages of the working conditions warrant the Commission intervening to insert the classification of Train Controllers into the Award and to provide the Train Controllers with a substantial pay increase.*”
- 61 The Commissioner then reviewed some of the evidence on these issues.
- 62 At paragraph [179] the Commissioner returned to the two main themes of salary and working conditions. The Commissioner said that the appropriate comparison must be between remuneration packages and not simply salary levels. In making this comment, the Commissioner referred back to paragraphs [129] and [131] of his reasons. (These paragraphs are quoted later in these reasons). In the context of considering the claim about the WPA/FIFO drivers, the Commissioner there said that remuneration rather than salary was the appropriate comparison. This was so that there could be a full comparison on a like by like basis, as far as possible. At paragraph [179] the Commissioner said that exhibit R5, prepared by Mr Hoare for the respondent (and referred to earlier), had attempted these comparisons and that this document was not damaged by the appellants’ submissions. This issue will be returned to later. The Commissioner then referred to Wage Fixing Principle 11(d) which stated that the rates of pay for classifications to be inserted in an award “*will be assessed by reference to the value of work already covered by the award*”. In the next and final sentence of paragraph [179], the Commissioner said that:-“*The assumption has been that Train Controllers work in concert with locomotive drivers and others and hence these are the rates which Train Controllers legitimately or otherwise have an eye to. This view point is understandable*”. The Commissioner did not then further comment on this issue.
- 63 At paragraph [180] the Commissioner said that irrespective of any reference to exhibit R5, train controllers had been assessed by the respondent as justifying a salary less than locomotive drivers. A reference was made to the comparison between salaries paid to locomotive drivers paid pursuant to an Australian Workplace Agreement (AWA) and train controllers. The Commissioner then made reference to the basis of the setting of remuneration by the respondent and the unchallenged evidence that the respondent said “*at the top end of the salary range for Train Controllers, compared to the market*”. The Commissioner then said that:-
“*The point is that if Train Controllers are undervalued by the company in comparison to locomotive drivers, irrespective of the Award, this has been so for some time. Hence the allegation would be that the company has got it wrong for sometime (sic) and the Commission should step in to correct the situation. Alternatively, there are matters which the company has unfairly not factored into their calculations, or ignored, which the Commission should entertain. The further option is that there are matters within the work of Train Controllers which have changed so significantly that they now justify a salary increase from a level of \$117,500 to \$138,829. The applicants’ real position, by the amendments which they sought, is that the salary should be \$155,000.*”
- 64 At paragraph [183] the Commissioner said that the appellants had established that the workloads of the train controllers are at times excessive and that their working conditions needed correction. The Commissioner referred to measures that could and were being taken to address this. The Commissioner accepted that the respondent could be criticised for allowing the present situation to occur.
- 65 At paragraph [184] the Commissioner said that it was not apparent from the evidence or submissions that the level of skill or responsibility required of train controllers had changed, but that the volume of traffic by increased train numbers had added pressure and complexity to the job.
- 66 At paragraph [185] the Commissioner said as follows:-
“*There is one other pay matter which has arisen during the hearing which should receive some comments. There is evidence that suggests that a Train Controller, at the top of the salary scale, can receive a salary increase, not a bonus, and yet have that salary increase not account for leave and superannuation purposes. If this is the case then it would lead to a view that the salary scale for Train Controllers is frozen or capped. I do not understand, if this is the case, why this should be so, given other salaries paid by BHPB are seemingly at times increased and not capped. This would lead to an unfairness.*”
- 67 The Commissioner did not return to the issue of whether there had been a salary cap for train controllers compared to other relevant employees within the rail section.
- 68 At paragraph [186] the Commissioner cited the decision of *AFMEPKIU and Others v BHP Billiton Iron Ore Pty Ltd and Other* (2003) 83 WAIG 1672 in which the argument had been used that the workload of other employees engaged by the respondent had increased due to increased production and that this had been used, together with arguments about changed work practices, to justify wage increases. The Commissioner made reference to the fact that these arguments have sometimes included

arguments about breaks so that the train controllers were not the only employees who had been affected by the increased production demands, albeit that they had experienced some specific problems in terms of breaks.

69 At paragraph [187] the Commissioner referred to evidence about a comment made by a Mr Bartholomew (a person in senior management at the respondent's rail section) that compared the skill levels required of engine drivers unfavourably to that of the train controllers. The Commissioner said that it was difficult to give the comment much weight in the context of justifying a substantial wage increase given the drivers are also essential to the rail operation. The Commissioner then said at paragraph [187]:-

"For the reasons expressed I do not consider that the applicant has made out the case for a salary increase for Train Controllers."

70 There was then a comment that there was no evidence or submission about other existing conditions of train controllers which would cause disadvantage or justify the insertion of the classification into the award. There was then reference to the situation regarding breaks. The Commissioner said that the problem had occurred due to increased workload by increased traffic on the railway system. The Commissioner then, in effect, said that, given the efforts which were being made by the respondent to address this issue, he was not persuaded that train controllers should be included within the award for this reason.

71 This concluded the Commissioner's reasons concerning the train controllers.

72 Having reviewed the respective cases of the parties and the reasons of the Commissioner about the train controllers, I can now proceed to consider the grounds of appeal specific to the train controllers.

73 **Ground 3** asserts that the Commission erred in law in that it failed to give any or any coherent reasons for its decision. The content of the duty of the Commission to give reasons for decision was considered in the recent Full Bench decision of *Sealanes (1985) Pty Ltd v SDAEA of WA and Others* (2005) 86 WAIG 5 at [69]-[73]. It is unnecessary to repeat what is there set out. In essence, the Commission has a duty to provide sufficient reasons so that a party understands why the decision was made and to ascertain if it involved any errors of fact or law. Although reasons for decision need not always deal with every matter which has been raised in proceedings, the substantial issues should be considered and the reasoning process upon which these issues were decided, set out. A substantial failure to state reasons for decision is, ordinarily, an error of law.

74 As the above review of the reasons indicates, the Commission did provide reasons for the decision it made regarding the train controllers and ground 3, as pleaded, cannot be made out.

75 As it was argued, however, the appellants asserted not so much that the Commission had not provided reasons for its decision but that those reasons, when examined, indicated that it did not deal with substantial aspects of the appellants' case. In particular, it was submitted that the Commission failed to deal with the appellants' argument that the train controllers were underpaid, having regard to a comparison with the salary or remuneration of other employees within the rail system, and that the salary of the train controllers had been unfairly capped.

76 This links in with **grounds 4.7 and 4.8** which are as follows:-

"The Commission erred in refusing to add the claimed classification of "train controller" to the award in that...

4.7(a) *it failed or refused to make any judgment, as the case required it to do, about the fairness of the salary and other remuneration of train controllers compared to the salaries and other remuneration of all other roles, not limited to locomotive drivers, within the rail department; and*

4.7(b) *had it performed the task it was required to do as set out in paragraph 4.7(a), it could not have come to any conclusion other than that train controllers were grossly underpaid, by reference to both salary and overall remuneration, and should be brought under the award to correct that unfairness; and*

4.8 *having identified the unfairness of the train controllers' salary being unilaterally and arbitrarily capped by the respondent, the Commission then did nothing to remedy that unfairness."*

77 With respect to ground 4.7(a), as set out earlier, the appellants argued that, by reference to the nature and importance of their positions, the train controllers should receive greater remuneration than the engine drivers, crew development officers, rail co-ordinators and rail supervisors. It was submitted that they were paid less than each of these types of employees, to a substantial degree, that this was unfair and that the unfairness should be rectified by the inclusion of the train controllers within the award with a substantial pay increase.

78 The respondent, as set out earlier, did not accept the factual premises upon which this argument was based. It did not accept the appellants' evaluation of the position of the train controller; nor did it accept that the train controllers were paid less than, at least, the award engine drivers, when a comparison of total remuneration was made.

79 The comparison between the remuneration of the award engine drivers and the train controllers was, to some extent, an imperfect exercise, as the basis of their remuneration was different. This was because the award engine drivers were paid pursuant to the award, whereas the train controllers (staff positions) were paid pursuant to individual contracts with differently structured remuneration. The respondent attempted to make this comparison by one of the documents received as exhibit R5, which has been referred to earlier.

80 The comparison was set out in the following table:-

"Staff Train Controller and Iron Ore and Production (BHP Billiton Iron Ore Pty Ltd)
Locomotive Driver Award Level 5

	Train Controller (42 hours)	Train Controller (48 hours)	Award Driver Level 5 (48 hours)
Current	\$117,800	\$134,628	\$144,238
Superannuation	\$13,342 ¹	\$15,248 ²	\$10,155
Total	\$131,142	\$149,876	\$154,393
Add Annual Leave Loading 25% ³	\$2749	\$3141	
Add Bonus Payment ⁴	\$8220	\$9399	
New Total	\$142,111⁵	\$162,416	\$154,393

¹ Employer superannuation is 14% of base wage (here \$95,300) for staff employees.

² Calculated on the base wage of \$108,914 (48 hours).

³ Annual leave loading of 25% calculated on base wages of \$95,300.

⁴ The bonus is calculated as 8.63% of the base rate and is subject to the employee meeting performance criteria.

⁵ This figure does not include other staff benefits for which Award employees are not eligible such as two free meals per day whilst on shift, long service leave loading of 20%; personal travel insurance; and study assistance.”

- 81 As set out earlier, the Commissioner referred to this table in paragraph [179] of his reasons. The Commissioner said that the table had not been damaged by the appellants’ submissions, with the exception that the train controllers’ shifts were not typically 12 hours in length but extended by approximately 15 minutes in hand over at the start of each shift. It can be seen that the table only endeavours to compare the remuneration packages of the award engine drivers and train controllers. It does not set out a comparison between the remuneration of the train controllers and the crew development officers, rail coordinators and rail supervisors. This may be because it was clear from the evidence that the train controllers’ remuneration was less than these other employees.
- 82 The appellants, on the appeal, took the Full Bench to a document tendered at the hearing at first instance which set out the annual salaries of various employees within the rail department current as at 25 July 2005. This document supported the argument made by the appellants about the comparative salaries of the train controllers. The Commissioner in paragraph [179] of his reasons did not refer to the income of the train controllers comparative to the crew development officers, rail coordinators and rail supervisors.
- 83 Immediately after the reference to the comparison table in paragraph [179] of his reasons, the Commissioner referred to Wage Fixing Principle 11(d). The Wage Fixing Principles of June 2004 were a schedule to the General Orders of the Commission in Court Session made on 3 June 2004 ((2004) WAIRC 11661). It was accepted by both parties that the principles applied, to the extent relevant, to the award variation application. Principle 11 is headed “*New Awards (Including Interim Awards) and Extensions to an Existing Award*”. It then sets out four principles to apply in those circumstances. The first three principles are not relevant to the present application as they apply to the making of a new award or an interim award. Principle 11(d) provides as follows:-
- “In the extension of an existing award to new work or to award-free work the rates applicable to such work will be assessed by reference to the value of work already covered by the award, providing structural efficiency considerations including the minimum rates adjustment provisions where relevant have been applied to the award.”*
- 84 It was agreed by the parties that the work of the engine drivers, which was already covered by the award, was the “work” against which there should be the assessment referred to in Principle 11(d). In my opinion, however, the principle does not provide that a comparison to the remuneration of other employees, not covered by the award, could not be undertaken for the purpose of deciding whether there should be an extension of the award to cover a particular class of employees. A plain reading of the principle does not convey this meaning. Indeed, the principle seems to refer to the situation after a decision has been made to include new work or award-free work within the award. It does not purport to say that the sole basis upon which new work or award-free work should be included into an award by way of a variation, is upon a comparison to the value of work already covered by the award.
- 85 As set out at length earlier, it was the appellants’ case, in part at least, that the need for the inclusion of the train controllers within the award was because of a comparison of their remuneration to other non-award rail employees. As the principle contemplates, if a decision was made to include the train controllers within the award, then the rates applicable to that work are to be assessed by reference to the value of work already covered by the award. In this case, it would make sense to make the comparison to the award engine drivers. Again, however, I do not think the principle contemplates that the value of this work is the sole criterion against which the value of the work is to be judged. In other words, a comparison to the remuneration of other non-award employees can be relevant, not only to the decision as to whether to include award-free work within the award, but also in the assessment of the value of that work when included in the award.
- 86 It is unclear from the reasons given in paragraph [179] by the Commissioner, as to whether he contemplated that Principle 11(d) had the more restrictive construction I have referred to in paragraphs [84]-[85] above, and thereby misdirected himself. What does appear clear, however, is that, with respect, the Commissioner did not complete the task which the appellants’ case, as claimed and argued, demanded. This was to decide whether there was an unfairness in the remuneration of the train controllers in comparison to the other named rail employees, which required the inclusion of the train controllers within the award, with a substantial pay increase. The reasons of the Commissioner noted this contention of the appellants, but they do not analyse it or properly determine it, in my respectful opinion.
- 87 I have earlier quoted the final sentence in paragraph [179] of the reasons. The Commissioner there referred to the understandability of the train controllers eyeing the pay rates of the engine drivers and others with whom they worked. The Commissioner did not determine, however, the legitimacy of such a comparison other than with the engine drivers.
- 88 In paragraph [180] of the Commissioner’s reasons, there was reference to the assessment by the respondent that train controllers justify a salary less than the engine drivers who are subject to an AWA. There is also reference to the evidence of Mr Hoare in paragraph [180] and to his explanation as to how jobs are valued within the respondent’s organisation. A summary of that explanation is repeated within paragraph [180]. In the same paragraph, there is reference to the respondent paying at the top end of the salary range for train controllers. The paragraph does not, however, and with respect, answer the contention of the appellants that the remuneration of the train controllers in comparison to employees other than the engine drivers, was unfair.
- 89 The Commissioner could have decided, if he accepted the evidence of Mr Hoare about the relative rating of the jobs which the appellants nominated for their comparison, that the assessment of the relative worth of the train controllers was not unfair. The reasons of the Commissioner do not, however, indicate whether or not he accepted this evidence of Mr Hoare. In the absence of such a finding and without any other reasoning on the issue, I do not think the Commissioner can be seen to have fully considered and decided the appellants’ case. The balance of the reasons after paragraph [180] do not advance the matter any further.
- 90 Accordingly, in my opinion, the appellants have established ground 4.7(a). I do not think that ground 4.7(b) has been established, however. In my opinion, the Commission could have concluded that the train controllers were not underpaid, if it accepted the evidence of Mr Hoare regarding the comparability of the train controllers’ functions as against the other relevant rail employees, bearing in mind that the train controllers’ salaries varied according to factors including their level of skill, experience and length of service. The problem is that the Commission did not indicate whether he accepted this evidence of Mr Hoare. Overall therefore the Commission did not complete the task which, in my opinion, it was obliged to, given the case of the appellants. Further, this is a task which I do not think can be completed by the Full Bench as, amongst other things, the issue involves an assessment of the nature and quality of Mr Hoare’s evidence. This depends in part upon opinions formed

about the credibility of Mr Hoare's evidence, as to which the Commissioner at first instance, having seen Mr Hoare give evidence, is in the appropriate position to make such a judgment.

- 91 I reach a similar conclusion to appeal ground 4.8 as to ground 4.7(a). This ground, at least as argued, was not so much that the Commission identified the unfairness of the train controllers' salary being capped and did nothing to remedy that unfairness, but was that the Commission failed to determine the issue of whether there was unfairness because of the train controllers' wages having an arbitral capping imposed by the respondent. I have earlier quoted paragraph [185] of the reasons of the Commissioner. The difficulty with this paragraph is that, with respect, although it identifies the possibility of an unfairness if there was a salary cap, it does not determine whether or not this had occurred and, if so, whether it was unfair. As stated earlier, the Commissioner did not return to the issue of whether there had been a salary cap for train controllers compared to other employees within the rail section. Accordingly, another aspect of the appellants' case was, with respect, not determined by the Commission at first instance.
- 92 In making submissions on this issue, the appellants' counsel referred the Full Bench to the evidence at first instance with respect to the salary cap issue. Reference was made, for example, to the evidence of Mr Porter at TFI 148, Mr Emmitt at TFI 186 and Mr Hoare at TFI 357. Reference was also made to the discussion paper dated 25 February 2005 prepared by Mr Gojack and the minutes of meetings between management and train controllers in November 2004 and April 2005.
- 93 In my opinion, this issue should have been determined by the Commissioner and was not. Again, the matter should be remitted to the Commissioner for further consideration of this issue.
- 94 Appeal **ground 4.1** asserts that the Commission erred in comparing the earnings of train controllers to Level 5 drivers covered by the award because the Commission treated superannuation as if it were the same as wages, when it is not. I have earlier set out the relevant comparison table which was tendered by the respondent and referred to the observations and findings made by the Commissioner at paragraph [179] of his reasons. The table included superannuation as part of the remuneration comparison and the Commissioner said that the appellants' criticisms of the table were, in effect, not accepted by him. In my view, it was open to the Commissioner to include a consideration of superannuation as part of the total remuneration package of the relevant employees. I do not think that the Commissioner's reasons show that he treated superannuation as if it were the same as wages. This ground is not established, in my opinion.
- 95 **Ground 4.2** asserts the Commission erred in failing to advert to and take into account the fact that the respondent's superannuation contribution was conditional upon the employee contributing 5% of his salary to the superannuation. I accept the submissions of the respondent that this point was not raised in submissions made to the Commission at first instance and, more fundamentally, that the appellants have not identified how this alleged failure was material to the Commissioner's conclusions in the overall assessment of the remuneration packages of the train controllers and the award engine driver. In my opinion, the ground has not been established.
- 96 **Ground 4.3** asserts the Commission erred in comparing the earnings of the train controllers with those of Level 5 engine drivers covered by the award because it treated the bonus payment to train controllers as if it was the same as wages when it is not. I do not accept that the Commissioner treated the bonus as if it was the same as wages. Instead, the Commissioner accepted that there should be a comparison of remuneration and not just salary and that the bonus payment should be taken into account in endeavouring to make a valid comparison. In my opinion, it was open for the Commissioner to take this approach and to try and ensure that a comparison of remuneration was not selective, but took into account base salary, employer superannuation contributions, annual leave loading and bonuses. It is accepted, as argued by the appellant, that the bonus payment is discretionary and therefore in any particular year may not be paid to an employee. However, the evidence of Mr Hoare was that, over the three years in which he had been in his present position, bonuses had been paid (TFI 325). In my opinion, there would have been something of a lack of realism if the Commissioner had failed to take into account the bonus in comparing remuneration.
- 97 In my opinion, there was no appealable error in the Commissioner placing reliance upon the table prepared by the respondent which included the bonus payment.
- 98 **Ground 4.4** again makes complaint about the Commissioner's consideration of the total remuneration package including reference to superannuation contributions and the bonus. The ground, to some extent, repeats grounds 4.1 and 4.2. It also asserts in ground 4.4 that superannuation contributions should not have been taken into account as they are in the nature of deferred remuneration, the availability and value of which varies from individual to individual depending on factors including their age, type of fund, performance of fund and the like. The ground also makes the point with respect to the bonus that the quantum of any future bonus is, at this stage, unknown. Whilst these points made by the appellants may be accepted, I do not think that the Commissioner's consideration of the table setting out the remuneration comparison, including its reference to superannuation and the bonus discloses appealable error. The reasons for reaching this conclusion are the same as those set out above with respect to grounds 4.1 and 4.2.
- 99 **Ground 4.5** asserts the Commission erred in that, in making the comparison between the remuneration for train controllers and engine drivers, the Commission took the highest of the train controllers' remuneration, therefore ignoring the fact that many controllers receive substantially less than that remuneration and the comparison was therefore invalid. In my opinion, this ground has not been established. The table prepared by the respondent showed a train controller salary of \$117,800. This was not the highest salary for a train controller. The highest salary was \$122,500. Additionally, the Commissioner expressly acknowledged at paragraph [181] of his reasons that train controllers were on a range of salaries. In light of this, it cannot be established that this was ignored by the Commissioner.
- 100 **Ground 4.6** asserts that the Commission erred in failing to make any allowance or adjustment for the fact that train controllers work on average 43 to 44 hours per week and not the 42 hours referred to in the comparison table. It is correct that the table referred to the hours of the train controllers as being 42 per week. It is also correct that the evidence was that there was a 15-30 minute hand over session each day which was in addition to the 42 hour week which was remunerated. The comparison table did not take this into account. However, it was expressly taken into account and referred to by the Commissioner in paragraph [179] of his reasons as referred to above. Although the Commissioner did not do any recalculations with respect to the table and taking into account the hand over period, this does not in any way disclose appealable error. In any event, as indicated in the respondent's written submissions on the appeal, if regard is had to the period of time of 15 minutes per hand over session and the hours per week are adjusted to 42.875 hours per week, the comparison figures are not materially different.
- 101 **Ground 4.9** asserts that the Commission wrongly fettered the exercise of its discretion by regarding a change in basic skills and responsibilities of train controllers as the essential and sole prerequisite to either bringing them onto the award or awarding them a pay increase. The ground asserts that, in doing so, the Commission wrongly excluded consideration of other relevant factors including three which are there set out.

- 102 In my opinion, this ground cannot be established. I do not think that the Commission's reasons disclose that it was of the view that a change in skills and responsibilities was the "*essential and sole prerequisite*" to bringing them under the award or awarding them a pay increase.
- 103 The Commissioner referred to this issue in paragraph [184] of his reasons, which has been referred to above. It did so in the context of the evidence and submissions made about the lack of proper breaks being able to be taken by the train controllers. The reasons do not disclose the error of which the ground complains. The reasons demonstrate that, although the Commissioner was not satisfied there had been a change in the level of skill and responsibility required of the train controllers, this did not, of itself, determine the issue as to whether there should be a pay increase or inclusion of the train controllers into the award.
- 104 **Ground 4.10** asserts that the Commission erred in that:-
"it treated the belated and half-hearted acknowledgment by the respondent of its past and continuing failure to discharge its duty to take reasonable care for the health, safety and welfare at work of train controllers as sufficient reason not to provide award protection to controllers when those matters were compelling reasons to in fact provide the protection of the award"
- 105 The ground is directed to the Commissioner's consideration of the issue of the lack of breaks which the train controllers were able to take in discharging their duties over a 12 hour shift. The ground appears to complain about the Commissioner's assessment of the evidence about this issue and whether it should or should not have led to a conclusion that the train controllers be covered by the award. The assessment of the evidence and the issue was a matter within the discretion of the Commission at first instance. In my opinion, appealable error has not been shown.
- 106 The reasons of the Commission demonstrate that it carefully considered the issue of the lack of breaks for train controllers and the causes of this. It also looked at the measures which the respondent was engaging in to try and rectify the problem including increasing the number of train controllers, adding positions of performance and development officers who could relieve train controllers, upgrading technology and upgrading facilities. In paragraph [188], the Commissioner reasoned as follows:-
"My reasoning displays that I consider the strongest argument for the inclusion of Train Controllers in the Award to be that the Commission's intervention is warranted to redress the unsatisfactory situation concerning breaks. I must weigh this issue against the evidence of the respondent in terms of changes being undertaken to correct the position. Albeit I have criticised the pace of some of the changes, I do not consider that given the history of coverage of Train Controllers and the circumstances that now present, the Commission should act to amend the Award as claimed."
- 107 In my opinion, it was open to the Commissioner to reach this conclusion. Whilst the conclusion may not have been reached by others, the Full Bench may only intervene if error has been disclosed of the type identified earlier. In my opinion, this has not occurred with respect to this issue and the appeal ground is not established.

Grounds 5 – 7 - WPA – FIFO Employees

- 108 As set out earlier, part of the purpose of the variation application was to bring under the award three locomotive engine driver employees who worked on a FIFO basis and whose employment had been subject to WPA's. The application was to have their salary, under the award, set at \$144,238. This was the same salary as the award engine drivers – Level 5. The WPA/FIFO drivers' present salary was \$133,974. (See paragraph [121] of the Commissioner's reasons.) The other terms and conditions of the WPA/FIFO drivers were not proposed to be altered by the application.
- 109 The appellants led evidence from Mr Gunovich and Mr Ashton in support of this part of its application. These were two of the three WPA/FIFO locomotive drivers whose employment was sought to be brought under the award. The third was a Mr Stromme. The evidence of Mr Ashton and Mr Gunovich was summarised in the reasons of the Commissioner at paragraphs [18]-[19] and [43]-[44]. It was also commented on in paragraphs [107]-[132] of the reasons for decision which was specifically about the WPA employees. These reasons will be referred to in greater detail shortly.
- 110 Before coming to the reasons, I will set out some of the background in relation to the award and its applicability to the WPA/FIFO drivers.
- 111 The WPA/FIFO drivers were locomotive engine drivers who had, for a number of years, been employed by the respondent pursuant to WPA's which had been made under the *Workplace Agreements Act 1993 (WA) (the WPA Act)*. These employees, unlike locomotive drivers who had been employed under relevant awards and industrial agreements, were not site based and resided elsewhere.
- 112 A variation of the award occurred by order of the Commission in Court Session on 20 July 2004; *CFMEU and Others v BHP Billiton Iron Ore Pty Ltd and Others* (2004) 84 WAIG 3219. By its decision, the Commission in Court Session declined to include WPA/FIFO engine drivers within the award. (See paragraphs [134] and [307].) The present application was another attempt to include these drivers within the award.
- 113 However, as stated in the reasons of the Commissioner at paragraph [107], the first argument relating to the WPA/FIFO drivers was whether they were already covered by the award. This argument came about because of the contents of s4H of *the WPA Act*. This section of *the WPA Act* was inserted into that Act by s31 of the *Labour Relations Reform Act 2002*. The section was part of the legislative arrangements to phase out WPA's and to provide transitional provisions for existing WPA's. The contents of s4H is as follows:-

"4H. Employment conditions if workplace agreement or arrangement terminated or employee ceases to be a party

(1) *This section applies where —*

- (a) *a workplace agreement or an arrangement under repealed section 19(4)(b) ceases to have effect as provided by section 4C, 4D, 4E or 4F; or*
- (b) *an employee ceases to be a party to a collective workplace agreement as provided by section 4G.*

(2) *The employment of an employee becomes subject to a contract of employment under this section.*

(3) *If —*

- (a) *the workplace agreement that ceased to have effect was an individual workplace agreement; or*
- (b) *the arrangement under repealed section 19(4)(b) that ceased to have effect followed on the expiry of an individual workplace agreement,*

the contract of employment is one containing —

- (c) *the same provisions as those of the workplace agreement or arrangement that has ceased to have effect, other than the provisions implied by section 18; and*
- (d) *if the employee had an existing contract of employment relating to the workplace agreement or arrangement, the provisions of that contract.*

(4) *If—*

- (a) *the workplace agreement that ceased to have effect was a collective workplace agreement; or*
- (b) *the arrangement under repealed section 19(4)(b) that ceased to have effect followed on the expiry of a collective workplace agreement,*

the contract of employment is an individual contract —

- (c) *applying to the employee such of the provisions of the collective workplace agreement or arrangement that has ceased to have effect, other than the provisions implied by section 18, as were applicable to the employee; and*
 - (d) *containing, in addition, the provisions of the existing contract of employment that the employee had relating to the workplace agreement or arrangement.*
- (5) *A contract of employment referred to in subsection (3) or (4) has effect, and may be varied or terminated, as if it were a contract entered into between the employer and the employee.*
- (6) *Despite subsection (2) the employer and the employee are bound by —*
- (a) *any award that extends to them; or*
 - (b) *any employer-employee agreement under Part VID of the Industrial Relations Act 1979 to which they are parties.*
- (7) *Where subsection (6)(a) applies, the award ordinary rate of pay (howsoever described in the award) shall, for the purposes of the award only, be the rate of pay as prescribed in the award and not that prescribed in the contract of employment.*
- (8) *Where subsection (6)(a) applies, nothing in this section or in any other enactment or law requires an employer to pay an employee more than the greater of —*
- (a) *the employee's entitlement arising under the contract of employment; or*
 - (b) *the employee's entitlement arising under the relevant award,*
- whichever is the greater when assessed on a yearly basis.*
- (9) *This section does not apply to —*
- (a) *a workplace agreement that was registered under repealed section 40I; or*
 - (b) *an arrangement under repealed section 19(4)(b) that followed on the expiry of such a workplace agreement.*

Note: For the position when an agreement or arrangement referred to in subsection (9) ceases to have effect, see section 152 of the Workplace Relations Act 1996 of the Commonwealth."

114 At paragraph [112], the Commissioner stated that s4H(2) of the WPA Act provided for the protection of the WPA as a contract, despite the demise of the system of making WPA's under that Act. The Commissioner also identified that whether the parties to the contract were bound by the award depended upon the construction to be given to s4H(6) in the circumstances of this case. This in turn depended upon whether the award "extends to them"; that is the WPA/FIFO engine drivers and the respondent.

115 At paragraph [113], the Commissioner set out the area and scope clause of the award which is Clause 3. This provides as follows:-

" 3. - AREA & SCOPE

(1) *This award extends to and binds:*

BHP Billiton Iron Ore Pty Ltd ("the Company") and no other employer and the following unions:

- (a) *the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers;*
- (b) *the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch;*
- (c) *the Communications, Electrical, Electronic, Information, Postal, Plumbing & Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch;*
- (d) *the Construction, Forestry, Mining and Energy Union of Workers;*
- (e) *the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch; and*

all employees employed by the Company in the classifications mentioned in this award.

(2) *This award is restricted in its operations to the land and premises occupied and controlled by the Company between the 18th and 26th parallel of South latitude."*

116 At paragraph [114], the Commissioner referred to the possibly applicable classification mentioned in the award in Schedule 3 – Award Classifications. This was paragraph 5 which was a Loco Level 5. This referred to: "A person at this level will have completed a level four (4) competency pass out and shall be qualified to operate all trains under Driver Only Operation over the BHP Iron Ore Pilbara District Railroad."

117 At paragraph [115], the Commissioner indicated his view that the WPA/FIFO employees met this description and therefore on "its face then the award would seem to apply". The Commissioner then went on to say:-

"However, I consider that a broader approach must be taken. There is no stipulation in the Award which actually specifies the FIFO drivers, or conditions which relate to them. Their conditions, as displayed at [Exhibit R1, Tab 15] are different to those relating to locomotive drivers under the Award. On this basis it might be said that the WPA/FIFO drivers are a specific group of employees and that the Award, as made, does not 'extend to them'. I

consider this to be the better interpretation of the Workplace Agreements Act in concert with the Award. I find that the WPA/FIFO drivers are not already covered by the Award. I note also that these drivers do not seek in this claim, and have not sought previously, that the terms and conditions for locomotive drivers in the Award be applied to them. This is of course with the exception of the Level 5 salary rate in this application.”

- 118 The Commissioner therefore concluded that s4H of the WPA Act did not have the effect that the WPA/FIFO drivers were covered by the award.
- 119 The Commissioner then dealt with and dismissed a submission by the respondent that the present application with respect to the WPA/FIFO drivers was in effect an abuse of process, given the earlier decision of the Commission, which declined to extend award coverage to the WPA/FIFO employees.
- 120 At paragraph [120] and following, the Commissioner then considered the merits of the application to amend the award to include the WPA/FIFO drivers. At paragraph [120], the Commissioner referred to the appellants' submission that there was a manifest unfairness to be corrected by the Commission. There was a dispute between the parties as to whether the award covered the employees which the Commission needed to resolve. It was also submitted that the WPA drivers' wages were suppressed by the respondent as a means of punishment for them refusing to enter into AWA's. The Commissioner referred to the appellants' submissions that the WPA/FIFO drivers needed to be included in the award to maintain their wages at a reasonable level. The Commissioner also referred to the submissions made by the appellants about the two WPA drivers who had given evidence about their desire to come under the award. The Commissioner referred to a document tendered by the appellants which endeavoured to compare the salary of the WPA drivers to Level 5 engine drivers employed under the award.
- 121 The Commissioner then set out the submissions made on behalf of the respondent. In doing this, some of the evidence of Mr Ashton and Mr Gunovich was again summarised.
- 122 At paragraph [128], the Commissioner summarised that the arguments in support of the appellants' claim; that they rested upon the desire by the employees to be under the award and any disadvantage they may suffer in terms of pay rates.
- 123 The conclusions reached by the Commissioner on these issues are set out in paragraphs [129]-[132] of his reasons, which I set out in full below:-

“129 *The comparison of pay rates which the applicants put forward is displayed earlier in the decision. The comparison the respondent puts forward is displayed in paragraphs 28 to 31 of their Outline of submissions. The applicants also complain that these drivers did not enjoy their latest pay increase from September 2004 as did drivers under the Award. The applicants submit that the Commission should ignore the difference in hours worked as WPA drivers provide more flexibilities. I discount this argument as these arrangements are what the drivers sought and wish to remain on. The remuneration packages should be compared on a like with like comparison, as far as is possible. The applicants submit also that if the WPA drivers' hours of 45.94 per week average are compared to those of the Award drivers (i.e. 48 hours per week average) then the salary comparison would be $45.98/48 \times \$144,238 = \$138,048$ for an equivalent annual rate. The respondent uses a slightly different hourly figure, on a fortnightly basis, of 91.64 hours per fortnight. They submit that taking account of the difference in hours worked the equivalent Award salary would be \$137,350.18. The WPA drivers are currently paid \$134,760 per annum. The respondent submits that the difference in superannuation contributions must be factored into the remuneration package. If this is done then the base salary plus superannuation package for WPA drivers amounts to \$149,818.40 per annum. The true comparison, salary plus superannuation and using equivalent hours, for an Award driver are \$147,505.78. In other words the applicants submit that there is approximately \$10,000 per annum difference in salary in favour of Award employees. If hours worked are equated then the difference remains about \$6,000 per annum. The respondent maintains that hours worked and superannuation must be factored in and this displays that WPA drivers are advantaged in the comparison by approximately \$2,000 per annum.*

130 *Mr Hoare's unchallenged evidence is that the weekly average hours worked by WPA drivers is 45.82. He says that the WPA drivers' salary when converted to a 48 hour average per week basis would be \$141,171 per annum. Mr Hoare under cross-examination also says that if one looks at the group certificates for WPA drivers, which is total remuneration, they are paid above the Award for 2004/05 financial year and were above the Award for September 2004 to April 2005. These figures were inclusive of bonus payments (Transcript p.341)*

131 *I accept the calculations of the respondent as being correct. I accept also the argument that a salary versus salary comparison should not be made. The comparison should be in respect of remuneration. I have omitted references to other differences in conditions as those are not necessary for the purposes of these calculations. It would appear that on a proper comparison of remuneration between WPA drivers and Award drivers, the WPA drivers are slightly advantaged. The only remaining disadvantage that has been argued is that the pay increase for WPA drivers was delayed. Award drivers got an increase in September 2004 and WPA drivers had to wait until April 2005. There is no explanation by the respondent as to why this occurred.*

132 *In short, I find no reason to increase the salary of WPA drivers. Except for their expressed desire to be covered by the Award there is no real evidence to substantiate a claim for the Award to be amended to insert those employees. Their expressed desire appears to be for the protection of the Award which at least for Mr Ashton seems to relate to the Dispute Resolution Process. The only disputes referred to, which the employees have had with the employer, relate to pay or arrangements for travel. I have covered already those issues. I am not satisfied that the applicants have made out the claim and would hence dismiss this claim.”*

- 124 **Ground 5** of the Notice of Appeal was that the Commission erred in law in that it failed to give any or any coherent reasons for the decision about the WPA/FIFO drivers. The relevant law with respect to the provision of reasons for decision has been referred to earlier. I have set out above the course of the reasons of the Commissioner and have quoted the concluding paragraphs. In my opinion, the ground of appeal is wholly unfounded. Reasons were given and they are capable of being understood.
- 125 **Ground 6** refers to the conclusion of the Commission that the award did not apply to the WPA drivers as a consequence of s4H of the WPA Act. I have set out above the Commissioner's reasoning on this topic. In my opinion, the reasoning of the Commissioner on this issue was correct. Locomotive engine drivers employed on an FIFO basis constitute a distinct class of employees. The award does not extend to them. The terms and conditions under which the WPA/FIFO drivers are employed are significantly different from those that apply to a Level 5 locomotive driver under the award. The relevant differences

include the shift arrangements, hours, overtime arrangements, residential arrangements, the performance review processes, and different overall packages in relation to remuneration and incentive bonuses. (See the respondent's written submissions on the appeal at paragraph [114]). The award does not encompass the work of the FIFO engine drivers who work shifts of 12 days on and 10 days off. The view that the award does not extend to the WPA/FIFO drivers is also enhanced when one has regard to the history of the award variation application which was referred to by the Commissioner in his reasons, and is referred to above.

- 126 **Grounds 7.1 to 7.4** involve assertions that the Commission erred in its assessment of the comparative earnings of the WPA drivers and the Level 5 award engine drivers for the same reasons identified in appeal grounds 4.1 – 4.4. In my opinion, these contentions are not made out for the same reasons as for grounds 4.1 – 4.4 above.
- 127 **Ground 7.5** asserts that the Commission failed to give any consideration or weight to the fact that WPA drivers are more flexible in their working than Level 5 engine drivers which therefore warranted higher wages than those drivers.
- 128 There is some difficulty in understanding this ground as the case of the appellants at first instance was that the salary of the WPA/FIFO drivers should be the same as the Level 5 award engine drivers. This should occur, it was contended, despite the fact that the working hours per week of the WPA/FIFO drivers was slightly less than that of the Level 5 award engine drivers. It was submitted by the appellants that the difference in hours worked should be ignored, in setting a salary, given the greater flexibilities which the WPA/FIFO drivers provided to the respondent. The Commissioner in paragraph [129] of his reasons, which has been quoted above, referred to this argument of the appellants; paraphrasing the submissions of their counsel made at TFI 370. On this basis, I do not think it can be said that the Commission failed to consider the fact that the WPA/FIFO drivers were more flexible in their working conditions.
- 129 The next sentence in the Commissioner's reasons, that indicates he discounted the argument, I find a little difficult to understand. I do not think, however, that this gives rise to any appealable error. At paragraph [131] the Commissioner accepted the calculations of the respondent about the comparison between the remuneration of the WPA/FIFO drivers and the Level 5 award engine drivers. The respondent's calculations, as set out in paragraph [129] of the reasons, were that the WPA/FIFO drivers were "*advantaged in the comparison by approximately \$2,000 per annum*". The acceptance of this calculation undermined one of the major bases of the appellants' argument for inclusion of the WPA/FIFO drivers into the award; which was that they were being underpaid compared to the award drivers.
- 130 I do not think that this ground is established.
- 131 **Ground 7.6** asserts that the Commission failed to give any consideration or weight to the fact that the WPA/FIFO drivers work similarly to AWA drivers and thus warranted broadly equivalent wages to those drivers at higher wages than the Level 5 drivers.
- 132 In my opinion, the criticism of the Commission contained in this ground is not warranted. The case of the appellants before the Commission at first instance was not that the WPA/FIFO drivers should receive wages higher than the Level 5 drivers on the basis of a comparison of the work and wages to those of AWA drivers.
- 133 At TFI 370, the appellants' counsel in his closing submissions to the Commission asserted that the wage rates of the WPA/FIFO drivers should be the same as the Level 5 award engine drivers, notwithstanding they worked a notional two hours per week less, because their working arrangements provided flexibilities for the respondent, similar to AWA employees; and that this flexibility had been identified by the Commission in previous decisions as appropriately providing for a wage premium. The written and oral submissions made by counsel for the appellants to the Commission at first instance was based upon a comparison between the wages of WPA/FIFO drivers and Level 5 engine drivers under the award. The same applies with respect to a comparison table which was provided to the Commission at first instance and which was summarised by the Commissioner in paragraphs [123] and [129] of his reasons. Indeed, in opening, counsel for the appellants distinguished the present application from the previous application on the basis that, in the previous application, the attempt to bring the WPA/FIFO drivers under the award was by way of a comparison with the AWA drivers. (See, for example, TFI 17.)
- 134 In my opinion, this ground of appeal cannot be established.
- 135 **Ground 7.7** asserts that the Commission failed to appreciate that the alleged effect of s4H of *the WPA Act* that the terms of the WPA could not be unilaterally altered by the respondent was of no consequence because the terms of the WPA provided that the vast bulk of the terms and conditions of employment were those set out in the staff handbook from time to time which could be unilaterally altered by the respondent.
- 136 The respondent submitted on the appeal, without demur from the appellants, that this argument was not raised at first instance. This may create difficulties in the appellants succeeding in any such ground, based on the principles discussed by the High Court in *Coulton and Others v Holcombe and Others* (1986) 162 CLR 1 at 7/8.
- 137 This aspect of the ground need not be further considered, however, as there is a fundamental problem with the ground, in any event. The case of the appellants at first instance was that the WPA/FIFO drivers did not wish to change any of their terms and conditions of employment other than the wage rate and being subject to the award. Therefore, if these terms and conditions included a possibility that some of them could be unilaterally altered by the respondent pursuant to a change in the contents of the staff handbook, this was not something which the employees wished to alter by becoming subject to the award. It could not therefore become a reason for including these employees within the award.
- 138 In my opinion, the ground of appeal has not been established.
- 139 **Ground 7.8** asserts that the Commission erred in that:-
- "it treated the Respondent's belated and unexplained increase in salary of \$10,000 per annum given in July 2005 and backdated to April 2005 as of no significance when in truth it was of substantial significance; viz, it demonstrated that*
- *the wages paid from time to time were determinable unilaterally by the Respondent and not by independent arbitration; and*
 - *it was a very substantial basis for the WPA employees desiring award coverage in that such a situation could not arise if they were covered by the award; and*
 - *the Respondent suppressed the wages of the WPA drivers in punishment for them refusing to accept or enter into an AWA;"*
- 140 The reasons of the Commissioner in paragraphs [131] and [132], quoted above, indicate that the Commissioner did consider the dates when the WPA/FIFO drivers had received their wage increases. The Commissioner found no reason, however, to increase the salary of WPA/FIFO drivers by their inclusion into the award, after taking into account this and other factors. The Commissioner also referred to this issue when setting out the submissions of the appellants at paragraph [121] of his reasons.

- 141 With respect to the first dot point contained in the ground, I do not think it can be inferred that the Commissioner overlooked that if the WPA/FIFO drivers were not covered by the award, then their wages from time to time could not be determined by the independent arbitration constituted by the Commission. This is an obvious point which I cannot imagine was overlooked by the Commissioner.
- 142 The contents of the second dot point was not a substantial basis given by the WPA/FIFO employee witnesses as to why they wanted to have award coverage. Their evidence was summarised by the Commissioner at paragraphs [18]-[19], [43]-[44], [125]-[127] and [132]. With respect to Mr Ashton, the Commissioner at paragraph [125] referred to him wanting to be under the award because he preferred the dispute resolution process contained in the award, the award provided the protection of working conditions and he should receive the same wages as award employees as he works the same hours, but displays greater flexibility in terms of starting times and locations. With respect to Mr Gunovich, the Commissioner summarised at paragraph [126] that he would prefer to be under the award as there were better outcomes and conditions and remuneration and there are more protections.
- 143 With respect to the third dot point, I accept the submission of the respondent that this was not established by the evidence at first instance. The respondent points out in their submissions, without demur, that this proposition was not put to the witnesses of the respondent in cross-examination.
- 144 In my opinion, this ground has not been established.
- 145 **Grounds 7.9, 7.10 and 7.11** have some overlap. They assert that the Commission erred in that:-
- “7.9 *it ignored the evidence that the Respondent induced employees to enter into individual agreements partly on the basis that they could become covered by the award on the expiry of the agreement if they wished when in fact they could not; alternatively*
- 7.10 *it ignored the evidence that the Respondent publicly represented it as a fact that employees who entered into individual agreements could revert to a collective arrangement at the end of the agreement if they so wished which representation was in substance false; and*
- 7.11 *it ignored the evidence that the Respondent induced employees to enter into individual agreements partly on the basis that they could then negotiate individual arrangements when in fact they could not;”*
- 146 In my opinion, the assertions made in ground 7.9 and 7.11 are not supported by the evidence. Mr Symons gave evidence at first instance that the reason he chose not to apply for a crew development officer staff position was that he had been told that if he took up the position he could not later return to the award (TFI 153). Mr Ashton gave evidence that he had asked whether, if he decided to go onto an AWA, he would be able to negotiate on certain points and was told that he could not (TFI 82). Mr Ashton also said that the major reason that he entered into a WPA was so that he could move to Perth and provide his children with a better education (TFI 79). Mr Gunovich’s evidence was that he became a WPA/FIFO driver to enable him to leave his residence in Port Hedland and return to his home town of Melbourne (TFI 167-168). Mr Ashton’s evidence was that he signed a WPA with the respondent on 27 March 2001. Mr Gunovich also entered into a WPA in March 2001.
- 147 With respect to ground 7.10, it appears from the submissions made at first instance and on appeal that the “evidence” to which reference is made is part of the respondent’s Health Safety Environment and Community Report in 2004 entitled “Sustainability – Sharing our Vision”. On page 40 of this document, there was a reference to freedom of association including the following:-
- “Individual contracts are offered to our employees in 1999 in order to ensure that business remained internationally competitive. Current employees were provided with the option of staying on collective agreements or moving to Australian Workplace Agreements (AWAs). At the end of the three year term of the contract, individuals have the option of staying on the contract or moving to a collective arrangement. The majority of employees have chosen to move to AWAs.”
- 148 It is correct that this aspect of the appellants’ argument was not specifically referred in the Commissioner’s reasons. In my opinion, however, this does not disclose appealable error. The contents of the report quoted does not provide, in my opinion, a basis for the three WPA/FIFO employees to become covered by the award. In its terms, the paragraph clearly does not refer to such employees. It refers to AWA employees. Neither Mr Gunovich nor Mr Ashton had signed AWA’s, but both had signed WPA agreements in 2001. Nor do I think what the appellants describe in their written submissions as, the “*rhetoric of choice*” contained in the quoted paragraph means that the Commission should have acceded to the variation application.
- 149 In my opinion, none of these three grounds should be upheld.
- 150 **Ground 7.12** asserts that the Commission failed to take into account s6(ca) of the Act for:-
- “the provision of a system of fair wages and conditions of employment when the WPA provided for a manifestly unfair system of wage setting in that the Respondent could unilaterally and unreviewably determine the level of wages and other conditions of employment”
- 151 It is correct that the reasons of the Commissioner do not specifically refer to taking into account s6(ca) of the Act which sets out one of the principle objects of the Act. I do not think, however, that the appellants can establish that the Commission failed to have regard to this object of the Act. The course of the reasoning of the Commissioner with respect to the WPA/FIFO drivers was to assess whether they should become subject to the award on the bases argued by the appellants. One substantial basis argued was that of wage inequality. The Commission found, after an examination of the relevant evidence and issues, that the WPA/FIFO drivers should not be made subject to the award, on this or any other basis. In my opinion, the appeal ground is not established.
- 152 **Ground 7.13** asserts that the Commission erred as it:-
- “treated with contempt the desire of the WPA employees for the security and superior outcomes that go with the application of the award in that that desire was either ignored or glibly assessed as of being of no substance.”
- 153 In my opinion, it is not a fair description of the reasoning of the Commissioner to state that he treated the desires of the WPA employees with contempt or glibly assessed them as being of no substance. The reasons of the Commissioner which have been quoted earlier set out that these desires were considered and taken into account. The Commissioner did not think that the desires of the drivers, in all of the circumstances referred to in the reasons of the Commission, warranted their inclusion within the award. This included an analysis of the current remuneration of the WPA/FIFO drivers as against the Level 5 engine drivers employed under the award.
- 154 The desire of the employees to be part of the award was no doubt an important factor for the Commissioner to consider. This is particularly so when s6(ad) of the Act provides that a principle object of the Act is to promote collective bargaining and to establish the primacy of collective agreements over individual agreements.

- 155 This object of *the Act* was not referred to by the Commissioner in his reasons. I have been somewhat troubled by this, but the lack of reference to the object may be reflected by the fact that it does not seem to have been expressly relied upon by the appellants.
- 156 In the end, I do not think that the ground, as pleaded, can be established; given that the Commissioner did take into account the expressed desires of the WPA/FIFO drivers to become part of the award and factored this into his consideration along with the other matters relied upon by the appellants. I do not know that I would have decided this part of the application in the way the Commissioner did. This is not, however, a basis upon which the appeal should be decided, as earlier indicated.
- 157 In the appellants' written submission on the appeal it was argued that the legislative scheme of *the Act* is to prefer collective employment arrangements and that the effect of the Commissioner's decision was to keep the WPA/FIFO employees "*forever stuck on the WPA*". In my opinion, the latter part of this submission is not correct. The employees could move off the WPA's and agree to an AWA with the respondent. Alternatively, it is open in the future for another application to be made to vary the award to include these employees, on appropriate grounds. A degradation of comparable wages or working conditions may well provide appropriate grounds.

Ground 8 – Crew Development Officers, Rail Co-ordinators and Rail Supervisors

- 158 The application at first instance about crew development officers (CDO), train co-ordinators and rail supervisors, differed from the case sought to be made with respect to the WPA/FIFO drivers and the train controllers. This was because no evidence was presented on behalf of the appellants from anyone currently working in these positions that they desired to have their employment covered by the award. Additionally, it was not argued that the wages of these employees was unfair and that this unfairness needed to be rectified by inclusion in the award with a pay increase.
- 159 The respondent led evidence from one rail supervisor, Mr Punter, who had been employed as such since 2001.
- 160 The Commissioner gave separate reasons for rejecting the application to vary the award to include the classifications of the CDO (paragraphs [133]-[143]), train co-ordinator (paragraphs [144]-[148]), and rail supervisor (paragraphs [149]-[155]).
- 161 With respect to the CDO, the Commissioner first summarised the arguments of the appellants and the respondent. The appellants had submitted that both the rail co-ordinator and CDO positions were already covered by the award in terms of an allowance. It was submitted, however, that by bringing these employees within the award as a discrete classification, this would strengthen the position of the engine drivers, on the award, to seek to perform other duties with the benefit and under the protection of the award. It was also submitted by the appellants that there was no material difference between a driver instructor, a classification covered by the award, and a CDO. The appellants submitted that the CDO position is the natural progression for drivers who do not want to agree to an AWA with the respondent, but wanted to remain subject to the award. The appellants submitted that the CDO should have a salary rate in the award of \$144,238, which was the same as that of the Level 5 engine drivers.
- 162 The respondent submitted that the CDO position is different to that of a driver instructor.
- 163 At paragraph [139] the Commissioner accepted that there was a fair degree of overlap between the positions of driver instructor and CDO. However, at paragraph [140] the Commissioner referred to the difference in the two jobs as described in the evidence by Mr Punter. This was that the CDOs are involved in safety and disciplinary investigation; whereas the training instructor is not. CDOs also do most of the passing out of drivers after being responsible for induction and classroom training. Writing procedures is also the responsibility of the CDOs.
- 164 Accordingly at paragraph [141] the Commissioner rejected the appellants' argument that the CDO classification was somehow already part of the award, and that the Commission, by allowing the variation, would simply be clarifying or making certain the position. At paragraph [141] the Commissioner said that he did not hear any evidence that any disadvantage exists by the CDOs not being part of the award, or that any CDO wishes to be part of the award.
- 165 The Commissioner then referred to evidence from Mr Symons and Mr Hoare that Mr Symons could not try a CDO position, which was a staff position, to ascertain whether he liked it, and if not, then return to the award. To undertake the CDO position, Mr Symons would be required to sign an AWA.
- 166 At paragraph [143] the Commissioner referred to the appellants' argument that the claim should succeed as it is necessary for career structure purposes and because of the respondent's attitude to AWA's. The Commissioner accepted that if engine drivers wanted to progress into supervisory, co-ordination or training/development roles then they must progress to positions covered by AWA's or staff positions, and further, that an employee may take up an AWA but could not revert to the award after that. At paragraph [143] the Commissioner referred to the respondent being legally able to offer AWA's and to follow their announced policy of preference for this form of industrial instrument. The Commissioner referred to previous, unnamed, Commission in Court Session decisions which had stated that it was not for the Commission to seek to counter this approach, as a dual stream of industrial instruments is legally available and may operate differently. The Commissioner concluded paragraph [143] by saying that having regard to the evidence, the objects of *the Act* and s26 of *the Act*, he could find no reason to grant the variation with respect to the CDOs.
- 167 With respect to the train co-ordinator position, the Commissioner at paragraph [144] referred to the appellants' argument that the classification was required in the award to provide a career path for engine drivers.
- 168 The appellants had also submitted that the award provides for a co-ordinator's allowance, which a driver may receive whilst performing that role. The purpose of the application was to make that provision a proper classification within the award. Additionally, the duty statement of a train co-ordinator showed that the duties are mainly those of an engine driver.
- 169 At paragraph [146] the Commissioner referred to the respondent's submission that the award provided for a driver co-ordinator's allowance, but there was no position in the award for that of a driver co-ordinator. It was submitted that the position of a co-ordinator at Jiblebar Junction (JBJ) was materially different to the engine driver's position. The respondent submitted that there was no case made out for incorporating the broader duty of a co-ordinator in the award and no evidence that any co-ordinator wanted award coverage.
- 170 The Commissioner's reasons for dismissing the application with respect to the train co-ordinator are contained in paragraphs [147]-[148] of his reasons as follows:-

¹⁴⁷

In my view, the application in relation to the classification of Train Co-ordinator must fail. There is no evidence to support the application. The only Co-ordinators exist at JBJ. Previously there were other co-ordinators. There is no evidence that any Co-ordinator wishes to be covered by the Award. The salary of the JBJ Co-ordinator cannot be seen as in anyway inadequate. There is no disadvantage which has been alluded to for those employees. The applicants' case is built on the proposition that this position is largely that of an engine driver who co-ordinates a range of driving operations. This is the

case. The applicants then propose that the engine drivers require a career structure in the Award and are prevented from achieving one. I have covered this argument above as it relates to the use of AWAs.

148

The drivers under the Award are not restricted from performing such duties and being paid for their work under the Award. The Commission in application 1246 of 2003 responded in part to restrictions on Award drivers being able to fully perform their role. This is not the case in this application."

- 171 With respect to rail supervisors, the Commissioner at paragraph [149] referred to the appellants' submission that supervisory positions are positions that engine drivers naturally aspire to. The submission was that all of the supervisors employed by the respondent are ex-engine drivers and this is a natural career path for engine drivers. It was submitted that the structural efficiency considerations under the Wage Fixing Principles required the establishment of career paths. The respondent, it was submitted, however, only offers these positions under AWA's, whereas some drivers want to remain under the protection of the award. It was submitted that this artificial constraint should be removed by introducing the classification into the award.
- 172 The Commissioner then referred to the submissions of the respondent that no case had been made for incorporating rail supervisors into the award, except the natural career progression argument. The respondent submitted that it would be unusual to make supervisors subject to the same award as the employees they supervise. It was also submitted that there was no apparent dissatisfaction by rail supervisors with their terms and conditions of employment or any desire expressed by rail supervisors to be part of the award. It was also submitted that there was no evidence that career movement was restricted by rail supervisors not being part of the award.
- 173 The Commissioner then referred to submissions made by Mr Gifford, who appeared on behalf of Australian Mines and Metals. In response to these submissions, at paragraph [151] the Commissioner expressed the view that he was not wedded to any notion that it was necessarily inappropriate to place supervisory positions in the same award as those whom are subject to their supervision. The Commissioner stated that the issue was whether there was an adequate rationale for the insertion of the classification into the award.
- 174 At paragraph [152] the Commissioner referred to the evidence of Mr Punter. Later in his reasons the Commissioner referred to Mr Punter's evidence that he was happy employed as he was and did not seek award coverage.
- 175 At paragraph [153] the Commissioner said that the appellants' submissions had not relied on any disadvantage or unfairness which supervisors currently experienced, but that engine drivers should enjoy a career structure in the award to which they can aspire. That is, that an engine driver cannot seek career advancement and remain under the protection and coverage of the award, and seek redress via the Commission.
- 176 At paragraph [154] the Commissioner referred to the lack of evidence by any supervisor that they wish to be covered by the award, and also the lack of evidence as to any disadvantage suffered by any supervisor by reason of the fact that they were not subject to the award.
- 177 At paragraph [155] the Commissioner said that, for reasons he had already expressed, he was not persuaded by the argument that the engine drivers should have a career path without having to leave the protection of the award to get one.
- 178 The application was therefore dismissed with respect to the rail supervisors.
- 179 The written submissions of the appellants, with respect to grounds 8.1-8.3 did not reflect these grounds, which are referred to below. The written submissions on these grounds were not added to by the appellants' oral submissions. The written submissions tended to, in a very summary way, repeat some of the arguments which were made at first instance. The purport of the argument seemed to be to request the Full Bench itself to engage in the exercise of the discretionary decision which fell upon the Commissioner at first instance. As indicated previously, this is not a function of the Full Bench on hearing an appeal like the present one. The written submissions do not support the appeal being upheld.
- 180 **Appeal ground 8.1** is that the Commission erred, in respect of the positions of the CDO and the train co-ordinator, in that it failed to have regard to the fact that these positions are essentially locomotive driver positions with additional duties already catered for under the award.
- 181 The above review of the reasons of the Commissioner show that it did not fail to have regard to these arguments made on behalf of the appellants. It considered the submissions and the evidence but accepted that there were differences between the position of the CDO and those of an engine driver with additional duties already catered for under the award. With respect to train co-ordinators, the Commissioner did not fail to have regard to the fact that the position was largely that of an engine driver who co-ordinates a range of driving operations with additional duties. The ground is not established, in my opinion.
- 182 **Ground 8.2** is that the Commission erred in respect of all of these positions in that it misunderstood the submission of the appellants that the intention of the application was to counter the respondent's "AWA-only" policy when it was not. The ground as drafted is not particularly clear. In my opinion, however, the reasons of the Commissioner do not reveal that it misunderstood any submission of the appellants about the respondent's AWA-only policy. In my opinion, the Commissioner was entitled to take the view that the respondent's position with respect to AWA's was not, of itself, a sufficient reason to include the classifications within the award. In my opinion, this ground of appeal has not been established.
- 183 **Ground 8.3** asserts that the Commission erred in that it misunderstood the purport of previous Commission in Court Session decisions that it was not for the Commission to seek to counter an "AWA-only" policy. The ground pleads that this was not the purport of these previous decisions. This ground appears to refer to paragraph [143] of the reasons of the Commissioner which I have referred to earlier. In the paragraph the Commissioner does not set out which previous Commission in Court Session decisions he is referring to. The respondent submits that they include applications No 157 and No 1246 of 2003 decided as *CFMEU and Others v BHP Billiton Iron Ore* (2004) 84 WAIG 3219. In the reasons of the Commission in Court Session at paragraph [99] it said:-
- "BHPB is quite correct in its submissions that it [an AWA] is an alternate form of industrial regulation available to it and the Commission should not seek to exercise its jurisdiction with a view to undermining or altering those statutory options available to BHPB."*
- 184 I am not satisfied that the Commissioner in this case misunderstood what the Commission in Court Session was saying in the above quotation.
- 185 The written submissions on behalf of the appellants do not indicate which decisions of the Commission in Court Session the Commissioner had misunderstood and how. In my opinion, this ground of appeal cannot be sustained.

Relief

- 186 In my opinion, therefore, grounds 4.7(a) and 4.8 of the appeal have been established, but the balance of the grounds of appeal have not. In my opinion, the appeal ought to be allowed on those grounds.
- 187 The appellants strongly argued that if the Full Bench were to allow the appeal, it should go on to make the award variations which have been sought, having regard to s49(6a) of *the Act*.

- 188 In my opinion, it is not appropriate for the Full Bench to take this step. Part of the reason for this is the basis upon which grounds 4.7(a) and 4.8 of the appeal have been established, which I have set out earlier. Additionally, these grounds relate to the possible inclusion into the award of the train controllers. If the award is to be varied to include this classification, then it is likely to be appropriate to include salary variations depending upon skill level, experience, length of employment or the like. The Full Bench is not in a position to currently assess these issues, and nor is it appropriate, in my opinion, for the Full Bench to receive additional evidence on this issue. I note that in his reasons for decision, with respect to the application to amend the claim, at paragraph [14], the Commissioner said that if the Commission reached the view that the classification of train controllers should be put into the award, and that the job of train controller was undervalued, additional evidence and/or submissions could be invited from the parties. This was in part to answer the appellants' contention that the salary of the train controller which should be inserted into the award was \$155,000 and not \$138,829 which was included in the written application made to the Commission. If the matter is remitted to the Commissioner at first instance, this issue may also be considered.
- 189 The Commissioner at paragraph [181] of his reasons also said:-
"... if I were minded to include the classification [of train controller] in the Award, for structural efficiency considerations, and in accordance with the objects of the Act and s.26 of the Act, and in light of the proposal put forward by the Train Controllers (exclusive of the salary levels), I would need to give careful consideration to levels of pay for Train Controllers, rather than simply one salary rate."
- 190 In my opinion, for all of these reasons, there is a "good reason" as referred to in s49(6a) of *the Act* to remit the matter to the Commissioner at first instance for further consideration and decision.
- 191 The respondent filed a Notice of Contention by which it said that the decision of the Commissioner ought to be affirmed on additional discretionary grounds. In summary these were that the appellants had acted contrary to their rules by enrolling as members people not eligible for membership or agreeing to and allowing other organisations without eligibility to enrol as members persons who are eligible to be their members. It was said that the Commission could not, consistent with the requirements of *the Act*, in effect condone such conduct by the granting of discretionary relief as was sought by such organisations. The notice also contended that the Commissioner at first instance erred in failing to have regard or proper regard for the need for organisations to comply with their rules and to the fact that the appellant organisations had acted contrary to the rules as set out.
- 192 The respondent did not contend that, as a matter of law, at least one of the appellants did not have the standing to make the variation application which was made to the Commissioner at first instance. In addition s40(2) of *the Act* provides that a party to an award, such as the present appellants, may apply to the Commission to vary it.
- 193 The respondent's argument about the appellants not acting in accordance with their rules was considered by the Commissioner in his reasons at paragraphs [102]-[106]. The Commissioner concluded that employees covered by the claim were subject to the constitutional coverage of the AFMEPKIU or the CFMEU and that these unions had properly authorised their solicitor and counsel to act for them in bringing the claim and pursuing the claim before the Commission.
- 194 The Commissioner did not in terms deal with the submission that breach of rules by an organisation was a discretionary ground for refusing an application to vary an award brought by such an organisation.
- 195 I accept the submission of the respondent that it is important for registered organisations to act in accordance with their rules. As was pointed out by members of the Full Bench in argument, however, if the respondent is aware of rule breaches by a registered organisation there are other means under *the Act* for dealing with this.
- 196 At this stage, the argument need only be considered with respect to the train controllers, as it is only with respect to the train controllers that, in my opinion, the appeal should succeed. As has been set out earlier, the position of the appellants was that the employment conditions of the train controllers, particularly with respect to their wages and inability to take a break, was so unfair that the Commission ought to intervene by including their classification within the award and giving them a substantial pay increase. If, upon remittal to the Commissioner at first instance, he finds that there is a good reason on this basis to include the train controllers as a classification in the award, then, in my opinion, the issue raised by the respondent should not lead to the Commission not exercising its discretion to include the classification.
- 197 This is because the inclusion of the train controllers within the award would be to remedy the unfairness then found by the Commission. In my opinion, the issue raised by the respondent is not of sufficient weight to exclude the protection of the award to the train controllers in such circumstances.
- 198 This is not to say that I necessarily accept the submission of the respondent that the conduct of an organisation, with respect to whether or not it is complying with its rules, is a discretionary factor to be weighed in determining an award variation application. However, even assuming this argument to be correct, as well as the factual premise upon which it is based in this instance, I do not think it should lead to the result that the Commissioner at first instance should exclude the train controllers from the award.
- 199 A minute of proposed orders will issue to reflect the reasons of the Full Bench.

COMMISSIONER S J KENNER:

The Initial Application

- 200 The claim at first instance was made by the appellants to vary the terms of the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award No A 2 of 2001 ("the Award"). The claims sought to insert in schedule 1 - Aggregate Wages of the Award, a new classification of "Level 5 (including WPA fly in fly out Drivers)" under the heading "CMETU Loco" and also, to insert four new classifications of Train Controller, Train Co-ordinator, Crew Development Officer and Rail Supervisor. Additionally, variations were sought to Schedule III - Award Classifications of the Award, to insert various definitions consistent with these claimed classifications. Consequential variations were also sought to cl 11 - Hours of Work, cl 12 - Annual Leave and cl 14 - Long Service Leave.
- 201 The grounds of the application, and the notice of application itself, are set out at AB1 tabs 1-2. In relation to the incorporation of the Workplace Agreement ("WPA") Level 5 driver classification, the grounds of the application assert that these employees' wages have been degraded by the respondent as a consequence of them not entering into Australian Workplace Agreements ("AWA's") and they require the protection of the Award. In relation to the other classifications sought to be included in the Award, the grounds of the application asserted that these employees were essentially being underpaid relative to those with whom they worked.
- 202 The decision of the learned Commissioner at first instance was to dismiss the substantive claims made by the appellants save for a minor variation to change the name of one of the appellants in the wages clause. The Commission's order and reasons for decision appear at AB1 tabs 4 and 5 respectively.

- 203 At the outset of the proceedings at first instance, the appellants sought an amendment of the claim to increase the rates of salaries for the positions of Train Controller, Train Co-ordinator and the Crew Development Officer. This application was opposed by the respondent and the Commission at first instance refused the amendment. A significant body of evidence was adduced in the proceedings at first instance by both the appellants and the respondent. The appellants called evidence from a number of witnesses including Mr Johncock a locomotive driver employed by the respondent; Mr Ashton a WPA locomotive driver; Mr James a yard traffic controller; Mr Thompson a train controller; Mr Porter a yard controller; Mr Symons a locomotive driver; Mr Gunovich a WPA driver; Mr Emmitt a train controller; and Mr Kara a train controller. For the respondent, evidence was adduced through Mr Goiack the respondent's Superintendent Train Control Operations Interface; Mr Punter a Supervisor and Mr Hoare the respondent's Principal Human Resources Adviser at Port Hedland. A summary of the evidence led at first instance appears at pars 15 to 91 of the learned Commissioner's reasons for decision.
- 204 Given that the application at first instance sought a variation to the Award to insert new classifications and/or classifications said to be presently award free, the learned Commissioner considered the relevant provisions of the Commission's Wage Fixing Principles, in particular principles 1 and 11, and set out consideration of those matters at pars 92 to 97. Additionally, the appellants below argued that s 36A of the Industrial Relations Act 1979 ("the Act"), dealing with applications for award coverage for non-award employees applied to the proceedings at first instance and as a consequence, an onus rested on the respondent to establish that it would not be in the public interest for the variations to the Award to be made. The learned Commissioner did not accept the appellant's submissions in this regard and concluded that s 36A did not apply to the application before him. Rather, the matter should be regarded as an application to vary the Award pursuant to s 40 of the Act in the usual manner.
- 205 There was also a further preliminary issue raised at first instance by counsel for the respondent Mr Dixon to the effect that by reason of their conduct, some or all of the appellants had acted contrary to their registered rules by enrolling persons as members who were not eligible for membership. This was pursuant to an arrangement entered into by the appellant unions in the Pilbara to form a company called the Pilbara Mine Workers Union ("PMWU"). The respondent's submissions below were that in enrolling persons not eligible to be their members, and therefore acting contrary to their registered rules, the Commission at first instance should decline the relief sought. This was opposed by counsel for the appellants at first instance Mr Schapper, who submitted that the classifications sought to be introduced into the Award were all classifications in respect of which the appellants had the constitutional capacity to enrol as members. They were therefore entitled, pursuant to s 29(1)(a)(ii) of the Act, to bring the application and counsel for the appellants was properly instructed to act on behalf of all of them. The Commission at first instance rejected the respondent's submissions and held that the application was properly brought before the Commission.
- 206 The consideration by the learned Commissioner of the claims before him commences at par 107 of his reasons for decision. As to the WPA fly in fly out drivers, firstly, the learned Commissioner rejected an argument by the appellants that by reason of s 4H of the Workplace Agreements Act 1993 ("the WPA Act") the WPA locomotive drivers were already subject to the terms of the Award by operation of law. Secondly, as to the merits, the learned Commissioner concluded that he should compare the WPA locomotive drivers and Award drivers in terms of total remuneration including superannuation and other benefits. On this basis, consistent with the evidence led by the respondent, he was not persuaded that the WPA locomotive drivers warranted a salary increase by the insertion of a classification into the Award. The Commission at first instance referred to evidence of the WPA drivers concerned desiring to be covered by the Award but concluded that those reasons were not sufficient to grant this aspect of the claim.
- 207 As to the Crew Development Officer position, the learned Commissioner was not satisfied on the evidence, that this position was the same as that of a driver instructor already covered by the Award. He accepted the evidence of Mr Punter that the two positions are different and the position was not already caught by the terms of the Award. Furthermore, the learned Commissioner was not persuaded by the appellant's argument that the insertion of this classification into the Award was necessary to ensure a career structure for locomotive drivers, nor was it necessary to do so to counter the respondent's approach of only offering these positions subject to AWA's or as staff appointments. This claim was refused.
- 208 In relation to the Train Co-ordinator, the Commission at first instance was not satisfied there was sufficient evidence to support the claim. The only Co-ordinator position in existence was at the Jimblebar Junction and there was no evidence that person sought to be covered by the Award, nor that was the existing allowance structure in the Award presently inadequate.
- 209 As to Rail Supervisors, the learned Commissioner found that this classification of employee was not subject to any disadvantage or unfairness rather, the sole basis of the claim appeared to seek to provide some career progression for Engine Drivers to move into such positions under the Award, rather than having to enter into AWA's. The Commission at first instance concluded that there was insufficient evidence to support any such claim and in particular, there was no evidence of any disadvantage or any expressed desire by Supervisors to be covered by the Award. Furthermore, the Commission was not persuaded that the "career structure" argument was of itself sufficient to warrant granting this aspect of the appellants' claim and it was refused.
- 210 It is fair to observe that the claim for the inclusion of the Train Controller classification was the mainstay of the appellant's argument at first instance and indeed on this appeal. Counsel for the appellants said as much in submissions. The learned Commissioner's reasons as to this aspect of the claim are set out at pars 156 to 188 of his reasons. In short it appears that the learned Commissioner in essence accepted the case advanced by the respondent that the position of Train Controller was no more important to those of other positions in the railway operations including Drivers, Train Co-ordinators, Crew Development Officers and Rail Supervisors. The learned Commissioner also accepted the respondent's submissions and evidence that the appropriate comparison to be made between in particular Train Controllers and Locomotive Drivers presently under the Award, and the other positions, was based upon total remuneration received and not just salary. On this basis the Commission at first instance did not consider that the Train Controllers' remuneration, taken as a whole, was so out of kilter with the other positions to warrant the inclusion of this classification in the Award at the rate of salary claimed.
- 211 Furthermore, as to evidence in relation to working conditions of Train Controllers, in particular the issue of the taking of breaks or more particularly, the inability to take such breaks, and workload factors, the learned Commissioner concluded that steps foreshadowed by the respondent to alleviate those concerns such as increasing manning levels and restructuring the department were more appropriate than varying the Award to cover Train Controllers. This claim was therefore also refused.

The Appeal

- 212 The appellants' appeal against the findings and conclusions of the Commission at first instance in relation to all of the decision, which covered a large number of appeal grounds, can be conveniently dealt with in terms of each of the specific classifications which were sought to be included in the Award. Additionally, grounds one and two dealt with the refusal of the amendment of the claim and the s 36A point.

Relevant Principles

213 It is trite to observe that in proceedings of this kind, given that the decision of the Commission at first instance was a discretionary decision the principles set out in *House v The King* (1936) 55 CLR 99 have application. That is, it is for the appellants to demonstrate an error in the exercise of the discretion at first instance in order for the decision to be disturbed on appeal. It is not sufficient for the Full Bench to simply substitute its view for that of the learned Commissioner in the absence of any identified error. In the oft quoted passage from the judgement of Dixon, Evatt and McTiernan JJ in *House* it was said at 504 - 505:

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

Ground 1

214 This ground alleges that the Commission at first instance erred in failing to allow the appellants to amend their claim at the outset of the proceedings. It was claimed that there was no or no sufficient prejudice to the respondent in granting an amendment and in particular, the Commission failed to consider s 26(2) of the Act, which enables the Commission in the granting of relief to not be restricted to the specific claim made. Whilst Mr Schapper maintained this ground of appeal, he submitted that if the Full Bench upheld the substantive grounds of appeal, then it should exercise its discretion afresh pursuant to s 49(5)(b) of the Act having regard to s 26(2) and the matters raised by the appellants at first instance in support of the amendment sought. I will return to this issue later in these reasons.

Ground Two

215 This ground alleges that the Commission at first instance erred in concluding that s 36A of the Act did not apply to the claim at first instance. The terms of s 36A of the Act are set out at par 98 of the learned Commissioner’s reasons and need not be repeated. The appellants contended that in accordance with their written submissions at first instance, s 36A refers to “... any proceedings...” in the first line of s 36A(1) and this reference is not to be read as limited to proceedings by way of the making of a discrete award. It was further contended that the words “...is considering the making of an Award...” in s 36A(1) includes the variation to an existing award to cover award free employees. The submission was that as a matter of commonsense, it would have been open for the appellants to have simply sought a discrete award for the particular classifications concerned rather than a variation to an existing award. Therefore it is nonsensical to not extend s 36A in these circumstances.

216 Counsel for the respondent Mr Dixon submitted that the learned Commissioner was correct in holding as he did. Section 36A in the context of the Act as a whole, clearly refers to the making of “an award” and not where a variation to an award is sought. Counsel submitted that the Act draws a distinction between “to vary” in various parts of the Act and that had Parliament intended that s 36A apply to a variation, as well as the making of an award, then it would have said so.

217 In my view, the respondent’s submissions are correct. Section 36A is unambiguous in its terms as to its coverage. The plain language of subsection (1) refers to the making of “an award” and not the “variation” of an existing award, when read in the context of the Act as a whole in particular having regard to ss 7(1), 29(1a) and (2), 29A(1b) and (2), 37(1), 40, 40B and also relevant provisions concerning General Orders in ss 50 and 51 of the Act.

218 Therefore this ground of appeal is not made out.

Train Controllers

219 As noted above, the central claim at first instance and upon this appeal was in respect of Train Controllers. Ground 3, going to the adequacy of the reasons at first instance, is repeated in ground 5 and I therefore deal with both of those grounds conjointly.

Grounds 3 and 5

220 These grounds complain that the learned Commissioner erred in law in that he failed to provide any or any coherent reasons for his decision. The relevant principles and obligations of members of the Commission, and of courts and tribunals generally, to give reasons for their decisions were set out in *Ruane v Woodside Offshore Petroleum Pty Ltd* (1990) 17 WAIG 913, in particular at 914 – 915. Those principles are set out at par 52 of the respondent’s written submissions and need not be repeated as they are so well known.

221 I have referred to the relevant paragraphs of the learned Commissioner’s reasons dealing with Train Controllers and WPA drivers above. I am far from persuaded that the reasons for decision as published were inadequate in the *Ruane* sense. The Commission has considered the relevant evidence, and has come to its conclusions based upon its assessment of that evidence. There is in the reasons a sufficient explanation as to the Commission’s decision and how it arrived at it. It is not to the point to speculate as to why the Commission at first instance may or may not have reached certain conclusions. On a full reading of the reasons, a sufficient analysis of the reasoning process has been outlined.

222 These grounds are not made out.

Grounds 4.1 - 4.4

223 In essence these grounds complain that the learned Commissioner erred in having regard to superannuation contributions and bonus payments payable to Train Controllers, as an overall part of remuneration packages, when comparing remuneration to locomotive drivers and other positions. The complaint is that the learned Commissioner regarded both superannuation payments and bonus payments as de facto wages in making the comparisons that he did at first instance.

224 There were various schedules of rates comparisons tendered in evidence at first instance. At AB1 tab 8 there appears a copy of exhibit R5 tendered by the respondent. In particular “Document 3” which was supplemented during the course of submissions on this appeal by a document entitled “Expansion of Document 3”, received considerable attention by the parties at first instance and is referred to at par 179 in the Commission’s reasons as follows:

“I return to the two main themes of salary and working conditions. It is the case for reasons mentioned previously, that the valid comparison must be between remuneration packages and not simply salary levels. Exhibit R5 attempts those comparisons and this document was not damaged, in my view, by the applicants’ submissions. This is with the exception that clearly the Train Controllers’ shifts are not typically 12 hours in length, but are extended by 15 minutes (approximately) in hand over at the start of each shift. Principle 11(d) states, in part, that the rates

of pay for classifications which are to be inserted in an award "will be assessed by reference to the value of work already covered by the award". The assumption has been that Train Controllers work in concert with locomotive drivers and others and hence these are the rates which Train Controllers legitimately or otherwise have an eye to. This view point is understandable."

- 225 The reference to "for reasons mentioned previously," is a reference to the learned Commissioner's reasons at pars 129 to 131 when dealing with the appellants' claim for the insertion of a classification for the WPA drivers. There the Commission accepted the submissions of the respondent that in considering whether there should be any salary increase for WPA drivers, the Commission should have regard to the overall remuneration package and there should not be a salary versus salary comparison only. However and importantly, for reasons which will become clearer later, there was in my opinion, a difference in the exercise to be undertaken by the learned Commissioner in relation to WPA drivers and the analysis required in respect of Train Controllers.
- 226 I have come to that conclusion because in the case of the WPA drivers, the applicant's case was, and it did not appear to be in contention below, that the essential nature of the work being performed, that is driving locomotives, was the same for both WPA drivers and Award drivers. There were submissions made and evidence adduced about flexibilities in relation to WPA drivers, but the essential nature of the duty, that is driving locomotives, was the same in both cases. However, in case of Train Controllers a different analysis was required. The appellants claim at first instance was that the Train Controllers were grossly undervalued in terms of the work that they performed, relative to other positions, including Award locomotive drivers and the other AWA and staff positions with which comparisons were made. That is, it was not a case of comparing work on a like with like basis, but rather assessing the value of the work of a Train Controller, relative to the value of other occupations.
- 227 Given that the conclusions of the learned Commissioner were based on exhibit R5 in the main, which compared total remuneration for the Train Controllers and Award Level 5 drivers, the question is whether as a matter of principle, this was a sound approach. In part, the answer to this question lies in the terms of the Wage Fixing Principles themselves, and upon which the Commission at first instance relied, as he was obliged to do, in considering the appellants' claims. Relevantly, Principle 11(d) provides as follows:
- "In the extension of an existing award to new work or to award-free work the rates applicable to such work will be assessed by reference to the value of work already covered by the award, providing structural efficiency considerations including the minimum rates adjustment provisions where relevant have been applied to the award."*
- 228 A substantial part of the appellant's case at first instance involved mounting a comparison between the duties and responsibilities of a Train Controller and those of an Award Level 5 driver. However, this was not the only basis of the appellant's case as it was clear from the opening and closing submissions, and the evidence adduced by the appellants, that the Commission was also invited to make relevant comparisons between the duties and responsibilities of Train Controllers and those of Crew Development Officers, Train Co-ordinators and Rail Supervisors. It can be seen from the terms of Principle 11(d) that in the case of the extension of an existing award to award-free work, which was the case in relation to Train Controllers, the Commission is obliged to assess the "rates" applicable to such work by reference to the "value of work" already covered by the Award. This is the essence of a work value comparison for the purposes of establishing an appropriate rate of wage or salary. In the context of an assessment of the wage or salary to be paid to a Train Controller, this requires a consideration of the skills, responsibility, qualifications for and conditions under which relevant work is performed.
- 229 In establishing a rate of wage or salary for classification purposes, the focus in terms of wage setting principles is on the rate of pay, being the component that reflects the qualifications, skills, responsibility and the conditions under which the work is performed. It is the rate of wage or salary, derived from an analysis of these matters, that reflects the work value for the particular position that is being assessed. Correspondingly, it is the rate of wage or salary that is to be used for comparison purposes in assessing relative work value as between different occupations. In my opinion, as a part of this process, it is impermissible to have regard, as a part of valuing the worth of work relative to other work performed, under the terms of the Wage Fixing Principles, to components of a remuneration package that are unrelated to the value of work in terms of skills, responsibilities and the environment in which work is performed, such as superannuation payments and bonuses. Neither of the latter types of payments are related to the performance of work per se, in a work value sense. Superannuation is a payment made as a consequence of legislative and contractual obligations for the purposes of retirement benefits and its only link with the performance of work as such, is its derivation from a percentage of the wage or salary of the individual concerned. Similarly, in the case of the respondent's operations, the bonus payments on the evidence at first instance are comprised of a number of different components including the overall performance of the respondent's business. Furthermore, the payments are made at the discretion of the employer.
- 230 In considering all of this, in my opinion, the approach of the respondent in terms of exhibit R5 in particular, led the Commission at first instance into error as the relevant comparisons upon which the learned Commissioner relied in reaching his conclusions were based on total remuneration. In my view, when reading the reasons as a whole, this was a decisive factor in his decision that any further increases to the Train Controllers were unwarranted.
- 231 In terms of the application of Principle 11(d), the Commission was required to assess the value of the work of a Train Controller in terms of a relevant salary comparison, with the value already established by the Commission in Court Session for an Award Level 5 driver in terms of aggregate salary set out in the Schedule to the Award. Having done so, it was then for the Commission at first instance to determine whether any unfairness was evident on work value grounds and if so, how that should be remedied. If for example, a variation to the Award was considered an appropriate response, then it may be that other components of the overall remuneration arrangements would be affected as a result, such as the loss of additional loadings and the like.
- 232 In my view therefore, with respect, the learned Commissioner erred as a matter of principle, took into account irrelevant considerations and failed to take into account relevant considerations, in concluding as he did as to the overall remuneration levels for the respective positions.
- 233 These grounds are therefore made out.

Ground 4.5

- 234 This ground complains that the Commission at first instance erred in only relying on, for the purposes of comparing remuneration of Train Controllers and others, the highest rate applicable for a Train Controller. It was submitted that the Commission ignored the fact that many Train Controllers are paid less or substantially less than the highest rate.
- 235 Given the way the appellants' case was conducted at first instance, I am not persuaded that this ground is made out. It is clear that the learned Commissioner recognised in particular at par 181, that there were a range of salaries payable to Train Controllers. Additionally also, the evidence was that a salary package rate of \$117,800 was not the highest rate payable to Train Controllers and the Commission at first instance was clearly aware of this. The conclusions of the learned Commissioner as to this issue were open on the evidence and materials before him.

Ground 4.6

236 This ground complains that the Commission failed to have any proper regard for the fact that Train Controllers were required to do a hand over at each shift, which led to their work hours on average being 43 to 44 hours per week and not 42 hours per week in the relevant comparisons. The learned Commissioner recognised the appellant's submissions in this regard at par 163 of his reasons, where he expressly referred to the argument that hours for Train Controllers are "more properly 44 hours per week given the additional time spent on shift change overs". At par 179 the learned Commissioner recognised the additional time spent in hand over when he said, in referring to exhibit R5, "This is with the exception that clearly the Train Controllers' shifts are not typically 12 hours in length, but are extended by 15 minutes approximately in hand over at the start of each shift." The learned Commissioner therefore had regard to this fact in coming to the conclusions that he did. It has not been established by the appellants that in any event, there would be any substantial difference in the overall comparison actually made by the Commission. This ground is not made out.

Grounds 4.7(a) and (b)

237 These two grounds complain that the learned Commissioner failed to make any judgement as to the salary and other remuneration of Train Controllers compared to the salaries and remuneration of other positions, not limited to locomotive drivers. Secondly, it was alleged that if this was done, then the only conclusion reasonably open is that Train Controllers are grossly underpaid and they ought be included in the Award.

238 The Wage Fixing Principles at Principle 11(d) requires the Commission to assess the value of the work of a Train Controller by reference to those covered by the Award. To not do so would constitute an error. However, in the exercise of the broad discretion reposed in the Commission, in terms of the case put at first instance, the Commission was not limited to such a comparison having regard to s 26(1)(a) of the Act, as long as it took into account this assessment in reaching its conclusions.

239 The appellants' case at first instance was not solely based on a comparison of the work of Train Controllers with Award Level 5 drivers. This is borne out from a reading of the appellants written submissions at AB 1 tab 7 pars 29, 33 and 34. Additionally, in the appellants' opening at first instance, Mr Schapper at 25 to 27T referred to salary comparisons between Train Controllers and all of the other occupations, not just Award Level 5 drivers. Additionally, there was documentary evidence in terms of the job descriptions for the Train Controllers, Rail Transport Co-ordinators, Crew Development Officers and Rail Transport Supervisors at AB 3 tabs 19 to 22. There was considerable oral evidence adduced in relation to the duties and responsibilities of these positions. Additionally, at 373 to 380T, Mr Schapper in closing submissions, referred to comparisons between the work performed by Train Controllers not just in terms of a comparison with an Award Level 5 driver, but additionally, with the other positions including for example, the Jimblebar Junction Co-ordinator position.

240 The learned Commissioner referred to the arguments of both counsel for the appellants and the respondent as to other position comparisons. At pars 157 and 158 reference is made to the comparison of the value of work of Train Controllers and those they worked closely with under the Award, they being Engine Drivers. The Commission set out the essential attributes of the Train Controller position and compared the salaries payable to those payable, for example, to the Jimblebar Junction Co-ordinator role. Reference is made at par 169 by the learned Commissioner, to the submissions of Mr Dixon and the respondent's case generally, that Train Controllers were assessed relative to other staff positions and their responsibilities and additionally, having regard to relevant market rates. Reference is made at par 173 to the submissions of the appellants that the salary claimed for Train Controllers constituted a gross inadequacy when compared to other positions employed by the respondent, in particular locomotive drivers. Reference is made to the complexity, workload and other requirements of the Train Controller position. At pars 176 and 177 the learned Commissioner refers to the evidence of Mr Punter and his comparison between the work of Train Controllers and Supervisors and the types of supervision undertaken by them respectively.

241 There was considerable evidence at first instance in relation to the comparison between the duties and responsibilities of Train Controllers and of positions other than Award Level 5 drivers. Mr Goiack in evidence in chief at 216 to 217T refers to the "partnership" between Train Controllers and Supervisors, and the supervision role of Train Controllers whilst "on track" and the involvement of supervisors after hours. He also referred in his evidence to the fact that Train Controllers and Locomotive Drivers were not comparable, given the differences in the roles performed. At 239T Mr Punter referred to the move towards yard supervisors performing some locomotive allocation, but said that had not then been put in place and conceded that presently, the Train Controllers still perform those responsibilities at 265T. He also accepted, significantly, that the Train Controllers, along with other positions, have substantial responsibilities to perform and at 261T that all three positions, that is Train Controllers, Supervisors and Co-ordinators, have an important role and one is not superior to the others.

242 In addition, and significantly also, Mr Goiack at 262T accepted that in some circumstances, a supervisor has to take direction from a Train Controller in relation to areas over which they have responsibility. In terms of salaries, Mr Goiack was taken to this issue in cross-examination and initially referred to "some abnormalities" in the figures between the salaries for Train Controllers, Co-ordinators and Supervisors. At 252T he declined to express a view as to whether such "abnormalities" were either fair or unfair. Balanced against that, was the evidence of Mr Punter at 309T, to the effect that in his view the supervisor position was more concerned with management issues and at 333T referred to the Hay point salary rating system and the higher rating for supervisors because of their responsibility to manage crews. His evidence also was at 351T that he considered the Train Controller positions as being important but ranked them lower than Supervisors, Co-ordinators and Crew Development Officers based on the Hay system.

243 However, Mr Hoare accepted that the Train Controller positions, in terms of the decisions that they make, were crucial to the efficient deployment of locomotives and rolling stock at the respondent's operations at 352T. He also accepted at 325T, that as opposed to an absence by a Supervisor, if a Train Controller is absent, then the respondent's whole railway system stops.

244 The learned Commissioner at pars 15 to 91 set out in some detail a summary of the evidence adduced by the appellant's witnesses. The evidence overall as to the responsibilities of Train Controllers was that they bore onerous responsibilities for all on track movements at the respondent's railroad. A significant amount of evidence was given about the very substantial increase in workload of Train Controllers, as a consequence of the number of trains running from six per day in 1990 to 12 trains per day now, with a forecast increase to 14 trains per day in the near future.

245 In assessing this evidence as expressed in his reasons, in my view, with due respect the learned Commissioner placed an over emphasis on the comparison between Train Controllers and Award Level 5 drivers and did not pay any or any sufficient attention to the relevant comparison between Train Controllers and Crew Development Officers, Train Co-ordinators, and Rail Supervisors. The terms of exhibit R5 are limited to a comparison between Train Controllers and Award Level 5 drivers and additionally, previous historical comparisons between Train Controllers and classifications in the former Goldsworthy Award with which the Train Controller had a historical award nexus. There does not seem to have been undertaken a salary and/or remuneration comparison between Train Controllers and other than Award Level 5 drivers, in light of the evidence adduced. It is also not insignificant to observe that had such a comparison been undertaken, there were very significant differences in base

salaries between Train Controllers and rail positions other than Award Level 5 drivers, with Train Controllers well behind in salary terms.

246 In light of the case mounted by the appellants, as set out above, in particular the appellants' invitation to the learned Commissioner to consider relevant comparisons between other than Award Level 5 drivers, in failing to do so, in my view, the learned Commissioner erred.

247 In light of my conclusions as to ground 4.7(a), it may well be open to conclude as is asserted by ground 4.7(b), that had the Commission at first instance undertaken the analysis of rates of salary between Train Controllers and positions other than Level 5 drivers, then inadequacies may have been apparent that required a remedy by the Commission. However, given that this analysis was for the reasons as outlined above not undertaken, an appealable error is made out.

Ground 4.8

248 The appellant asserts that the Commission at first instance identified unfairness in a salary cap for Train Controllers, but then failed to act upon it by granting the variation to the Award. The learned Commissioner at par 185 referred to the evidence in this regard and opined that it appeared that the salary scale for Train Controllers is "frozen or capped". The learned Commissioner went on to then say that if this was the case, he did not understand why this should be so when comparison is made to other salaries paid by the respondent and this would lead to unfairness. Of all of the evidence referred to in the appellant's outline of submissions, in my view, it was open for the learned Commissioner to so conclude. The question is what should be done about this. It seems to me that the more appropriate step to take in relation to this ground of appeal is for the existence of or otherwise of such a cap to be a relevant consideration in the Commission's determination of what an appropriate salary for a Train Controller should be, having regard to the required comparisons to which I have referred to immediately above.

Ground 4.9

249 This ground alleges that the discretion of the Commission miscarried in that the learned Commissioner wrongly limited the exercise of his discretion by limiting his consideration of any salary increase for Train Controllers to a change in basic skills and responsibilities, and disregarding other relevant considerations. The conclusions of the learned Commissioner in relation to this matter appear to be set out at par 184 when he refers to there being no change in the level of skill or responsibility required of Train Controllers and that the basic skills and responsibilities remained the same. Reference was then made to the volume and intensity of the work requirements having increased. He accepted at pars 183 and 186 of his reasons that the workloads of Train Controllers have increased markedly in recent times and is excessive at various times. Whilst it is not entirely clear from the reasons, it appears that the learned Commissioner ascribed some importance to his finding that there had been no change in the level of skill or responsibility required of Train Controllers.

250 However, it seems to me that the Commission's conclusion in this regard may have, with respect, involved a misconception as to the nature of the appellants' case in relation to Train Controllers. The case, as advanced by the appellants, was to invite the Commission (for the first time) to effectively undertake a work value assessment of the work of a Train Controller, by comparison with other positions both covered by the Award and those not so covered. The appellants' case was not erected, at least as I apprehend it, on the submissions put to us on this appeal, upon any alleged change in work value for the position of Train Controller. That is, whether or not the skill and responsibility of Train Controllers may have changed over time, was not a necessary pre-requisite to establishing, by way of a relevant work value comparison with other positions in rail, whether the Train Controllers position has been undervalued in terms of the salary payable for that particular work. On this basis, it appears to me that the learned Commissioner may have been overly influenced by this factor in considering whether any adjustment to the salary for Train Controllers was warranted. I would uphold this ground.

WPA Drivers

Ground 5

251 I have already dealt with this ground above.

Ground 6

252 This ground asserts that the learned Commissioner erred in law in concluding that the Award did not already extend to WPA drivers and that on its proper construction, s 4H of the WPA Act compelled this conclusion. In connection with this ground, the learned Commissioner set out the contentions of the appellants and the respondent and his conclusions at pars 107 to 119 of his reasons for decision. The Commission accepted the submissions of counsel for the respondent that for the purposes of s 4H(6)(a) of the WPA Act, the Award did not extend to WPA drivers. This conclusion was reached principally on the basis that the terms and conditions of WPA FIFO drivers were not contemplated by the terms of the Award either now or when it was made.

253 Counsel at first instance referred to the proceedings leading to the making of the Award and the respondent also referred to subsequent proceedings before the Commission in Court Session, dealing with variations to the Award after it was made.

254 It is common ground and a matter of record that at the time the Award was made by the Commission in Court Session, a number of the respondent's employees, including those in locomotive driver positions, were engaged on workplace agreements made subject to the terms of the WPA Act. At that time, s 6 of the WPA Act was relevant and it provided as follows:

“6. *Effect of workplace agreement*

(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 extended by an agreement of the kind described in section 14 (2).”*
- 255 The effect of s 6(1) of the WPA Act was that any employed locomotive driver engaged by the respondent on a workplace agreement at the time of the making of the Award, would not be subject to the operation of the Award, by reason of that legislation. It is clear that from the terms of this section, that a relevant award, in this case the Award, was only “suspended” while the relevant workplace agreement remained in force and effect. It is also clear from s 6(1) that at any time that a relevant workplace agreement ceased to have effect and the person concerned remained an employee in a classification to which the relevant award had application, the relevant award would be “revived” for that employee and employer and the contract of employment would be subject to its full terms and effect.
- 256 As at the time of the making of the Award in 2002, any locomotive driver employed by the respondent and subject to a workplace agreement, whose workplace agreement for any reason ceased to have effect, would then have become subject to terms of the Award, as long as they were performing work the major and substantive component of which fell within a classification covered by the Award.
- 257 Section 4H of the WPA is set out at par 109 of the learned Commissioners’ reasons for decision at first instance and I need not repeat it. This provision was enacted as a compliment to the terms of the Labour Relations Reform Act 2002, which by these enactments phased out the operation of workplace agreements under the WPA Act. In my view, s 4H(6) has a similar effect as the former s 6(1) of the WPA Act, to the effect that a relevant award that would otherwise apply to an employee is “revived” on the cessation of the relevant workplace agreement. That is, the effect of s 4H(6) appears to give the same recognition to the cessation of workplace agreements by statutory effect under ss 4C, 4D, 4E and 4F of the WPA Act, as did s 6(1) in the case of the cessation of a workplace agreement for any other reason.
- 258 The issue to be determined is one of the construction of s 4H(6) when read with the relevant provisions of the Award, in particular cls 3, 7 and the Schedules. By s 4H(6), the reference made in par (a) to “extends to them” simply means in context an award that otherwise “binds” or has “application to” the relevant employee. By cl 3 - Area and Scope subclause (1), the Award “extends to and binds... and all employees employed by the Company in the classifications mentioned in this award”. Further, by clause 7 - Aggregate Wages in subclause (1), it is provided that “Employees shall be employed in the classifications set out in the classification structure in the attached schedules...”. By schedule III - Award Classification there is a classification as follows:
- “5. CMETU Loco Level 5.*
- A person at this level will have completed a level four (4) competency pass out and shall be qualified to operate all trains under driver only operation over the BHP Iron Ore Pilbara District Rail Road.”*
- 259 It seems reasonably clear therefore, that an employee of the respondent substantially engaged in the work of a Locomotive Driver Level 5 on the respondent’s Pilbara District Railroad will be bound by and subject to the terms of the Award. It seems not to have been in contention, and the learned Commissioner concluded, that the WPA position of “Rail Transport Technician”, as referred to in par 115 of the Commission’s reasons, are persons engaged as locomotive drivers. That is, their duties are to drive locomotives on the Pilbara District Railroad operated by the respondent.
- 260 Counsel for the respondent in written and oral submissions, referred to relevant authorities dealing with the ability of a court to have regard to the history of award provisions when engaged in the process of interpretation. The submission was that when the Award was made, there was no express intention to have WPA employees covered by the Award. However, in my view, it is important to appreciate that the exclusion of workplace agreement employees at the time the Award was made by the Commission in Court Session, was as a consequence of the operation and effect of the WPA Act. That is, but for the existence of a relevant workplace agreement, an employee performing work in a classification contained in the Award at the time it was made, would be bound by and subject to its terms. In my view therefore, consideration of relevant principles as to historical analyses of award provisions have the potential to mislead in the present context. The only import of history in the present context, is to observe that at the time the Award was made, certain legislation was in existence that precluded the application of the Award to persons governed by a certain species of industrial instrument made under that legislation and only so long as those industrial instruments remained in effect.
- 261 In my opinion, the critical issue to determine coverage by the Award is the engagement in work falling within a classification contained in the Award. That is, what the scope clause of the Award says on its plain and ordinary meaning. In my opinion the learned Commissioner erred in his construction of clause 3 - Area and Scope of the Award in concluding that the Award does not extend to WPA drivers. It was submitted both at first instance and on appeal, that the FIFO drivers have particular terms and conditions in relation to working arrangements as opposed to Award drivers. That may be so. Simply because however the terms of a former workplace agreement has become a statutory contract of employment by the operation of s 4H(2) of the WPA Act, and has some different conditions in it, does not mean that the Award does not also have application. It seems that the legislature has contemplated the co-existence of both awards and the terms of any workplace agreement preserved as a statutory contract by the combined effect of ss 4H (6), (7) and (8) of the WPA Act.
- 262 In view of my conclusions as to ground 6 it is unnecessary for me to deal with ground 7.

Ground 8

Crew Development Officers, Train Co-ordinators and Supervisors

- 263 The Commission at first instance concluded at pars 140 and 141 that as to the Crew Development Officer position, on the evidence, this position was sufficiently different to that of the existing Award based Training Instructor and was not already subject to the Award. This finding was based primarily on the evidence of Mr Punter and Mr Symons. Additionally, the Commission was not persuaded that it was necessary to insert this classification into the Award to provide a career path for drivers or to counter the respondent’s use of AWA’s.
- 264 In relation to the Train Co-ordinator position, the learned Commissioner at par 147 concluded that the appellants’ claim for the insertion of this classification into the Award was unsupported by any evidence. Moreover, he also concluded at par 147 that the only relevant existing position was the Jimblebar Junction Train Co-ordinator and there was no suggestion on the evidence,

that the occupant of this position had any desire to be covered by the Award. As with the Crew Development Officer, the Commission at first instance was also not persuaded that the notion of a career path was sufficient to warrant the inclusion of the classification into the Award.

- 265 Finally, in relation to the Rail Supervisor position, the learned Commissioner concluded that the appellants' sole ground for the insertion of such a classification in the Award, that being to provide a career progression within the Award for locomotive drivers, was not sufficient to warrant the inclusion in the Award of this classification either.
- 266 In my opinion taking the learned Commissioner's reasons as a whole in light of all of the evidence, these conclusions were reasonably open. I am not persuaded that any appealable error has been demonstrated.
- 267 Therefore this ground is not made out.

Notice of Contention

- 268 The respondent filed what was described as a "Notice of Contention" which in its terms sought to affirm the decision of the Commission at first instance. As noted above, the grounds in support were that the appellants had engaged in a course of conduct in relation to the enrolment of members that should influence the exercise of the Commission's discretion at first instance.
- 269 A Notice of Contention is not recognised under either the Act or the Regulations for the purposes of an appeal to the Full Bench. Counsel for the appellants did not however object to the respondent raising the matters as set out in the Notice and the subject of its written submissions at pars 1 to 13.
- 270 Compliance with the registered rules of an organisation registered under the Act is an important matter. Organisations take their privileges and rights from registration under the Act and allegations of improper conduct can be serious matters.
- 271 The application at first instance was brought pursuant to s 40(2) of the Act whereby a variation to the Award was sought. It is open for any organisation named as a party to an award to apply to vary it. The learned Commissioner concluded correctly that the classifications sought to be included in the Award were those in respect of which at least two of the appellants had constitutional coverage. That is sufficient for the purposes of s 40(2) of the Act.
- 272 Concerns as to the conduct of the appellants could have been brought before the Commission seeking other forms of relief under the Act. I have some reservations about matters such as these being raised effectively by a side wind in award variation proceedings. One issue that arises in this respect is if it is the case that Train Controllers should, as a matter of equity, good conscience and the substantial merits of the case, be covered by the Award, whether the individual employees concerned should be made to suffer the penalty of not having that result, as a consequence of conduct alleged against their organisation(s).
- 273 On this occasion, I am not persuaded by the respondent's submissions that the appellants should be denied relief on this basis.

Remedy to be Granted

- 274 Counsel for the appellants Mr Schapper urged the Full Bench, if it was inclined to uphold the appeal, to exercise its discretion afresh on the basis of the evidence and materials before the Full Bench. In particular in relation to Train Controllers, he submitted that the Full Bench should establish an appropriate rate of salary to overcome what the appellants regard as the present gross inadequacy as disclosed on the evidence.
- 275 Given the nature of the errors in the exercise of the discretion that have been identified, I would not be minded to take that course. Given that the learned Commissioner has not in effect completed the task requested of him by the appellants, and that was required by the nature of the application under the Act, then in my view it is only appropriate that the matter be remitted to the Commission at first instance for him to finally determine the matter on the evidence and materials below. Furthermore, it seems to me that that may also well provide the opportunity for the appellants to refresh their application to amend the substantive claims, and if granted, would enable the respondent to bring any further evidence before the Commission that it may wish to in defence of any such amended claim. In all of the circumstances of this case, for the purposes of s 49(6)(a) of the Act, I am of the opinion that given the nature of the errors identified, that the Full Bench is not in a position to make its own decision on the merits of the case and that there is good reason for the matter to be remitted to the learned Commissioner.
- 276 Therefore, I would uphold the appeal in part. I would suspend the operation of the decision and remit the matter to the Commission at first instance for further hearing and determination in accordance with the reasons of the Full Bench.

COMMISSIONER J L HARRISON:

- 277 I have had the advantage of reading the reasons for decision of his Honour the Acting President and Kenner, C in draft form which comprehensively set out the background of this appeal.
- 278 As stated by the Acting President and Kenner, C the decision at first instance was discretionary and the principles relating to discretionary judgements are well known (see *House v King* (1936) 55 CLR 499 at 504 to 505).
- 279 I agree with the reasons and conclusions of the Acting President in relation to Grounds 1, 2, 3, 5 and 8 and find that these grounds of appeal are not made out. I also agree with and adopt the views of the Acting President in relation to the 'Notice of Contention' filed by the respondent.

Grounds 4.1 to 4.4

- 280 These grounds claim that the learned Commissioner erred in taking into account superannuation contributions and discretionary bonus payments when comparing the remuneration of train controllers with that of Level 5 locomotive drivers.
- 281 When dealing with work value considerations and comparing the value of an employee's classification with another relevant classification it is my view that the rates of pay or salary and not the remuneration of other relevant classifications should be reviewed and taken into account as part of this assessment as this reflects a proper comparison of the value of the work undertaken by different classifications.
- 282 In this jurisdiction the ordinary meaning of salary has generally been accepted as being a fixed payment made periodically by an employer to an employee in return for work and is a payment that an employee can expect to receive on a regular basis (see *Totaliser Agency Board v Edith Fisher* (1997) 77 WAIG 1889). In my opinion and with respect the learned Commissioner erred when he took into account what I regard to be irrelevant considerations by including bonus payments paid to train controllers as part of this comparison as bonus payments are not payments which are guaranteed to an employee nor is it a payment made in return for the work undertaken and the Commissioner erred when he took into account payments made for superannuation purposes which are also not payments made for work undertaken.
- 283 These grounds are therefore made out.

Grounds 4.5 and 4.6

284 I am not persuaded that these grounds are made out as the learned Commissioner expressly referred to being aware that train controllers are on a range of salaries in his reasons for decision and the Commissioner also indicated in his reasons for decision that he was aware that the train controllers worked more than 42 hours per week.

Ground 4.7(a) and (b)

285 There was a substantial amount of evidence indicating that the appellants' case was argued on the basis of a comparison of the value of the work undertaken by train controllers with a range of relevant classifications, including Level 5 locomotive drivers and the appellants argued that if this work was properly assessed this should lead to the inclusion of train controllers in the Award. As the learned Commissioner only compared train controllers with Level 5 locomotive drivers and did not compare train controllers with other occupations which work alongside train controllers when determining whether the classification of train controller should be included in the Award, which in my view is a comparison contemplated having regard to s26(1)(a) of the Act as well as Principle 11(d) of the State Wage Principles, I conclude with respect that the learned Commissioner erred when he did not take into account this relevant consideration. I would therefore uphold ground 4.7(a).

286 As to ground 4.7(b) it is my opinion that a comparison of the salaries of other relevant classifications such as crew development officers, rail co-ordinators and rail supervisors with the salary paid to train controllers could have led the Commission to form the view that train controllers were underpaid and should be brought under the Award to correct this unfairness.

Ground 4.8

287 At paragraph 185 of his decision the learned Commissioner refers to the possibility of the train controller's salary being capped and states that if this is the case then this would lead to an unfairness. The Commissioner did not then take this issue any further even though the appellants argued that regard should be had to this issue when the Commission determined whether or not the classification of train controller should be incorporated into the Award. In not determining whether the train controller's salary was capped and if so the impact of this on whether the classification of train controller should be brought under the Award it is my view with respect that the learned Commissioner did not consider and taken into account a relevant consideration. I would therefore uphold this ground of appeal.

Ground 4.9

288 The appellants maintain that contrary to its argument in the first instance that the Commission assess the work value of a train controller compared to other positions covered by the Award and other relevant positions the learned Commissioner focused solely on an assessment of changes to the skills and responsibilities of train controllers when deciding whether to bring train controllers under the Award and award them a pay increase. In my view changes in the skills and responsibilities of train controllers was one of a number of relevant considerations which the Commission at first instance was required to take into account when assessing whether or not the classification of train controller should be incorporated into the Award. Even though the Commissioner considered the inability of train controllers to take breaks during their 12 hour shifts when deciding whether or not train controllers should be incorporated into the award in my opinion the learned Commissioner did not expressly consider a number of other relevant considerations as identified by the appellants in this ground of appeal and which also formed the basis of the appellants' case at first instance. It is therefore my view that this ground of appeal is made out.

Ground 4.10

289 This ground relates to the learned Commissioner's conclusion at paragraph 188 of his decision whereby he stated that given the circumstances which presented at the time of the hearing the inclusion of train controllers in the Award to ensure employees had breaks was not warranted. The Commissioner also refers in this paragraph to the appellants' argument that award coverage should be given to train controllers to address the unsatisfactory situation concerning breaks and the Commissioner states that he weighed this against the respondent's evidence of changes being made to correct this situation.

290 In my view the Commissioner did not take into account a number of relevant considerations when reaching his conclusions in relation to this issue.

291 The appellants argued at first instance that the respondent's failure to discharge its duty to take reasonable care for the health, safety and welfare of train controllers by enabling train controllers to take breaks during their 12 hour shifts was a compelling reason for the Commission to provide award protection for train controllers which allowed train controllers 60 minutes of breaks per 12 hour shift.

292 The Commissioner made no findings about or gave any weight to the respondent's failure to provide breaks for train controllers during their 12 hours shifts even though for a significant period prior to and at the time of the hearing the respondent did not have any specific mechanisms in place nor did it take any action to ensure that train controllers took any breaks during their 12 hour shifts, including toilet breaks. In my view this is a relevant consideration that the Commissioner should have taken into account when deciding whether or not train controllers required the protection of the Award so as to ensure that the train controllers were able to take breaks during their 12 hour shifts.

293 In my opinion, the learned Commissioner failed to take into account that by not providing train controllers with breaks during their 12 hour shifts the respondent was in breach of its statutory duty to provide a safe workplace for its employees as required under common law and the *Mines Safety and Inspection Act 1994*. In my view the Commissioner failed to take into account that this failure had been and would be ongoing and that train controllers would be exposed to unsafe working conditions for some months notwithstanding the undertakings given by the respondent to provide resources at some stage in the future so that train controllers could take the necessary breaks during their 12 hours shifts.

294 I would therefore uphold this ground of appeal.

Ground 6

295 I agree with the reasoning set out by Kenner, C in relation to this ground and I am also of the view that given the construction of s4H(6) of the WPA Act when read with the relevant provisions of the Award that the award currently extends to WPA drivers.

Ground 7

296 Given my conclusions in relation to ground 6 it is unnecessary to deal with this ground of appeal.

Relief

297 For the reasons expressed by Kenner, C it is my view that the Full Bench is not in a position to decide the merits of this claim and I therefore conclude that there is good reason to remit this matter back to the learned Commissioner at first instance for further consideration and determination.

298 In the circumstances I would uphold the appeal in part, suspend the operation of the decision and remit the matter to the Commission at first instance for further consideration and determination in accordance with the reasons of the Full Bench.

2006 WAIRC 03875

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH; THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS; THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH; THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH	APPELLANTS
	-and-	
	BHP BILLITON IRON ORE PTY LTD	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER S J KENNER COMMISSIONER J L HARRISON	
DATE	FRIDAY, 3 MARCH 2006	
FILE NO/S	FBA 19 OF 2005	
CITATION NO.	2006 WAIRC 03875	
Decision	Appeal upheld in part	
Appearances		
Appellants	Mr D Schapper (of Counsel), by leave	
Respondent	Mr H Dixon SC, by leave, and with him Ms G Archer (of Counsel), by leave	

Order

This matter having come on for hearing before the Full Bench on 24 and 25 January 2006, and having heard Mr D Schapper (of Counsel), by leave, on behalf of the appellants and Mr H Dixon SC, by leave, and with him Ms G Archer (of Counsel), by leave, on behalf of the respondent, and the Full Bench having heard and determined the matter, and the reasons for decision having been delivered on 27 February 2006, it is this day, 3 March 2006, ordered as follows:-

- (1) The appeal be allowed in part.
- (2) The order of Commissioner Wood in application 338 of 2005 be suspended and the matters the subject of appeal grounds 4.1, 4.2, 4.3, 4.4, 4.7(a) and (b), 4.8, 4.9, and 6 be remitted to the Commissioner at first instance for further hearing and determination in accordance with the reasons of the Full Bench.
- (3) The appeal is otherwise dismissed.

By the Full Bench
(Sgd.) M T RITTER,
Acting President.

[L.S.]

2006 WAIRC 03867

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	APPELLANT
	-and-	
	THE COMMISSIONER OF POLICE, WESTERN AUSTRALIAN POLICE	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER P E SCOTT COMMISSIONER J H SMITH	
HEARD	TUESDAY, 28 FEBRUARY 2006	
DELIVERED	THURSDAY, 2 MARCH 2006	
FILE NO.	FBA 21 OF 2005	
CITATION NO.	2006 WAIRC 03867	

CatchWords	Industrial Law (WA) - appeal against the decision of the Public Service Arbitrator - conversion to permanent officer status - "dead issue" - appeal dismissed - <i>Public Sector Management Act 1994</i> , s64, s64(1)(b) - <i>Public Service Award 1992</i> , clause 8(5), clause 8(5)(b)(i) - <i>Industrial Relations Act 1979</i> (WA) (as amended), s27(1)(a)(iv), s44, s49, s49(5)(a), s80E, s80G(1) - <i>Industrial Relations Commission Regulations 2005</i> , regulation 31 - <i>Premier's Circular No 2002/17</i> , clause 3(3).
Decision	Appeal dismissed.
Appearances	
Appellant	Mr W Claydon, as agent
Respondent	Ms R Lavell

Reasons for Decision

THE FULL BENCH:

- 1 Before the Full Bench is an appeal instituted under s49 and s80G(1) of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*). The appeal is against an order made by a Public Service Arbitrator (the Arbitrator) on 22 November 2005. The order made by the Arbitrator was to dismiss an application filed on 30 August 2005. The application was filed as a request for a conference pursuant to s44 of *the Act* in relation to a dispute, and if not conciliated, a hearing and determination pursuant to s80E of *the Act*. The grounds on which the application was made were set out in a schedule to the application.
- 2 The dispute was not settled by conciliation. Accordingly, on 21 September 2005, the Arbitrator, acting pursuant to regulation 31 of the *Industrial Relations Commission Regulations 2005*, issued a Memorandum of Matters for Hearing and Determination. The schedule to the Memorandum set out the dispute between the parties as follows:-
 - “1. The applicant is in dispute with the respondent regarding the employment of its member Mr Paul Hannah at the WA Police Service.
 2. Mr Hannah commenced employment at the WA Police Service on 20 July 2004 on a fixed term contract for one month as a Level 1 Officer. Mr Hannah has remained in this position since this time on a series of fixed term contracts. His current contract expires on 2 September 2005.
 3. Mr Hannah originally filled the position on a contract basis to provide relief while the substantive occupant was acting elsewhere. This position has subsequently become vacant.
 4. Mr Hannah requested conversion to permanent officer status on 26 July 2005 in accordance with the Premier's Circular Number 2002/17.
 5. The respondent rejected Mr Hannah's request for conversion.
 6. The applicant says that Mr Hannah meets the criteria for conversion to permanent officer status as set out in Clause 5 of the Circular and that permanency should be granted. The applicant accordingly seeks declarations and orders of the Commission.
 7. The respondent wholly denies the applicant's claim and opposes the orders sought.”
- 3 After a hearing on 20 October 2005, the Arbitrator on 22 November 2005 issued an order dismissing the application. On the same date, the Arbitrator's reasons for decision were published. In his reasons, the Arbitrator held that Mr Hannah was not entitled to conversion to permanent officer status pursuant to the Premier's Circular No 2002/17. This was because the conversion referred to in this circular did not, as stated in clause 3(3) of the circular, apply to “fixed term contract public service employees correctly engaged under s64(1)(b) of the *Public Sector Management Act 1994*”.
- 4 The Arbitrator held that Mr Hannah was correctly engaged under this subsection of the *Public Sector Management Act 1994* (*the PSM Act*), because the fixed terms of employment under which Mr Hannah had been engaged were in accordance with the terms of clause 8(5) of the *Public Service Award 1992* (the award). It was common ground before the Arbitrator that Mr Hannah's employment was subject to the award. The Arbitrator found that clause 8(5)(b)(i) applied to Mr Hannah as his engagement on fixed term contracts were for the purpose of “covering one off periods of relief”.
- 5 The notice of appeal had three grounds, which were directed to the Arbitrator's construction of the award and s64 of *the PSM Act* in the context of the fixed term contracts under which Mr Hannah was engaged and the reasons why Mr Hannah had been so engaged. The notice of appeal sought essentially the same relief as sought at first instance.
- 6 Prior to the hearing of the appeal, the parties filed and served written submissions. The respondent submitted that the appeal ought to be dismissed pursuant to s27(1)(a)(iv) of *the Act* on the basis that the subject matter of the appeal was now a “dead issue”. The reasons for the making of this submission will be set out shortly. The submissions of the respondent also indicated that this issue had been discussed between the parties prior to the filing of the submissions. This was also reflected in the fact that the appellant responded to this issue in their written submissions.
- 7 At the commencement of the hearing of the appeal, the Full Bench accepted a submission of the respondent that their argument for the dismissal of the appeal be heard as a preliminary issue. The Full Bench then heard the submissions of the respondent and the appellant on this issue. The Full Bench then adjourned for a short while before returning and advising the parties we were of the view that the appeal ought to be dismissed on the basis argued by the respondent. The parties were advised that reasons for decision and an order formally dismissing the appeal would be published as soon as practicable.
- 8 These are our reasons for concluding that the appeal ought to be dismissed on the basis argued by the respondent.
- 9 The respondent's written submissions included the following factual background, which was not disputed by the appellant:-
 - “2. Mr Paul Hannah was employed with WA Police from 20 July 2004 on a series of fixed-term contracts.
 3. The level one position temporarily filled by Mr Hannah was substantively held by Ms Arlene Fernandez, who was “acting” in a position elsewhere.
 4. On 5 July 2005, the position which Mr Hannah was temporarily filling became vacant and the process for filling the position commenced.
 5. On 26 July 2005, Mr Hannah wrote to the Director (Human Resources) of WA Police stating that he believed he was eligible for conversion to permanent status in accordance with Premier's Circular 2002/17 and clause 8 of the *Public Service Award 1992* (“Award”). (Exhibit R1, AB, p81)

6. *The Director (Human Resources) responded to Mr Hannah in correspondence dated 2 August 2005 and advised that Premier's Circular 2002/17 did not provide for conversion to permanent status for employees engaged under section 64(1)(b) of the **Public Sector Management Act 1994** ("PSMA") (that is, fixed-term public servants). Mr Hannah was further advised that Premier's Circular 2002/17 merely required agencies employing fixed-term public servants under section 64(1)(b) of the PSMA to review positions occupied by those employees and, where the positions were not related to a project or task, to take steps to fill the positions in accordance with the requirements of the PSMA. (Exhibit R2, AB, p82-83)*
 7. *On 30 August 2005, the Appellant commenced application PSAC 40 of 2005, which sought to have Mr Hannah converted to permanent officer status and suggested that Mr Hannah met the criteria for conversion as outlined in Premier's Circular 2002/17.*
 8. *On 19 October 2005, the position temporarily filled by Mr Hannah was advertised in open competition. Mr Hannah applied for the position.*
 9. *On 20 October 2005, a hearing was held before the Public Service Arbitrator and on 22 November 2005 the decision was delivered dismissing the application of the Appellant.*
 10. *On 8 December 2005, the Appellant appealed Commissioner Kenner's decision to the Full Bench of the Western Australian Industrial Relations Commission ("Appeal").*
 11. *On 13 December 2005, Mr Hannah was advised that he was recommended for appointment to the position. Mr Hannah was permanently appointed to the position (under section 64(1)(a) of the PSMA) with effect from 30 December 2005."*
- 10 The respondent therefore argued that the appeal was unnecessary. This was because the purpose of the proceedings was to secure permanency of employment for Mr Hannah as a public service officer, and this had now occurred. Essentially, the respondent argued that the issue of converting Mr Hannah to a permanent employee was now a dead issue, given that he had already been made a permanent employee.
- 11 In our opinion, it is open to the Full Bench to dismiss an appeal under s27(1)(a)(iv) of *the Act*, or for that matter s49(5)(a), where no purpose would be served in the Full Bench hearing and determining the appeal. This can occur where the determination of the appeal is unnecessary because the dispute which was between the parties and before the Commission/Full Bench, has been resolved. We respectfully agree with the observations of Sharkey P (with whom Gregor SC agreed) in *Civil Service Association of Western Australia v Dr Ruth Shean, Chief Executive Officer, Disability Services Commission* (2005) 85 WAIG 2993, where His Honour said at paragraphs [36]-[38]:-
- "36 ...However, it is a clear principle applicable in this Commission that, unless the public interest dictates otherwise, the Commission's charter is to deal with practical solutions and not to engage in merely academic exercises (see *Civil Service Association of WA Inc v Director General, Department of Consumer and Employment Protection* (2002) 82 WAIG 952 at para 45 (FB)).
- 37 This Commission is also bound by the principle laid down in *Confederation of Western Australian Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch and Others* (IAC) (op cit). That principle is expressible, as it was expressed in *Ku-Ring-Gai Municipal Council v Suburban Centres Pty Ltd* (1971) 2 NSWLR 335 at 339 as follows:-
- "it is not the function of the established courts to entertain applications which are designed solely or primarily as a means of obtaining legal advice for potential litigants, and courts should, so far as possible, avoid making determinations of hypothetical questions."
- 38 *The Industrial Appeal Court in those reasons for decision applied the ratio of Veloudos and Others v Young* [1981] 56 FLR 182 as follows:-
- "Courts will not decide a question that is academic in the sense that it is useless, merely hypothetical, raised prematurely or a dead issue; although they preserve a discretion to determine a question which has ceased to be a live issue inter partes, whether determination would be in the public interest."
- 12 We agree with the submission of the respondent that the question of whether Mr Hannah is entitled to permanency, on the basis of the Premier's Circular, is no longer a live issue. This is because Mr Hannah has now been granted permanent employment.
- 13 The matter may be considered by having regard to the orders which were sought in the application made to the Arbitrator. An order was sought that the respondent "*converts Mr Hannah to permanent officer status*". This has now occurred. Similarly, the Memorandum issued by the Arbitrator on 21 September 2005 referred to the appellant's argument that "*permanency should be granted*" to Mr Hannah and that the appellant "*accordingly seeks declarations and orders of the Commission*". As stated earlier, the notice of appeal essentially sought the same relief as at first instance. It is now wholly unnecessary for the Full Bench to consider making orders that Mr Hannah is eligible for or should be granted permanent status, as this has already occurred. Whether, pursuant to the Premier's Circular, Mr Hannah ought to have been considered for permanent status is no longer a live issue. There is no order which the Full Bench could make which could have any effect upon or be sensibly complied with by the respondent.
- 14 The appellant argued, consistent with the authorities referred to above, that there was a public interest in the Full Bench determining the appeal. It was argued that the parties remain in dispute as to the applicability of fixed term contracts as opposed to permanent employment. Whilst this may be so, the dispute which was before the Arbitrator and subsequently the Full Bench was not a broad based dispute about the applicability of fixed term contracts. It was a dispute specifically about the engagement of Mr Hannah and whether he was entitled to be made a permanent employee. In other words, there was not before the Arbitrator a broader dispute, of which Mr Hannah's position was only one part.
- 15 The appellant also submitted that the appeal brought into question the construction of the relevant clause of the award by the Arbitrator and this was relevant to issues which have arisen or may in the future arise between the parties. Again, this may be so but it does not, in our view, provide a reason for the Full Bench determining the present appeal. If there are ongoing issues about the construction of the relevant clause of the award, then an application may be made to the Commission for interpretation of the award. Relevant to the present appeal, Sharkey P in the *Dr Shean* case cited earlier, at paragraph [29] said that, "*the interest of a particular organisation or peak body, it is trite to observe, in challenging the reasoning of a decision, is not to be equated with the public interest*".
- 16 Additionally, and as stated, given the present status of Mr Hannah's employment, there is nothing which the Full Bench could order in this matter which could directly affect the rights of the parties.

17 For these reasons, we were of the view that the appeal ought to be dismissed, as the appeal no longer contained any live issues for the determination of the Full Bench.

2006 WAIRC 03868

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
APPELLANT

-and-

THE COMMISSIONER OF POLICE, WESTERN AUSTRALIAN POLICE
RESPONDENT

CORAM FULL BENCH
THE HONOURABLE M T RITTER, ACTING PRESIDENT
COMMISSIONER P E SCOTT
COMMISSIONER J H SMITH

DATE THURSDAY, 2 MARCH 2006
FILE NO/S FBA 21 OF 2005
CITATION NO. 2006 WAIRC 03868

Decision Appeal dismissed.
Appearances
Appellant Mr W Claydon, as agent
Respondent Ms R Lavell

Order

This matter having come on for hearing before the Full Bench on 28 February 2006, and having heard Mr W Claydon, as agent on behalf of the appellant, and Ms R Lavell, on behalf of the respondent, and the reasons for decision having been delivered on 2 March 2006, it is this day, 2 March 2006, ordered that appeal No FBA 21 of 2005 is dismissed.

[L.S.]

By the Full Bench
(Sgd.) M T RITTER,
Acting President.

2006 WAIRC 03908

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
BHP BILLITON IRON ORE PTY LTD
APPELLANT

-and-

THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
RESPONDENT

CORAM FULL BENCH
THE HONOURABLE M T RITTER, ACTING PRESIDENT
CHIEF COMMISSIONER A R BEECH
SENIOR COMMISSIONER J F GREGOR

HEARD WEDNESDAY, 15 FEBRUARY 2006
DELIVERED WEDNESDAY, 8 MARCH 2006
FILE NO. FBA 15 OF 2005
CITATION NO. 2006 WAIRC 03908

CatchWords Industrial Law (WA) - appeal against decision of single Commissioner - alleged unfair dismissal - dismissal for misconduct - failure to follow instruction - discretionary decision - drug and alcohol programme - Issue Resolution Process - jurisdiction of Commission - order for loss suffered because of dismissal - mitigation of loss - whether prior decision of Full Bench ought be followed - *Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 - Industrial Relations Act 1979 (WA) (as amended), s23(3)(h), s23A, s23A(3), s23A(4), s23A(5), s23A(5)(a), s23A(5)(b), s23A(7), s26(2), s44, s44(6)(bb)(ii), s44(9), s49, s49(9).*

Decision Appeal allowed in part, appeal otherwise dismissed.
Appearances
Appellant Mr A D Lucev (of Counsel), by leave and with him Ms K O'Rourke
Respondent Mr D H Schapper (of Counsel), by leave

*Reasons for Decision***THE ACTING PRESIDENT:****Introduction**

- 1 This is an appeal instituted under s49 of the *Industrial Relations Act 1979 (WA)* (as amended) (*the Act*). The appeal is against orders made by the Commission on 3 October 2005.
- 2 These orders were made consequent upon an application being filed by the respondent in the Commission on 22 July 2005 seeking a conference pursuant to s44 of *the Act*. The grounds on which the application was made were set out in a schedule to the application. The schedule said the respondent was in dispute with the appellant over the termination of employment of their member, Mr John Johnston. Mr Johnston had been employed by the appellant for almost 20 years, most recently as a motor vehicle driver, at the Mt Whaleback mine in Newman. He is also a convener of the respondent union. The schedule claimed the termination of Mr Johnston's employment was harsh, oppressive or unfair and sought the assistance of the Commission in an endeavour to resolve the matter.
- 3 The matter was not able to be settled at a conciliation conference held in accordance with s44 of *the Act*. Accordingly, on 5 August 2005, the Commission issued a Memorandum of Matters for Hearing and Determination pursuant to s44(9) of *the Act*. The schedule to the Memorandum was as follows:-

"1. *The Applicant says that:*

- (a) *The Applicant's member, Mr John Johnston, had his employment terminated with the Respondent on 21 July 2005;*
- (b) *The Respondent paid Mr Johnston in lieu of notice in accordance with clause 9(3) of the Award;*
- (c) *The termination letter given to Mr Johnston dated 21 July 2005 specifies the basis on which the Respondent purported to terminate Mr Johnston's employment;*
- (d) *The termination letter states that a disciplinary inquiry instituted by the Respondent found that Mr Johnston:*
 - (i) *abused and intimidated the Assistant Mining Superintendent on 18 June 2005;*
 - (ii) *unreasonably and unjustifiably interfered with a drug and alcohol test and failed to comply with a lawful instruction to leave the testing location on 18 June 2005; and*
 - (iii) *lacked candour in responding to questions in the investigation.*

2. *The Applicant denies that Mr Johnston:*

- (a) *abused and intimidated the Assistant Mining Superintendent on 18 June 2005;*
- (b) *unreasonably and unjustifiably interfered with a drug and alcohol test and failed to comply with a lawful instruction to leave the testing location on 18 June 2005; or*
- (c) *lacked candour in responding to questions in the investigation.*

3. *In all the circumstances, particularly those referred to above, the Applicant says that the termination of Mr Johnston's employment with the Respondent is unfair.*

4. *The Applicant seeks an order from the Commission reinstating Mr Johnston's employment with the Respondent without loss of entitlement.*

5. *The Respondent opposes the Applicant's claims and denies that the Applicant is entitled to the relief sought or any relief at all."*

- 4 The dispute was heard by the Commission at Newman on 5-7 September 2005 including a site inspection.
- 5 On 23 September 2005 the Commission published its reasons for decision and, as stated earlier, orders were made on 3 October 2005. The orders made were that the Commission:-

- "1. *DECLARES that the applicant's member, Mr John Johnston was unfairly dismissed by the respondent on 21 July 2005;*
2. *DECLARES that reinstatement of the applicant's member, Mr John Johnston, is practicable;*
3. *ORDERS that within 7 days of the date of this order, the Respondent shall reinstate the Applicant's member, Mr John Johnston, to his previous position;*
4. *ORDERS that Mr John Johnston's service with the Respondent shall be deemed not to have been broken by reason of the termination of his employment;*
5. *ORDERS that Mr John Johnston be paid for the period between his dismissal on 21 July 2005 and the date of his reinstatement as if he had been at work during that period;*
6. *ORDERS that the respondent counsel Mr John Johnston, and place on his personal file a counselling note for his breach of the BHP Iron Ore – Drug and Alcohol Programme, by taking Mr Fairbrass off site on 18 June 2005."*

The Notice of Appeal

- 6 A notice of appeal was filed on 21 October 2005. The schedule to the notice of appeal sets out what are described as seven "grounds" of appeal. In truth, "grounds" 5-7 are not grounds of appeal as such but simply an indication of the orders which the appellant was seeking from the Full Bench, depending upon which grounds of appeal the Full Bench upheld. Grounds 1-4 of the grounds of appeal are in the following terms:-

"1. *The Commission erred in finding that Mr Johnston's conduct, by removing Mr Fairbrass:*

- (a) *from the care of supervision;*
- (b) *from the drug and alcohol testing room; and/or*
- (c) *from the site,*

in breach of the Appellant's Drug and Alcohol Program ("Program"), and in breach of a lawful and reasonable direction from a management employee, did not fairly or reasonably warrant dismissal.

- 2 *In the alternative to ground 1:*
 - 2.1 *the Commission had no jurisdiction to stipulate that the penalty to be applied to Mr Johnston for breaching the Program be that of a counselling note to be placed on Mr Johnston's personnel file;*
 - 2.2 *further, in the alternative to ground 2.1, if the Commission has the jurisdiction to stipulate the penalty to be applied to Mr Johnston for breaching the Program, it erred in finding that the appropriate penalty for that breach was a counselling note to be placed on Mr Johnston's file; and*
 - 2.3 *in any event, the Commission erred in denying the Appellant procedural fairness by not permitting it the opportunity to deal with the issue of the appropriate penalty for Mr Johnston's breach of the program.*
- 3 *The Commission erred:*
 - 3.1 *in finding that Mr Johnston was entitled to represent Mr Fairbrass at the test pursuant to clause 23 - Issue Resolution Process of the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002;*
 - 3.2 *in finding that Mr Johnston sought to represent Mr Fairbrass as a union member within the terms of the Issue Resolution Process;*
 - 3.3 *in finding that the letter dated 8 June 2005 by Mallesons Stephen Jacques as solicitors for the Appellant that Mr Johnston sought to rely on was relevant to union representation in this matter;*
 - 3.4 *in finding that material before the Commission in C32 of 2005 was relevant to this matter as this material only relates to the Program as amended; and/or*
 - 3.5 *in failing to find that Mr Johnston's actions in seeking to represent Mr Fairbrass at the test on 18 June 2005 interfered with the test Mr Fairbrass was required to take in relation to his return to work in accordance with the Program.*
- 4 *The Commission erred by failing to correctly interpret and apply section 23A(5)(b) of the Industrial Relations Act, 1979 (WA) in ordering that the Appellant pay Mr Johnston for the period between his dismissal on 21 July 2005 and the date of his reinstatement as if he had been working during that period when he made no endeavour to mitigate his loss as a result of the dismissal."*

The Facts

- 7 The events which led to the termination of Mr Johnston's employment occurred in the early morning of 18 June 2005 at the appellant's Mt Whaleback mine in Newman, and in the disciplinary inquiry which followed. To some extent the events on 18 June 2005 were related to an incident on 13 June 2005, which will be referred to later.
- 8 At the hearing, evidence for the respondent was given by Mr Johnston, Mr Dave Fairbrass and Mr James McKean. Evidence for the appellant was given by Mr Jack McDonald, Mr Joe Rovetto, Mr Justin Miles, Mr Mick Carroll, Mr Mike Lohse, and Mr Geoff Knuckey. Documentary exhibits were tendered. These included statements by Mr Brad Roe and Mr Chris Thompson who had observed some of the events on the morning of 18 June 2005. These statements were before the appellant when it decided to terminate Mr Johnston's employment, but neither party called Mr Roe or Mr Thompson to give evidence.
- 9 The evidence at the hearing is summarised in detail in the reasons of the Commissioner at paragraphs [5]-[70] and were referred to and analysed in other parts of the reasons. The following briefer summary of the facts is in part reliant upon the summary of the evidence provided by the Commissioner in his reasons for decision.
- 10 Mr Fairbrass is a truck driver employed by the appellant at the Mt Whaleback mine in Newman. On 13 June 2005 he reported an incident at an intersection which is known as SP17. The incident was that another truck had entered the intersection and stopped halfway across the road. Mr Fairbrass did not think that the truck was going to stop and consequently he took evasive action. According to the road rules in place, the truck should have given way to the truck driven by Mr Fairbrass. Mr Fairbrass reported the incident to a supervisor. The supervisor informed Mr Fairbrass that he would have to undergo a drug and alcohol (D&A) test in accordance with the D&A programme of the appellant. Mr Fairbrass, together with a union representative, Mr Des Brewer, objected to the taking of the test. This was because Mr Fairbrass was of the view that as he was not responsible for the incident and had only sought to report it, he was not required to take a "for cause" test in accordance with the programme. Initially, following this discussion, Mr Fairbrass was advised that he did not have to take the test as he had passed the time limit relevant to the test. Subsequently, however, he was advised that he would have to take the test. He refused to do so on the basis that he did not believe that he was required to take the test. He was therefore deemed to have a "first positive" test under the programme. The programme provides that if somebody refuses to take a test it is deemed to be a positive result. Positive results are subject to disciplinary action as set out in the programme.
- 11 In accordance with the programme, Mr Fairbrass was required to take another D&A test before he next commenced work. Mr Fairbrass was to next commence work on 18 June 2005.
- 12 On 17 June 2005 Mr Fairbrass was advised by Mr McDonald, an assistant superintendent of mining, that the test would be conducted before he commenced shift the next day. The programme also required Mr Fairbrass not to drive to work. Mr Fairbrass agreed with Mr Johnston that Mr Johnston would take Mr Fairbrass to work that day. This occurred at about 5.45am. Mr Fairbrass and Mr Johnston then separated. A little while later Mr McDonald approached Mr Fairbrass and asked him to take the D&A test. Mr McDonald and Mr Fairbrass then proceeded to go to the D&A test waiting room. On the way to and at the waiting room, Mr Fairbrass telephoned Mr Johnston and spoke to him. This led to Mr Johnston also attending at the D&A waiting room where he had a conversation with Mr McDonald. Shortly afterwards, two contractors, Mr Rovetto and Mr Miles, entered the room to undergo tests. This led to an assertion by Mr Johnston that Mr Fairbrass' "confidentiality" had been breached and Mr Johnston and Mr Fairbrass then left the waiting room. Inside and outside of the room there was then conversation between Mr McDonald, Mr Johnston and Mr Fairbrass. The content of what was said and done by Mr Johnston in this period was a key issue in relation to his termination of employment and also the determination made by the Commission. At the conclusion of the conversation, Mr Johnston drove Mr Fairbrass to his home.
- 13 The events of the morning were reported by Mr McDonald to Mr Carroll, the mining superintendent. Mr Carroll then reported the matter to Mr Knuckey, the manager of maintenance at the Mt Whaleback mine. Mr Knuckey, later that morning, spoke to Mr Johnston on the telephone and stood him down. There then followed an investigation which was conducted by the human

resources department of the respondent at Mt Whaleback. The investigation was commenced by a Mr Jessop and then taken over by Mr Lohse, the acting manager of the human resources department. The investigation involved the obtaining of some information and statements and the interviewing of Mr Johnston.

- 14 On 19 July 2005 Mr Lohse had a meeting involving Mr Knuckey, Mr Caroll, Mr Jessop and other senior personnel. It was there that the decision to terminate Mr Johnston's employment was made.
- 15 Mr Johnston was informed of this at a meeting on 21 July 2005 which was also attended by Mr McKean. On that date a letter of dismissal was read to Mr Johnston and later provided to Mr McKean who in turn gave it to Mr Johnston. The relevant contents of the letter are as follows:-

"I refer to the disciplinary inquiry conducted, on 27 June 2005 and 15 July 2005 in relation to the incident on 18 June 2005.

The disciplinary inquiry was conducted into allegations that you had verbally abused and intimidated the Assistant Mining Superintendent whilst he was in the process of conducting a drug and alcohol test in accordance with the Company's Drug and Alcohol Program, your actions in interfering with the test and failing to comply with a lawful direction made at that time.

In the inquiry you denied abusing the Assistant Mining Superintendent and interfering with the testing.

The inquiry has found that, notwithstanding your denial, you did abuse and intimidate the Assistant Mining Superintendent. That behaviour was totally unacceptable and unjustifiable. All employees have the right to be protected from such behaviour in the workplace.

The investigation has also found that you unreasonably and unjustifiably interfered with a drug and alcohol test and failed to comply with the lawful instruction to leave the testing location.

In addition, the inquiry found that you lacked candour in responding to questions in the investigation.

In all the circumstances, including those referred to above, and having considered all the matters raised by you, the Company considers that you are unsuitable for further employment and your employment is terminated in accordance with clause 9(3) of the Award with payment in lieu of notice.

Please contact HR Services to finalise the procedural aspect of the termination of your employment."

- 16 The letter was signed by Mr Knuckey.
- 17 The above is a brief overview of the events which led to the termination of employment of Mr Johnston. There was considerable disagreement as to what happened during the interaction between Mr Johnston and Mr McDonald on the morning of 18 June 2005. This is relevant to the findings made by the Commissioner at first instance and some of the grounds of appeal. I will therefore outline in summary the evidence about what occurred that morning.
- 18 Mr Johnston said that he was advised by Mr Brewer of the incident involving Mr Fairbrass on 13 June 2005. He was informed that Mr Brewer wanted to address the issue through the Issue Resolution Process, under the *Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002* (the award). Mr Johnston then spoke to Mr Fairbrass' supervisor who said that Mr Brewer had raised the Issue Resolution Process and the matter could not be proceeded with any further at this stage. Mr Johnston said the matter would be proceeded with on the next block of shifts.
- 19 After driving Mr Fairbrass to work on 18 June 2005, Mr Johnston proceeded to his work area. Mr Fairbrass telephoned him a little while later and said that Mr McDonald had approached him. He was informed that Mr McDonald had said Mr Fairbrass was to do a D&A test. Mr Fairbrass inquired of Mr Johnston whether they were going to have a meeting as the matter was in dispute. Mr Johnston told Mr Fairbrass to tell Mr McDonald that the matter had been raised with Mr Fairbrass' supervisor as a dispute and that they would like to have a meeting about it. The conversation then ended.
- 20 Mr Fairbrass telephoned Mr Johnston again five minutes later and said that Mr McDonald said he was not going to have a meeting. Mr Fairbrass told Mr Johnston that he was in the D&A test waiting room. Mr Johnston said that he would be over there shortly. Mr Johnston then asked his acting foreman for the day whether he minded if he went to a meeting as there was an issue at the D&A waiting room. Mr Johnston received the permission of the acting foreman to attend at the waiting room and Mr Johnston then proceeded there.
- 21 Upon arrival at the waiting room, Mr Johnston opened the door and said "*Morning*". He saw that Mr McDonald and Mr Fairbrass were both in the room. Mr McDonald asked Mr Johnston whether he was there for a test and if not he should "*get out*". Mr Johnston said no to the question whether he was going to have a test and said that he was there to represent Mr Fairbrass. Mr Johnston said that there was issue being raised through the Issue Resolution Process. Mr Johnston said that whilst he was continuing this sentence he was interrupted by Mr McDonald who said "*if you're not here for a test, get out*". Mr Johnston said that he told Mr McDonald he was there to represent Mr Fairbrass, and he had a letter dated 8 June 2005 which had been sent to the Commission. Mr Johnston said he was interrupted again and told again by Mr McDonald that if he was not there for a test to "*get out*".
- 22 Mr McDonald said that he had been to "*HR*" and that was how it was going to be. Mr Johnston replied that he did not doubt that he had been to "*HR*" but that Mr Johnston was there to represent Mr Fairbrass. Mr Johnston indicated that the matter was over the head of Mr McDonald and he should involve Mr Steve Cooper in discussions. (The evidence did not precisely reveal Mr Cooper's position, but it appears he was a person involved in a senior way, on behalf of the appellant, in discussions relevant to changes to be made to the D&A programme, which had been the subject of negotiations and Commission conferences).
- 23 Mr Johnston said that after he referred to Mr Cooper, two contractors (who turned out to be Mr Rovetto and Mr Miles) entered the room. Mr Johnston asked them whether they were there for a test. They said that they were and Mr Johnston then said to Mr McDonald "*Jack, there goes Dave's confidentiality. Come on Dave. We're out of here*". Mr Johnston then walked to the door and Mr Fairbrass followed him. Mr McDonald then went to the door and asked Mr Fairbrass whether he was going to do the test. Mr Fairbrass did not immediately answer him. He was asked about this again. Mr Fairbrass said he was not refusing to do the test but his confidentiality had been breached.
- 24 Mr Johnston then said he told Mr McDonald to get hold of someone that could handle the matter and said he was ignored after making this request. Mr Johnston said that Mr McDonald continued to raise his voice to Mr Fairbrass about whether this was a second refusal. Mr McDonald walked about 20-30 metres away before turning around, walking back and saying that he was taking Mr Fairbrass home. There was some discussion about whether Mr McDonald or Mr Johnston should take Mr Fairbrass home. Mr McDonald said he would take Mr Fairbrass home as he was his foreman. Mr Johnston's evidence was that

- Mr Fairbrass asked him to take him home and that he did so. Before attending to this, he spoke to his acting foreman and sought permission to take Mr Fairbrass home. This permission was granted.
- 25 Mr Johnston also gave evidence about his standing down, the investigation which followed and his termination of employment.
- 26 One of the matters raised in the disciplinary inquiry was that Mr Johnston had taken Mr Fairbrass home. During the course of the inquiry Mr Johnston acknowledged that this was in breach of the D&A programme which relevantly provided that it was the duty of the supervisor to take an employee offsite who had not done a test. It was also part of the D&A programme that this duty should not be delegated.
- 27 Mr Fairbrass' evidence was that after being taken to work by Mr Johnston on 18 June 2005 he went to his shift change and was then approached by Mr McDonald. Mr McDonald asked him to attend with him in a meeting room which Mr Fairbrass agreed to. He was there informed that he had to take a D&A test before the commencement of his shift. Mr Fairbrass' evidence was that he informed Mr McDonald that he would like Mr Johnston to be present as representation. He said Mr McDonald replied that he had spoken to "IR" and that Mr Fairbrass was to do the test and could then have representation. Mr Fairbrass told Mr McDonald that he thought he could have representation first and he was advised no. Mr Fairbrass then collected his bag and telephoned Mr Johnston. He said that he explained the situation to Mr Johnston and that Mr Johnston said that he was entitled to representation and that Mr Fairbrass should explain this to Mr McDonald again. The telephone conversation then ended. Mr Fairbrass said that he walked to the waiting room and whilst they were waiting for the nurse, Mr Fairbrass asked Mr McDonald again if he could have representation. Mr Fairbrass then said Mr McDonald told him he could not; that he had to take the test first and could have representation afterwards. Mr Fairbrass said he then telephoned Mr Johnston and explained this to him. Mr Johnston then said that he would come over to the waiting room.
- 28 About 10-15 minutes later Mr Johnston entered the waiting room. Mr Fairbrass said that Mr Johnston said "*Morning all*" to Mr Fairbrass and Mr McDonald. Mr Fairbrass said Mr McDonald told Mr Johnston that if he was not there for a test he should leave now. Mr Johnston said that he was there to represent Mr Fairbrass. Mr Johnston was told that if he was not there for a test he should leave. Mr Fairbrass said that Mr McDonald was quite forceful in saying that. Mr Fairbrass' evidence was that Mr Johnston was trying explain to Mr McDonald about a letter that he had dated 8 June 2005, and Mr McDonald was "*basically telling him to leave*" if he was not there for a test. Mr Fairbrass said that Mr McDonald explained he had spoken to "IR", and that Mr Fairbrass was to do the test. Mr Fairbrass' evidence was that Mr Johnston said that he had no doubt that Mr McDonald had spoken to "IR" but said this was over Mr McDonald's head and that he should get Mr Cooper. Mr Fairbrass said the door then opened and two contractors came in. Mr Fairbrass said Mr Johnston turned to the contractors and asked them if they were there for a test. They said they were, and Mr Johnston then turned to Mr McDonald and said: "*Well there goes your confidentiality, Jack. Come on, Dave, we're out of here*". Mr Fairbrass' evidence was that Mr Johnston then walked out of the door and he followed him. Mr McDonald then started yelling at Mr Fairbrass, asking him whether he was going to take the test. Initially, Mr Fairbrass did not say anything. When he was outside, putting his beanie in his bag, Mr McDonald yelled at him "*Are you refusing to take a test?*" Mr Fairbrass said that he was not refusing to take the test, but said "*there goes your confidentiality with those two in there*". Mr Fairbrass said that Mr Johnston was trying to talk to Mr McDonald about the letter that he had, and Mr McDonald was yelling at Mr Fairbrass to take the test. Mr Fairbrass said that this continued for a short while. Mr McDonald then walked off to the end of the building that they were standing next to and then turned around and came back and told Mr Fairbrass that he was taking him home. Mr Fairbrass' evidence was that Mr Johnston then said "*Well, why are you taking him home?*", and Mr McDonald replied that it was because he was Mr Fairbrass' foreman. Mr Johnston then said that Mr McDonald would not take Mr Fairbrass home, and that if anyone was taking him home he (Mr Johnston) would. Mr Fairbrass said in evidence that Mr McDonald then walked off again and that Mr Johnston then said to him that he was "*sick of this shit*", and Mr Johnston and he then turned around and walked off.
- 29 Mr Fairbrass said in evidence that he wanted Mr Johnston to take him home and explained this to him. This then occurred. Mr Fairbrass said in evidence that he preferred Mr Johnston to take him home because if he had got in the car with Mr McDonald he "*wouldn't have been responsible*". When asked what he meant by that he said "*anything could have happened in that car*".
- 30 In his evidence, Mr McDonald said he met with Mr Fairbrass on the morning of 18 June 2005 and went to a meeting room with him. He explained there that Mr Fairbrass needed to go to the "D&A room" because of his first refusal being a deemed positive D&A result. He told Mr Fairbrass that he was required to take a D&A test before he went back to work. Mr Fairbrass said if he had to go there he wanted Mr Johnston to be present. Mr McDonald said that it was not possible for Mr Johnston to be present because of the D&A programme, with confidentiality, but he could have him for as long as he needed after the D&A test. Mr McDonald said that he arrived at that view because he had previously met with human resources people and Mr Carroll about the matter.
- 31 Mr McDonald's evidence was that after this initial discussion he and Mr Fairbrass walked to the waiting room. On the way to the waiting room Mr Fairbrass made a telephone call. Mr McDonald said he heard Mr Fairbrass say he was on his way to the waiting room and that he had been refused representation. Mr McDonald and Mr Fairbrass then arrived at the waiting room. Mr McDonald said he rang the bell for the nurse. There was then some conversation involving the nurse, Mr McDonald and Mr Fairbrass which is not material. Mr McDonald then said he thought Mr Fairbrass received a telephone call after a couple of minutes. He said the telephone call was brief and that he heard Mr Fairbrass say that he was sitting in the waiting room. After about 10 minutes, Mr McDonald said Mr Johnston walked in the door of the waiting room and said "*What's going on here Jack?*" Mr McDonald said that Mr Johnston walked between Mr McDonald and Mr Fairbrass when he said this. Mr McDonald said he asked Mr Johnston whether he was there for a test. He said that Mr Johnston replied by saying "*Jack, don't be a smart-arse. I'm here to represent Dave*". Mr McDonald said he told Mr Johnston he was not going to discuss this now, he had spoken to human resources and this was the process they were taking. Mr McDonald's evidence was that Mr Johnston then said something to the effect that "*Dave's case is in the Commission and he's been in - - down there all week, and Dave won't be taking the test*". Mr McDonald said he turned to Mr Fairbrass and asked him whether he was refusing to do the test. Mr Fairbrass said no. Mr McDonald said Mr Johnston then interrupted and said "*Jack, don't be a fucking smart-arse. He's not doing the test*". Mr McDonald then said that two contractors walked into the room and Mr Johnston spun around and asked them whether they were there to do a test. Mr McDonald said that the contractors said they were, and Mr Johnston then turned to him and said "*Jack you've just breached confidentiality*". Mr McDonald said that Mr Johnston then turned to Mr Fairbrass and said "*Dave, grab your gear. We're getting out of here*". As Mr Fairbrass then did this, Mr McDonald asked Mr Fairbrass whether he was refusing to do the D&A test. Mr McDonald said Mr Fairbrass did not respond, but picked up his bag and walked out the door. Mr McDonald said that there was then quite a lot said by Mr Johnston and quite a bit of swearing.
- 32 Mr McDonald said that he did not "*get*" a lot of what was said, but Mr Johnston was making remarks, Mr McDonald thought, to Mr Fairbrass. Mr McDonald said that he walked after Mr Fairbrass when the latter left the room and in the doorway said to Mr Fairbrass that he would strongly recommend he take the test. He said Mr Fairbrass did not respond to that. Mr McDonald

- said that Mr Johnston turned around and said, "*Jack, piss off, he's not taking the test*". Mr McDonald said he indicated to Mr Fairbrass that this was going to count as a second refusal. Mr McDonald's evidence was that Mr Johnston then turned around to him and said "*Fuck off, you little upstart, he's not taking the test*". This was said when Mr Johnston was outside the waiting room and probably a metre from Mr McDonald. Mr McDonald's evidence was that he told Mr Johnston that he was not going to take the conversation any further because it was getting into personal abuse. Mr McDonald said that he had to get somebody down there because things were starting to get out of hand. He then telephoned a shift supervisor. Mr McDonald said that as he did this, Mr Johnston leaned into him and said "*Jack...there's two on one here, you got no fucking chance*". Mr McDonald said he did not respond to that. In Mr McDonald's evidence, he said that he interpreted this remark to mean there would be two people denying his version of what had occurred so that he should not take the matter any further.
- 33 Mr McDonald said he then informed Mr Fairbrass that he would need to take him home and escort him off site. He said that Mr Johnston turned to him and said "*Jack, you're not taking him anywhere. I'll take him*". Mr McDonald said he told Mr Johnston that it was his duty of care to take Mr Fairbrass off site as he was his supervisor and responsible for him. Mr Johnston turned around and said that he did not care and walked off with Mr Fairbrass. Mr McDonald said that he then telephoned Mr Carroll to let him know what was going on. Mr McDonald said he telephoned the Occupational Health and Safety department because he did not know where Mr Fairbrass and Mr Johnston were going. Mr McDonald said he got a telephone call back 10 minutes later saying that they had gone through the front security gate. This was about 6.21am. Mr McDonald then spoke to Mr Carroll and went through with him what had happened.
- 34 Mr Rovetto said in evidence that on the morning of 18 June 2005 he, together with Mr Miles, were selected at random to have D&A tests. They then attended at the D&A testing room. He said he walked up to the door, opened the door, and there was a man with a moustache, (Mr Johnston), standing in the doorway. Mr Johnston asked Mr Rovetto whether he was there to do a D&A test, and he said "*Yes*". Mr Johnston then turned and talked to another man, which must have been Mr Fairbrass, and said to him "*C'mon let's go*". Mr Rovetto said there was another man sitting down opposite the doorway in the room which must have been Mr McDonald. Mr Rovetto said that after Mr Johnston had said "*C'mon let's go*" he turned around and headed to the door. Mr McDonald then said "*I take it you're refusing the drug test*" to Mr Fairbrass. Mr Rovetto said Mr Fairbrass did not reply. Mr Johnston, Mr Fairbrass and Mr McDonald all walked outside.
- 35 There was then conversation of which Mr Rovetto did not recall all of the details. He did recall, however, Mr Johnston saying to Mr Fairbrass that he should take stress relief. Mr Rovetto then heard Mr Johnston say that he was going to see someone about this. He also heard Mr Johnston call Mr McDonald a "*stupid something -- somewhere along those lines*". Mr Rovetto said that Mr Johnston was a bit loud and tried to get his point across in an aggressive sort of way. He said he also recalled a bit of foul language, but could not recall what words were used. He said that his was said by Mr Johnston. Mr Rovetto said that Mr McDonald remained pretty calm. He said that Mr McDonald just wanted to know if Mr Fairbrass was going to do a D&A test or not.
- 36 Mr Miles gave evidence that he and Mr Rovetto attended at the waiting room to do their random D&A tests on the morning of 18 June 2005. When they walked into the waiting room Mr Johnston turned to Mr Rovetto and him and asked whether they were there to do a test. When they replied "*Yes*", Mr Johnston said "*Okay. Let's go*". Mr McDonald asked Mr Fairbrass whether he was refusing to do the test. Mr Fairbrass said that his privacy or confidentiality had been broken, and after that Mr Johnston "*seemed to override the whole conversation*". Mr Miles said Mr Johnston was aggressive and "*trying to put on a few standover tactics*". Mr Miles explained this by saying that he had worked as a bouncer and had "*seen guys puff their chest up. We know this as pigeon chest. He stepped closer, he'd raise his voice more to try and drown out the other guy that was talking*". Mr Miles said Mr McDonald remained calm. Mr Miles said there was conversation about whether Mr Fairbrass was refusing to do the test, and that this was again overridden by Mr Johnston who tried answering the question for Mr Fairbrass. Mr Miles said Mr Johnston and Mr Fairbrass left the room. Mr McDonald walked to the door, held it close to him and said "*I take it you're refusing to do the test?*", and Mr Miles then heard somebody say "*It's two on one. You have no chance*". Mr McDonald then said "*I take it you're refusing to do the test?*" and walked off to the left at a relatively fast pace. He then said that he also overheard either Mr Johnston or Mr Fairbrass say that Mr McDonald was a "*stupid cunt*". Mr Miles otherwise said that he was not able to see what was then happening outside.
- 37 I earlier referred to the statements given by Mr Roe and Mr Thompson. Relevantly, the statement of Mr Roe said that he was sitting with Mr Thompson outside the electrical workshop on the morning of 18 June 2005, during a shift change. He noticed Mr Thompson look over to a conversation between three people outside the occupational health and D&A waiting room. Mr Roe saw what appeared to be an argument between Mr Johnston and another person. There was a third person there who was not saying anything. The statement said Mr Johnston was saying something about a "*breach of policy*" and the other person did not have to take the test. This was in what sounded like a raised voice. The statement said the other person appeared to be talking past Mr Johnston to the third person asking whether he was refusing to take a test. The person talking appeared frustrated by what was taking place. He may have used a raised voice but was not yelling. The statement said the gentleman standing next to Mr Johnston to whom the question had been directed, did not reply. The statement said Mr Roe had heard Mr Johnston reply in a raised voice that he "*doesn't have to*" and heard Mr Johnston say "*Go and read the policy*". The statement said the man who had been asking the questions moved away from Mr Johnston and the other guy, about two to three metres, appeared to make a call on his mobile and then walked back suddenly. He then saw Mr Johnston and the other man walking in one direction and the other man walking in another direction.
- 38 The statement of Mr Thompson, relevantly, said that he saw a conversation taking place between three people on the morning of 18 June 2005, outside the occupational health and D&A waiting room. The statement said that at the time Mr Thomson was sitting with Mr Roe outside the electrical workshop, during shift change. The statement said Mr Thompson overheard one person saying something about the "*policy being followed*". The statement said Mr Thompson heard Mr Johnston reply something like "*you don't know the policy*" or "*you don't know what (sic) policy is about*". The statement of Mr Thompson said that he noticed the foreman step aside a few metres and then come back again. The statement said Mr Thompson did not recall if the foreman was attempting to make a phone call. Mr Thompson's statement said he recalled Mr Johnston saying something to the foreman like "*calm down*". He recalled the foreman saying something about the "*policy*" and then saying something about this is going to be "*a first or second strike or positive*". The statement said Mr Thompson could not recall if the foreman said first or second. The statement recorded that Mr Thompson noticed the foreman and Mr Johnston and another man walking away. The statement also recorded that he saw the two contractors who had entered into the D&A waiting room after Mr Johnston that morning. It also said that Mr Thompson heard raised voices during the discussion between Mr Johnston and the two other people but no yelling. The statement said he also recalled not noticing the third person saying anything during the discussion he observed.
- 39 The relevant evidence of these witnesses and others was summarised in considerably more detail by the Commissioner at first instance in his reasons, including issues raised in cross-examination and re-examination. Evidence relevant to the investigation

which took place, and, in particular, procedural aspects of that were also referred to in the reasons for decision of the Commissioner.

The Commissioner's Findings

40 In paragraphs [120]-[157] of the Commissioner's reasons, he set out the "*Issues and Conclusions*". The following observations, findings and conclusions of the Commissioner are relevant. (I will set out the paragraph of the observation, finding or conclusion in brackets after each point):-

- (a) The most important issue is whether Mr Johnston acted as alleged in verbally abusing and intimidating Mr McDonald. ([120])
- (b) Mr Johnston took Mr Fairbrass home which he conceded was a breach of the D&A programme. ([120])
- (c) There was no issue about whether Mr Johnston had breached the rules of the appellant by being absent from his worksite without permission. Mr Johnston sought and was granted permission by his supervisor to leave his workplace. ([120])
- (d) For reasons given by the Commissioner, Mr Miles' evidence was unreliable and exaggerated and should be disregarded in its totality. ([124])
- (e) Mr Rovetto was more measured in his giving of evidence, but his evidence needed to be weighed carefully. ([125])
- (f) The prospect of Mr Rovetto or Mr Miles having seen or heard much of the exchange between Mr Johnston, Mr McDonald and Mr Fairbrass, once the waiting room door closed, was minimal; as was the prospect of them having seen much when the door was ajar. ([127])
- (g) For reasons given by the Commissioner, Mr Rovetto's evidence was treated with considerable caution as to its accuracy. ([128])
- (h) Although not called as witnesses, the statements of Mr Roe and Mr Thompson were "*uncontested*" and they were accepted by the Commissioner. ([131])
- (i) After a considerable review of the evidence, the Commissioner did not accept that Mr Johnston said to Mr McDonald the "*2 on 1*" comment; which the Commissioner said he would find to be the most intimidatory comment. The Commissioner was not convinced Mr Johnston told Mr McDonald to "*piss off*" once, let alone twice, or that he called him a "*fucking little upstart*", or passed the comment to Mr Fairbrass that Mr McDonald was a "*stupid cunt*" or "*stupid prick*". ([141])
- (j) There was nothing in the demeanour of Mr McDonald, Mr Johnston or Mr Fairbrass at the hearing that led him to doubt their evidence. ([142])
- (k) Mr McDonald took his duties very seriously and took considerable offence to his duties being interfered with by Mr Johnston. This was clear from Mr Donald's evidence as a whole. ([143])
- (l) The Commissioner doubted Mr McDonald was calm during the exchange and thought he took considerable offence at Mr Johnston's intervention in his task of making sure Mr Fairbrass had every opportunity to do the test, and if he did not then advising him that it would be taken to be a second positive result. ([143])
- (m) The submission of the appellant that Mr Johnston and Mr Fairbrass lied by denying every adverse point made against them did not ring true and was not sustained on the evidence. ([143])
- (n) The Commissioner preferred the evidence of Mr Johnston and Mr Fairbrass to that of Mr McDonald, leading to the conclusion that Mr Johnston did not verbally abuse nor verbally or physically intimidate Mr McDonald on 18 June 2005. ([144])
- (o) For these reasons, Mr Johnston did not receive a fair go; the Commissioner cited *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385. ([145])
- (p) With respect to procedural fairness, there were three aspects to the stand-down and investigation that the Commissioner had difficulty with. The first was that Mr Johnston was entitled to know the substance of the allegation against him when stood down on 18 June 2005. The full details could have been provided later, but, at that time, Mr Johnston was entitled to know that he faced the serious allegation of abuse and intimidation of a supervisor. ([146])
- (q) Secondly, a single combined statement of Mr Miles and Mr Rovetto, whom had been interviewed together by human resources officers, was not put to Mr Johnston until after the decision was made to dismiss him. Accordingly, Mr Johnston did not have an opportunity prior to dismissal to put a view as to what he thought of the contractors' statement. ([147])
- (r) Thirdly, Mr McDonald was not interviewed by human resources officers, although he had made statements which were given to them. ([147])
- (s) The Commissioner said, in effect, that if all the allegations against Mr Johnston were true, then the procedural elements would themselves have made the dismissal unfair; the Commissioner cited *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. ([148])
- (t) The Commissioner said the following at paragraph [149]. Given its importance to one of the grounds of appeal it will be set out in full:-

"Mr McDonald in his evidence says that Mr Johnston referred to having been in the Commission all week in relation to the earlier incident of 13 June 2005 concerning Mr Fairbrass. Mr Johnston rejects this and says that he tried to show Mr McDonald a letter dated 8 June 2005 from Mallesons solicitors. This letter is not before me in these proceedings. However, I am separately dealing with matter no. C32 of 2005 concerning the implementation of the new D&A policy. That file contains a letter of 8 June 2005 which is a report back, as directed by the Commission, from Mallesons as to the progress with discussions between the company and unions over certain issues in the new policy. One such issue, which was at that stage unresolved in discussions, was whether union or OH&S representatives could be present at 'for cause' testing. The application in respect of Mr Fairbrass (matter no. C112 of 2005) was not lodged in the Commission until 29 June 2005 and came on for conference on 30 June 2005. Hence the first time the Commission became aware of any incident with Mr Fairbrass was 11 days after the 18 June 2005 incident.

Mr McDonald mentioned in cross-examination that the matter which Mr Johnston was in the Commission for could not have been Mr Fairbrass' incident; that is so. Mr Johnston made it clear during the inquiry that he was referring to matter no. C32 of 2005, not Mr Fairbrass' matter. He said that he tried to show Mr McDonald a letter of 8 June 2005 from lawyers for the respondent. This letter is directly relevant to union representation of 'for cause' testing. He did not say he had been in the Commission on Mr Fairbrass' matter. Mr Johnston's evidence is more logical and probable on this point. Remembering of course that what happened on 18 June 2005 did not happen just in isolation. There was the incident of 13 June 2005. The prelude to 18 June 2005 also included Mr McDonald meeting with and taking some instruction from Human Resources as to how to conduct the second test. If Mr Johnston was in fact just trying it on with Mr McDonald, he would have been easily found out."

- (u) With respect to the allegation that Mr Johnston lacked candour during the investigation, this could not be sustained because Mr Johnston did not abuse or intimidate Mr McDonald. Therefore a denial by him of these matters could not constitute a lack of candour. ([150])
- (v) Mr Johnston clearly interfered with the duties of a supervisor under the D&A programme by removing Mr Fairbrass from site. This point was conceded during the inquiry by Mr Johnston. ([150])
- (w) Mr Johnston overrode Mr McDonald's wishes and duty in this regard, because Mr Fairbrass did not think he could have been held responsible for his actions if he had got into a vehicle with Mr McDonald. The issue should have been resolved on site by referring the matter to higher supervision, which Mr Johnston attempted to do. Despite this, Mr Fairbrass should not have been taken off site by Mr Johnston. ([151])
- (x) The other issue was whether Mr Johnston was entitled to represent Mr Fairbrass at the test. The allegation of interference by Mr Johnston with a D&A test flows from this point. ([152])
- (y) In paragraph [152] the Commissioner set out the Issue Resolution Process, clause 23 of the award, which is as follows:-

"23. - ISSUE RESOLUTION PROCESS

- (1) *An employee or employees who wish to raise a matter shall first discuss it with his/her/their direct supervisor as soon as is practicable.*
 - (2) *If those discussions do not result in a settlement the question, dispute or difficulty shall be referred to the next level of supervision. Discussions at this level will take place as soon as practicable.*
 - (3) *The terms of any agreed settlement shall be jointly recorded.*
 - (4) *Any settlement resolution reached which is contrary to the terms of this award shall have no effect unless and until that conflict is resolved to allow for it.*
 - (5) *Throughout all stages of the procedure all relevant facts shall be clearly identified and recorded.*
 - (6) *Each employee shall be entitled to union representation and assistance at each stage of this procedure. Any shop steward representing or assisting an employee shall be entitled to do so without loss of pay. Provided that if the union representative concerned is not a shop steward or official of the union of which the employee is or is eligible to be a member, then that union representative must be authorised in writing by that union to assist the employee.*
 - (7) *If a matter affects more than one employee, subject to the requirements of sub clause (6), the employees concerned have the right to have the matter dealt with, and be represented and assisted by shop stewards and the union in accordance with the procedure in this clause.*
 - (8) *Any question, dispute or difficulty not settled may be referred to the Commission provided that the persons involved in the question, dispute or difficulty have conferred amongst themselves and made reasonable attempts to resolve the question, dispute or difficulties before referring the matter to the Commission."*
- (z) The incident on 18 June 2005 must be seen in the context of the incident of 13 June 2005. The Commissioner accepted *"that Mr Johnston sought to represent a member within the terms of the Issue Resolution Process. The fact that the incident got out of hand is not, in my view, the fault of Mr Johnston and he cannot be blamed or accused of interfering with a D&A test or a supervisor's responsibility"*. ([154])
 - (aa) Mr Johnston had a prominent role in Mr Fairbrass leaving the waiting room. Mr McDonald's actions when Mr Johnston entered the room to represent Mr Fairbrass were blunt or hostile. The matter escalated from there. Mr Johnston departed when he said Mr Fairbrass' confidentiality of testing had been broken. The Commissioner said *"I am not clear as to how this is the case. However, in the context of the denial by Mr McDonald of Mr Johnston's right to represent Mr Fairbrass, and Mr McDonald's refusal to obtain Mr Cooper's assistance (or some [sic] else), I do not consider that Mr Johnston should be penalised for those actions"*. ([155])
 - (ab) There was an issue as to whether Mr Johnston should receive any penalty for breaching the policy and removing Mr Fairbrass from site. Mr Johnston should not have taken Mr Fairbrass offsite. Mr Johnston did ask Mr McDonald to get someone to sort out the problem. Weighing all of the circumstances, Mr Johnston should be counselled for taking Mr Fairbrass offsite. He knows he did the wrong thing. A counselling note should be placed on his file. ([156])
 - (ac) Having regard to the principles in the *Undercliffe* case, the Commissioner found that Mr Johnston's dismissal was unfair. ([157])

- 41 The Commissioner then went on to consider the issue of reinstatement and found that reinstatement was practicable and appropriate. The Commissioner concluded that Mr Johnston should be reinstated within no longer than seven days of the date of the order without any loss of entitlement or service.

Principles in Deciding Appeal

- 42 The conclusion of the Commissioner that Mr Johnston was unfairly terminated from his employment and should be reinstated was a discretionary decision. It was a decision which, in the circumstances of this case, involved the Commissioner considering and evaluating the evidence, including the conflicting evidence and making a determination about the seriousness of Mr Johnston's conduct, and the consequences which ought to have followed from it.

43 There are limits upon which a discretionary decision may be set aside on appeal. This is partly due to the nature of a discretionary decision, involving a decision-making process in which no one consideration and no combination of considerations is necessarily determinative of the result, so that the decision-maker is allowed some latitude as to the choice of decision to be made. (See *Coal and Allied Operations Pty Ltd v AIRC and Others* (2000) 203 CLR 194 per Gleeson CJ, Gaudron and Hayne JJ at paragraph [19]).

44 The limits upon appellate intervention against a discretionary decision were considered by Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 in the following passage which has been cited and quoted in numerous decisions of the Full Bench:-

“The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”

45 In this appeal it is also appropriate to bear in mind the observations made by the Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519-520, as follows:-

“The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight.”

Ground 1

46 This ground directly challenges the Commissioner's conclusion about whether the aspects of Mr Johnston's conduct set out in the ground warranted dismissal. Accordingly, the principles set out earlier about appellate intervention weigh heavily against the appellant.

47 The reasons of the Commissioner indicate that he gave consideration to Mr Johnston's role and/or conduct in removing Mr Fairbrass from the care of supervision, from the D&A testing room and the site, in breach of the D&A programme, and contrary to the wishes of Mr McDonald. This conduct, the circumstances surrounding the conduct, and the Commissioner's evaluation of the seriousness of the conduct are set out in paragraphs [150]-[156] of the Commissioner's reasons. The Commissioner concluded that Mr Johnston should be counselled for taking Mr Fairbrass off site, but that his dismissal was, for all of the reasons he expressed, unfair.

48 Accordingly, I do not accept the appellant's submission that the Commissioner failed to consider or properly consider the qualitative seriousness of Mr Johnston's conduct. The reasons of the Commissioner show, in my opinion, that the Commissioner carried out an evaluation of Mr Johnston's conduct. In my opinion, the assessment of the conduct made by the Commissioner was open to him on the evidence.

49 It was argued by the appellant that the statement made by the Commissioner which I have noted in paragraph [40](a) above, showed a misunderstanding by the Commissioner of the facts and issues of the case. I do not accept this. In my opinion, the Commissioner was entitled to express this view on the basis of the evidence and cases of the parties, as presented. Additionally, the Commissioner was not under any procedural fairness duty to inform the parties of this part of his process of reasoning, prior to its revelation in the reasons for decision (cf *VBAM of 2002 v Minister for Immigration and Multicultural Affairs* [2003] FCA 504 at paragraph [43]).

50 Nor do I accept the appellant's submission that the Commissioner's reasons, expressly or implicitly, show that there was a misunderstanding of what an unfair dismissal is. The Commissioner's reference to the *Undercliffe* case, a leading authority in this State about the Commissioner's unfair dismissal jurisdiction, supports this view. The appellant referred to the decision of the Industrial Appeal Court in *Amalgamated Metal Workers' and Shipwrights Union of Western Australia v Robe River Iron Associates* (1989) 69 WAIG 985 (IAC), and the reference by Kennedy J at 989 that the critical question is the industrial fairness of what the employer did in terminating employment. In my view, the reasons of the Commissioner show that this was the very issue which the Commissioner considered. In my opinion, the Commissioner did not err in his assessment of the industrial fairness of what occurred.

51 In its submissions, the appellant emphasised the importance of its D&A programme in the context of the inherently dangerous mining industry. The importance of the programme is accepted. However, the Commissioner at first instance referred to the submissions of the appellant's counsel on this issue. (See paragraph [85] of the Commissioner's reasons).

52 The Commissioner also referred to the seriousness of insuring that a supervisor can properly perform his/her duties and responsibilities. (See paragraph [143]).

53 Despite those important matters, it was necessary for the Commissioner to assess the conduct of Mr Johnston, in breach of the D&A programme. This required an evaluation of the nature and extent of the breach of the programme and the circumstances surrounding the breach. This was required to be done by the Commissioner to ascertain the industrial fairness of the termination of Mr Johnston's employment. In my opinion, this was done by the Commissioner in such a way which does not disclose appealable error.

54 It is true, as the appellant submitted, that Mr Johnston's actions were deliberate, and, insofar as they involved the removal of Mr Fairbrass from the site, contrary to both the D&A programme and what was reasonable. In my opinion, however, this did not lead to the conclusion that the Commissioner was bound to find that the termination of employment was not unfair. In my opinion, Mr Johnston's conduct was not such that the Commissioner was bound to find that he had evinced an intention to

disregard the terms of the contract of employment sufficient to warrant dismissal. (See *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287, cited by Kennedy J in *Amalgamated Metal Workers' and Shipwrights Union of Western Australia v Robe River Iron Associates* at page 989).

55 In my opinion, ground 1 of the appeal should not be upheld.

Ground 3

56 I will deal with this ground next as it was argued by the appellant together with ground 1.

57 In this ground, the appellant asserts that the Commissioner erred in making or failing to make a number of findings which are set out in the ground.

58 Ground 3.1 asserts that the Commissioner erred in finding that Mr Johnston was entitled to represent Mr Fairbrass at the test pursuant to clause 23, the Issue Resolution Process, of the award. The terms of clause 23 have been set out earlier.

59 I am not sure that the appellant is correct in asserting that the Commissioner made the finding complained of in this ground. This is because at paragraph [154] the Commissioner accepted that Mr Johnston “sought to represent a member within the terms of the Issue Resolution Process”. This sentence, in my view, directs attention to the intentions and beliefs of Mr Johnston about the representation of Mr Fairbrass within the Issue Resolution Process and thereby attending at the waiting room to represent Mr Fairbrass. In my opinion, it was open for the Commissioner to find, on Mr Johnston’s evidence, that these were his intentions. The Commissioner found at the same paragraph that the incident on 18 June 2005 needed to be seen in the context of the incident on 13 June 2005 involving Mr Fairbrass. This conclusion was also clearly open to the Commissioner. The Commissioner at the same paragraph made a finding that the fact that the incident got out of hand was not the fault of Mr Johnston and he could not be blamed for interfering with the D&A test or a supervisor’s responsibility. These findings were open to the Commissioner, in my opinion, having seen and heard the witnesses give evidence and evaluated the content of their evidence.

60 I also do not think the respondent has established that Mr Johnston was not entitled to represent Mr Fairbrass that morning pursuant to the Issue Resolution Process, and, in particular, clause 23(6) of the award. The appellant submits that the Issue Resolution Process had not been invoked at the relevant time. However, the evidence was capable of establishing that the Issue Resolution Process had been invoked from the time of the incident on 13 June 2005 and that Mr Johnston’s involvement on 18 June 2005 was a continuation of that.

61 The appellant also submits there was no entitlement under the D&A programme for representation of “for cause” testing. Reference is made to paragraph 6.3 of the document entitled *BHP Iron Ore – Drug and Alcohol Programme*, which was in evidence before the Commissioner. This clause does not, however, clearly indicate that an employee in the circumstances of Mr Fairbrass was not entitled to union representation when there was an issue raised in relation to the non-testing on 13 June 2005. In any event, in paragraph [154] of his reasons, as I have referred to, the Commissioner found that the fact that the incident got out of hand was not the fault of Mr Johnston.

62 In the next paragraph the Commissioner referred to Mr Johnston’s prominent role in Mr Fairbrass leaving the waiting room. The Commissioner also referred to Mr McDonald’s blunt or hostile actions when Mr Johnston entered the waiting room and that the matter escalated from there. The Commissioner said that, although it was not clear how Mr Fairbrass’ confidentiality of testing had been broken by the entrance of the contractors into the waiting room, in the context of the denial by Mr McDonald of Mr Johnston’s right to represent Mr Fairbrass, and Mr McDonald’s refusal to obtain Mr Cooper’s assistance, Mr Johnston should not be penalised for his actions in relation to Mr Fairbrass leaving the room. In my opinion, these findings of fact and conclusions were open to the Commissioner on the evidence before him. There is therefore no appealable error.

63 Ground 3.2 asserts the Commissioner erred in finding that Mr Johnston sought to represent Mr Fairbrass as a union member within the terms of the Issue Resolution Process. In my opinion, this assertion does not raise any issues separate to ground 3.1 and discloses no appealable error.

64 Ground 3.3 asserts the Commissioner erred in finding that the letter dated 8 June 2005 by Mallesons Stephen Jacques, as solicitors for the appellant, that Mr Johnston sought to rely on, was relevant to union representation in this matter. The reference by the Commissioner to the Mallesons’ letter was in paragraph [149] of his reasons. This was immediately after the Commissioner’s conclusions about procedural fairness issues. I have set out paragraph [149] in full above.

65 Following paragraph [149] the Commissioner dealt briefly with the issue of Mr Johnston’s alleged lack of candour during the investigation and then the issue of Mr Johnston’s interference with the duties of a supervisor. The letter dated 8 June 2005 does not feature in any of the Commissioner’s reasoning about Mr Johnston’s interference with the test of Mr Fairbrass, failure to follow the instructions of a supervisor, and removal of Mr Fairbrass from site. I do not think that the Commissioner relied on the contents of the letter dated 8 June 2005 in making the findings he did at paragraphs [150]-[156].

66 Additionally, I do not think the Commissioner made the finding attributed to him in this ground. The Commissioner did not find that the Mallesons’ letter was “relevant to union representation in this matter”. The finding of the Commissioner, included in paragraph [149], is simply that the letter was directly relevant to union representation of “for cause” testing. This was not a finding that the letter was relevant to the representation by Mr Johnston in this matter. The latter issue was considered separately by the Commissioner in paragraphs [150]-[154], as set out earlier.

67 I add the following about the Mallesons’ letter. Although it had been referred to in the evidence before the Commissioner, the letter was not in evidence. Neither were the contents of Commission file C32 of 2005. Paragraph [149] of the Commissioner’s reasons indicate that the Commissioner examined file C32 of 2005 and looked at the contents of the Mallesons’ letter. In my opinion, the Commissioner ought not to have taken this course, as the Mallesons’ letter was not in evidence. If the Commissioner thought it relevant to have regard to the content of the Mallesons’ letter in file C32 of 2005, he ought to have informed the parties of his intention to take this course and allow the parties to make submissions on this issue. This obligation arises out of s26(3) of the Act, and also the common law duties of procedural fairness. Ordinarily, this would lead to an appeal being allowed, unless one can be satisfied that the relevant breach could not have affected the decision made (*Stead v SGIC* (1986) 161 CLR 141), or lead to no practical unfairness (*Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1 per Gleeson CJ at [37]). In relation to this ground of appeal, I am so satisfied. This is because of the discrete reference to the contents of the Mallesons’ letter in paragraph [149], prior to the consideration by the Commissioner of the conduct of Mr Johnston in relation to the proposed testing of Mr Fairbrass, and his conduct thereafter, in paragraphs [150] and following of the reasons. Not only did the Commissioner not refer to this letter in these paragraphs of the reasons, there is no suggestion that the earlier reference to it influenced the conclusions there reached. Additionally, the reference by the Commissioner to the contents of the letter and that it was relevant to union representation of “for cause” testing in paragraph [149] of his reasons, is not disputed by the appellant.

68 In my opinion, ground 3.3 should not be upheld.

- 69 Ground 3.4 asserts that the Commissioner erred in finding that material before it in matter C32 of 2005 was relevant to the present matter, as the material in C32 of 2005 only relates to the D&A programme as sought to be amended by the appellant. As set out above, the file in C32 of 2005 was referred to in paragraph [149] of the Commissioner's reasons. It was not referred to in paragraphs [150] and following, dealing with the issues which the appellant contests in the appeal. The Commissioner specifically stated in paragraph [149] that C32 of 2005 concerned the implementation of the new D&A programme. The Commissioner was therefore not under any misapprehension as to what matter C32 of 2005 was about. In my opinion, the assertion contained in this ground that the Commissioner made a finding that material before the Commission in C32 of 2005 was relevant to the Commissioner's findings about the actions of Mr Johnston in the waiting room and in removing Mr Fairbrass from the site, have not been established and this ground of appeal is not sustained.
- 70 Ground 3.5 asserts the Commissioner erred in failing to find that Mr Johnston's actions in seeking to represent Mr Fairbrass at the test on 18 June 2005 interfered with the test Mr Fairbrass was required to take in relation to his return to work in accordance with the D&A programme. In his reasons at paragraph [154] the Commissioner found that Mr Johnston could not be blamed for interfering with the D&A test or a supervisor's responsibility. In part this was because of the acceptance by the Commissioner of the evidence that Mr Johnston was seeking to represent a union member within the terms of the Issue Resolution Process. I have referred to this issue earlier. In my opinion, it was open to the Commissioner to make the finding which he did. In the next paragraph, the Commissioner made the finding that Mr Johnston had a prominent role in Mr Fairbrass leaving the waiting room. Again, however, the Commissioner concluded, in particular having regard to the actions of Mr McDonald when Mr Johnston entered the waiting room, that Mr Johnston should not be penalised for his actions in contributing to Mr Fairbrass leaving the waiting room. Again, in my opinion, this conclusion was open to the Commissioner. An appealable error has not been established. The Commissioner, in my view, was entitled to make the findings he did and the evidence did not oblige him to make a finding in the terms asserted in this ground. Alternatively and perhaps more importantly, even if such a finding were made, it would not lead inevitably to the conclusion that the dismissal was not unfair and that therefore the Commissioner's discretion miscarried.
- 71 During the course of the hearing of the appeal the appellant submitted that Mr Johnston could not have genuinely believed Mr Fairbrass' confidentiality was infringed by the presence of the two contractors in the waiting room. This was not put to Mr Johnston at the hearing during his cross-examination. Mr Johnston was cross-examined about the confidentiality issue at page 50 of the transcript. During that questioning, Mr Johnston asserted that it was part of the confidentiality policy that there was to be one person in the waiting room at a time. He said that he had raised this issue on a number of occasions. He indicated that every time he had been for a test there had been only one person in the waiting room, except on one occasion, and that he had then raised it as an issue when it had occurred.
- 72 In my opinion, ground 3 of the appeal has not been established.

Ground 2

- 73 Ground 2.1 pleads that the Commissioner had no jurisdiction to stipulate that the penalty to be applied to Mr Johnston for breaching the D&A programme by taking Mr Fairbrass offsite was a counselling note. The respondent concedes that the Commissioner did not have this jurisdiction and accepts that order 6 should be set aside. Despite this concession, as this is an issue of jurisdiction, it is necessary for the Full Bench to consider and determine the matter for itself.
- 74 As set out earlier, the application to the Commissioner at first instance was an application for a conference pursuant to s44 of *the Act*. The schedule to the application submitted that the termination of Mr Johnston's employment was harsh, oppressive or unfair. Section 23(3)(h) of *the Act* provides that:-
- "The Commission in the exercise of the jurisdiction conferred on it by this Part shall not -*
- ...
- (h) *on a claim of harsh, oppressive or unfair dismissal —*
- (i) *in the case of an application under section 44, make any order except an order that is authorised by section 23A or 44; and*
- (ii) *in any other case, make any order except an order that is authorised by section 23A."*
- 75 In this matter, the application did claim harsh, oppressive or unfair dismissal under s44, and therefore s23(3)(h) limited the orders which could be made. It limited the orders to those which could be made under s23A or s44 of *the Act*. S23A does not provide jurisdiction to make any order of the type made by the Commissioner with respect to the counselling note.
- 76 With respect to the orders which could be made under s44 of *the Act*, s44(9) is relevant. This provides:-
- "Where at the conclusion of a conference held in accordance with this section any question, dispute, or disagreement in relation to an industrial matter has not been settled by agreement between all of the parties, the Commission may hear and determine that question, dispute, or disagreement and may make an order binding only the parties in relation to whom the matter has not been so settled."*
- 77 Accordingly, the Commissioner had jurisdiction to hear and determine the dispute which had not by then been settled by the parties. As contained in the schedule to the Memorandum of the Commission dated 5 August 2005, that dispute was about the unfairness of Mr Johnston's termination of employment, and whether he ought to be reinstated with consequential orders. In my opinion, s44(9) of *the Act* and the Memorandum of Matters for Hearing and Determination did not provide the Commissioner with the jurisdiction to make order 6.
- 78 I note that s26(2) of *the Act* provides that in granting relief or redress under this Act the Commission is not restricted to the specific claim made or to the subject matter of the claim. In my opinion, this general power is subject to the specific prescription of the jurisdiction and powers of the Commission when dealing with a claim for "*unfair dismissal*" as set out in s23(3)(h) of *the Act*.
- 79 It may be that an order of the type which was made could be within jurisdiction if the making of such an order was explicitly part of the dispute remaining for determination under s44(9) of *the Act*, following the conclusion of a conference. Alternatively, if during the hearing of a dispute under s44(9), the issue of the making of such an order was raised by the parties or the Commission, the order could perhaps be made, by the Commission, in reliance upon s26(2). Neither of the possibilities applied, however, in this case.
- 80 In my opinion, appeal ground 2.1 is established. The consequence of this, however, is simply that order 6 of the orders made by the Commissioner at first instance is set aside. It does not affect orders 1-5.

Ground 4

- 81 This ground calls into question order 5 of the orders made by the Commission. That order was that Mr Johnston be paid for the period between his dismissal on 21 July 2005 and the date of his reinstatement as if he had been working during that period. The appeal ground pleads that in making such an order the Commissioner failed to correctly interpret and apply s23A(5)(b) of *the Act*. The appeal ground pleads the order should not have been made when Mr Johnston “*made no endeavour to mitigate his loss as a result of the dismissal*”.
- 82 An order under S23A(5) may only be made when the Commission is making an order under s23A(3) or s23A(4). By these subsections, the Commission has power to order an employer to reinstate or re-employ an employee whose dismissal was harsh, oppressive or unfair. S23A(5) provides that in addition to making such an order the Commission may make either or both of the following orders:-
- “(a) an order it considers necessary to maintain the continuity of the employee’s employment;
- (b) an order to the employer to pay to the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal.”
- 83 In making order 5, the Commission relied upon the jurisdiction and power granted by s23A(5)(b) of *the Act*. In his reasons, the Commissioner did not analyse the requirements of s23A(5)(b), nor discuss the issue of mitigation of loss, the evidence before the Commissioner on the issue, and the other circumstances relevant to it.
- 84 In arguing this ground of appeal, the appellant acknowledges that it faces the difficulty of the previous decision of the Full Bench in *Portilla v BHP Billiton Iron Ore Pty Ltd* (2005) 147 IR 1. In *Portilla*, in the joint reasons of Sharkey P and Kenner C at paragraph [206] it was said that there is in s23A(5)(b), “*no requirement to mitigate loss where an order is made to the employer to pay to an employee “the remuneration lost or likely to have been lost by the employee because of the dismissal”*”. Although Beech CC wrote separate reasons, there is nothing in those reasons to suggest any divergence from the views of Sharkey P and Kenner C on this issue. To provide a little more context to the statement made by Sharkey P and Kenner C at paragraph [206] in *Portilla*, I will set out in full paragraphs [206] and [207] of their reasons as follows:-
- “206 In our opinion, s23A(5)(a) and (b) orders are designed, unequivocally, to put an employee back in the position in which she or he would have been, had she or he not been unfairly dismissed, both by actual reinstatement or re-employment and/or by restoring the remuneration lost. Such an order is very different from an order to pay compensation for loss caused by an unfair dismissal. There is no requirement to mitigate loss where an order is made to the employer to pay to an employee “the remuneration lost or likely to have been lost by the employee because of the dismissal”. Such an order is required by s23A(5)(b), in its actual words, to require the payment of the remuneration lost; that is, the actual remuneration lost or, alternatively, the remuneration which is likely to have been lost. There is no requirement to mitigate or take any act of mitigation into account in the section, unlike s23A(7) which expressly requires mitigation to be taken into account in awarding an amount of compensation (see also the **Workplace Relations Act 1996** (Cth), s170CH(1), (2) and (4)).
- 207 If we are wrong in that opinion, and the amount ordered to be paid under s23A(5)(b) of the Act constitutes compensation, then we would find fair compensation for loss during the time when Mr Portilla remained dismissed and was awaiting the outcome of proceedings was the whole amount of remuneration not paid to him (see the principles expressed in **Growers Market Butchers v Backman** (1999) 79 WAIG 1313 (FB)).”
- 85 If the above statements in *Portilla* are correct as a matter of law, there would have been no requirement for the Commissioner in this case to ascertain whether Mr Johnston had mitigated his loss. The appellant submits that *Portilla* was wrongly decided. The appellant submits that common law notions of mitigation of loss are imported into a consideration of whether a discretionary order of the type contained in s23A(5)(b) of *the Act* should be made, and, if so, the quantum of such an order. The respondent submits, in effect, that *Portilla* was correctly decided.
- 86 *Portilla* is a relatively recent decision of the Full Bench of the Commission. We were informed during the hearing of the appeal that although an appeal had been instituted against the decision of the Full Bench to the Industrial Appeal Court, the matter has now settled and the appeal is not proceeding.
- 87 In my view, although the Full Bench has the authority, as a matter of law and precedent, to review the correctness of its earlier decisions and make a decision contrary to an earlier decision, on matters of law, a Full Bench should be cautious in undertaking such an exercise. This was the view taken, in joint reasons, by five Justices of the Court of Appeal of the Supreme Court of Western Australia, with respect to judgments of that court or a previous decision of the Full Court, in *Pilcher v H B Brady & Co Pty Ltd* [2005] WASCA 159 at [24]-[26]. In my view, the Full Bench ought to take a similar approach to its earlier decisions. The reasons for this caution include matters of judicial comity and also to assist the predictability of outcome of proceedings before the Commission at both single Commissioner and Full Bench level. (In the context of the Federal Court and the Federal Magistrate’s Court see *Minister for Immigration and Multicultural and Indigenous Affairs v SZANS* (2005) 141 FCR 586 at [35]-[39]).
- 88 In exercising this type of caution, in my opinion, a review of the correctness of an earlier decision of the Full Bench, on a question of law, should ordinarily only take place where the question truly arises as a matter of law and fact in the case before the Full Bench.
- 89 In my opinion, this is not the appropriate occasion for the Full Bench to examine the correctness of the decision in *Portilla*. This is because, in my view, even if the Commissioner was obliged to consider whether Mr Johnston had mitigated his loss as part of the determination of whether, and, if so, what order he should make under s23A(5)(b) of *the Act*, it would have made no difference to the order made. This was because, in all the circumstances, the respondent did not establish that there was such a failure to mitigate loss such as would impact upon the order which the Commissioner made. (The appellant conceded that if mitigation of loss was a relevant consideration for the purposes of s23A(5)(b), the employer bore the onus of establishing that there had been a failure to reasonably mitigate loss; see *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316).
- 90 The opinion expressed in the previous paragraph is based upon the circumstances within which the present litigation took place and the evidence which was given at the hearing.
- 91 Mr Johnston was terminated from his employment on 21 July 2005. The notice of application to the Commission, calling into question the fairness of the termination and seeking the assistance of the Commission to resolve the matter, was filed on 22 July 2005. The application was the subject of a conference before the Commission until the certification by the

Commissioner on 5 August 2005 that the matter had not been settled by agreement between the parties. Part of the schedule to the Memorandum of Matters for Hearing and Determination was that the respondent sought an order from the Commission reinstating Mr Johnston's employment without loss of entitlements. On the same date, that is 5 August 2005, the Commission issued a notice to the parties that the matter was set down for hearing at Newman between 5-7 September 2005. These dates were only about 7 weeks after Mr Johnston's dismissal.

- 92 As discussed with the parties during the hearing of the appeal, prior to the hearing of the application at first instance the respondent sought an interim order from the Commission that the appellant maintain Mr Johnston's income pending the hearing of the substantive application, pursuant to s44(6)(bb)(ii) of *the Act*. That application was heard by the Commission on 12 August 2005. Prior to the hearing of the application, the appellant filed written submissions opposing the making of such an order. In paragraphs [8] and [9] of the written submissions it was asserted that on termination of Mr Johnston's employment he "*received a payment of \$18,580.51 net after tax. This equates to over three months usual earnings for Mr Johnston*". It was therefore submitted that there could be no suggestion that Mr Johnston will be unable to maintain a reasonable standard of living pending the hearing and determination of the matter. The submission referred to the fact that the application had been set down for hearing on 5-7 September 2005.
- 93 During the hearing of the appeal we were informed that the statement contained in the written submissions made to the Commission about the payment made to Mr Johnston was incorrect. We were informed that the true position was that the appellant had been prepared to pay this amount to Mr Johnston upon him signing termination papers, but that Mr Johnston had not agreed to do this and therefore the amount had not been paid to Mr Johnston. Counsel for the respondent confirmed that this was the case, although it was submitted that if Mr Johnston was entitled to the amount referred to, in accordance with the provisions of the award, it was difficult to see how the payment could be withheld simply because Mr Johnston had failed to sign termination papers. Be that as it may, the incorrect statement should not have been made to the Commission in the written submissions. It has not been satisfactorily explained to the Full Bench why this occurred.
- 94 Furthermore, this information was referred to by the Commissioner in hearing the income maintenance application on 12 August 2005 and relied on by him. If counsel then appearing were aware that the Commissioner was relying upon an incorrect statement of the facts, as asserted in the appellant's written submissions, then counsel should have corrected the position.
- 95 Relevantly, in my view, to the question of mitigation are the observations made by the Commissioner in deciding the income maintenance application, at pages 3-4 of the transcript at first instance (T), as follows:-

"In respect of income maintenance, I've sought, as I indicated at conference, to list this matter as a matter of some priority and the matter is listed. I note from the submissions that Mr Johnson's termination I think is on the 21st of July or thereabouts, and he is said to have been given notice and payments that would take him some - - in excess of 3 months, I'm not quite sure whether it's just over, but - - or more. I would - - the hearing in which case will be during that period of payment, and I will certainly undertake to give a decision on this as a matter of urgency as well. That should mean that I'm in a position whereby there is, in fact, no income loss before I've had to determine the key issue; and that is whether the termination is unfair or otherwise. On that basis, then, I wouldn't seek to issue an order for income maintenance."

- 96 The position therefore was that the appellant terminated Mr Johnston's employment on 21 July 2005. The next day his union by application sought the assistance of the Commission to resolve the dispute arising out of the termination of his employment. A conference conducted by the Commission was unable to resolve the dispute, and on 5 August 2005 the Commission as a priority listed the matter for hearing on 5-7 September 2005 at Newman. On 12 August 2005 the Commissioner said that he would give a decision on the substantive application, after it was heard, as a matter of urgency.
- 97 In those circumstances, and, in particular given Mr Johnston's position, I do not think it was unreasonable for him to not actively seek alternative employment, pending the decision of the Commissioner. By referring to Mr Johnston's position, I am referring to his evidence that he was 46 years of age and lived with his partner in Newman. He has three children aged 13, 11 and 7. He had lived in Newman for 20 years, had been working for BHP since 26 June 1985, and had been involved with the respondent union for about 18½ years and for the overwhelming majority of that time, he has been a union representative as a shop steward, deputy convenor or convenor (T23).
- 98 The other evidence at the hearing relevant to mitigation was as follows. Towards the end of his examination in chief, Mr Johnston was asked if he had been doing any work since his termination of employment. Mr Johnston answered "*Housework*". Counsel then said "*So you've been a house person, have you?*" Mr Johnston answered "*I've been continuing my role as a union official. And that's basically it*". Mr Johnston said that he had not sought paid work, but volunteered that he had been offered work in Perth, but not in Newman. In cross-examination, Mr Johnston was asked about the work he had been offered in Perth. Mr Johnston said that it was as a union official with the "*AWU*". Mr Johnston said that terms were not discussed and he did not have any indication of how much money was on offer. Mr Johnston said that he had been approached by somebody from the AWU and asked whether he would be interested and that Mr Johnston had replied that he was not interested.
- 99 In my opinion, Mr Johnston, acting reasonably, was not required to take or pursue employment in Perth, given the length both of his residence in Newman and employment with the appellant, the fact that he was seeking a reinstatement order and the early determination of his application by the Commission. In addition, having regard to the history of the proceedings and the undertaking by the Commission to provide an urgent decision, Mr Johnston was not acting unreasonably in failing to actively pursue alternative employment in and around Newman.
- 100 Accordingly, if mitigation of loss was an issue, in my opinion, the respondent did not establish that Mr Johnston had failed to act reasonably to mitigate his loss. In saying this I also note that the respondent did not adduce or lead any evidence or make submissions upon what alternative employment could have been taken in or around Newman, when this could reasonably have been secured, and how much Mr Johnston could have earned if he had taken such employment. Information on these issues would often be necessary before the Commissioner could further analyse the question of mitigation and quantify the extent to which any failure by Mr Johnston to mitigate his loss affected the extent of the loss caused by his dismissal from employment by the appellant, for the purposes of s23A(5)(b) of *the Act*.
- 101 When the issue of the reasonableness of Mr Johnston's conduct was discussed with counsel for the appellant during the course of the hearing of the appeal, counsel referred to the statement by Sharkey P in the *Growers Market Butchers* case at page 1316 that the duty to mitigate loss in claims of unfair dismissal in practical terms requires the employee to diligently seek suitable alternative employment. At that point, Sharkey P made reference to *Brace v Calder and Others* [1895] 2 QB 253. In my view, however, this observation made by Sharkey P in the *Growers Market Butchers* case does not mean that in every case it will be unreasonable for a dismissed employee to do other than immediately set about the task of obtaining alternative employment.

- The observation made by Sharkey P is, in my opinion, simply a manifestation of what in many if not most cases would be the reasonable course required of a dismissed employee. In my opinion, the reasonableness of the conduct, overall, remains the touchstone of whether mitigation of loss has occurred. This view is reinforced by a later paragraph in the reasons of Sharkey P in *Growers Market Butchers* case at page 1316 where His Honour said: “*The obligation to mitigate loss is an obligation to act reasonably in the mitigation of loss but not an obligation which a reasonable and prudent person would not undertake*”. Some examples of this are then provided.
- 102 Additionally, I note that the Full Bench of the Australian Industrial Relations Commission in *Biviano v Suji Kim Collection*, 28 March 2002, PR915963 at [52] said that to avoid a reduction in damages a plaintiff must take reasonable steps to minimise the effect of a termination of contract. This is in line with the view I have expressed above.
- 103 In any event, diligence is an evaluative concept which cannot be divorced from the facts and circumstances of the particular case.
- 104 I also add that *Brace v Calder* is not an authority which, in my view, lends happily to the statement about diligently seeking alternative employment, at least in unfair dismissal cases. *Brace v Calder* was a common law breach of employment contract case. The plaintiff was employed by a partnership, under a contract for a term of two years. Before that period expired, the partnership dissolved by the retirement of two of the four partners, with the other two partners continuing to carry on business. Those parties offered the plaintiff employment with their partnership for the remainder of the two year term, on the same remuneration and terms as previously existed. The plaintiff did not accept this offer. A majority of the Court of Appeal decided that, although there had been a breach of contract, only nominal damages would be awarded. This was because, in declining the new offer of employment, “*it was his own fault that he suffered any loss*” (per Lopes LJ at page 261). Rigby LJ at page 263 said the “*defendants are entitled in mitigation of damages to put forward the offer of an engagement on the same terms made by the continuing partners*”, and in effect agreed no loss had been suffered. The reasons of the members of the Court of Appeal do not mention diligently “*seeking*” alternative employment as a matter relevant to mitigation.
- 105 For the above reasons, in my opinion, even if the Commission were required to assess the issue of mitigation of loss in deciding whether and what order to make under s23A(5)(b) of the Act, in this instance, the appellant did not establish any reasonable failure to mitigate loss by Mr Johnston such as would cause the Commission to vary order 5 at first instance.
- 106 In partial difference to the substantial written and oral submissions of the appellant on the issue of mitigation, I make the following additional observations.
- 107 Whether the issue of mitigation of loss has any role to play in the assessment of the making of an order under s23A(5)(b) of the Act must depend upon the statutory language used. In particular, the precise terms of s23A(5)(b) and s23A as a whole.
- 108 Within this context, s23A(7) provides an argument against the submissions of the appellant. S23A(7) provides, amongst other things, that in deciding an amount of compensation for the purposes of making a compensation order, where reinstatement or re-employment is impracticable, the Commission is to have regard to the efforts of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal. The argument is that if mitigation of loss was a factor which the Commission was required to take into account for the purpose of making an order under s23A(5)(b), this would have been specifically set out, as was the case with respect to s23A(7). Whilst noting this argument, in my opinion, it is not necessarily decisive of the issue.
- 109 This is because the language used in s23A(5)(b) of the Act may itself involve the requirement to assess mitigation of loss. One issue which the Commission has to determine in making an order under s23A(5)(b) is whether there has been loss “*by the employee because of the dismissal*”. In a case where there had been a failure to take reasonable steps to mitigate loss, it could be argued that all or part of the loss suffered by the employee, was not “*because of the dismissal*”, for the purposes of s23A(5)(b) of the Act. In this context, notions developed in the common law or in considering other statutory provisions as to when remuneration can be said to be lost because of a dismissal, may be relevant. I note relevantly, there is a body of authority to support the proposition that where a wronged party has failed to mitigate their loss, the total loss they have suffered has not been caused by the wrongdoer. (See *Biviano, Sotiros Shipping Inc and AECO Maritime SA v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd’s Law Reports 605 at 608, *Mann Judd (A Firm) v Paper Sales Australia (WA) Pty Ltd and Others* [1998] WASC 268, *Standard Chartered Bank v Pakistan National Shipping Corporation and Others* [2001] 1 All ER Comm 822 at [38]-[41] and *Westen v Union des Assurances de Paris*, IRCA, 28 August 1996, 960419).
- 110 If this is correct, then issues of mitigation will be relevant to determining whether a loss suffered is “*because of the dismissal*”. In an appropriate case, the Commissioner would need to evaluate whether a quantified loss was because of the dismissal or, at least to some quantifiable extent, the result of the employee failing to take reasonable steps to minimise his loss. If so, there would be a reduction in the amount ordered to be paid to the employee.
- 111 In this appeal however, for the reasons earlier set out, in my opinion, ground 4 has not been established, and order 5 made by the Commission at first instance should remain.

Conclusion

- 112 For the reasons set out above, in my opinion, only ground 2 of the appeal has been established. As stated earlier, this has the effect that order 6 made by the Commission at first instance should be set aside leaving intact the other orders made. Accordingly, in my opinion the following orders should be made by the Full Bench:-
1. The appeal is allowed in part.
 2. Order 6 made by the Commission on 3 October 2005 is set aside.
 3. The appeal is otherwise dismissed.

CHIEF COMMISSIONER A R BEECH:

- 113 I have had the advantage of reading in draft form the Reasons for Decision of his Honour. I agree with his Honour’s Reasons and the orders proposed. I wish to add the following comments in so doing. The reasons why the appellant dismissed Mr Johnston are set out in his letter of termination (AB 165). The reasons specified included the appellant’s finding that Mr Johnston abused and intimidated the Assistant Mining Superintendent. The Commissioner at first instance found that that conduct was not made out on the evidence. This was not challenged on appeal. It therefore cannot stand as justification for his dismissal.
- 114 The appellant also found that Mr Johnston had unreasonably and unjustifiably interfered with the drug and alcohol test and failed to comply with a lawful instruction to leave the testing location. As to the first part of that sentence, the Commission at first instance find that was not made out on the evidence. The appellant submits that the Commission at first instance was in error in so finding; however, for the reasons set out by his Honour, the appellant’s submission fails. Accordingly that also lapses as justification for Mr Johnston’s dismissal.

- 115 The second part of that sentence was at least partly made out on the evidence before the Commission at first instance.
- 116 The final stated reason why the appellant dismissed Mr Johnston is the appellant's finding that Mr Johnston lacked candour in responding to questions in the investigation. The Commission at first instance found that this was not made out on the evidence. This was not challenged on appeal, and it too cannot stand as justification for the dismissal.
- 117 I note the letter of dismissal includes a "catch all" phrase stating: "In all the circumstances, including those referred to above ...". However, it is not appropriate in a letter of dismissal for either its recipient, or this Full Bench, to have to guess what is encompassed by those words. They add little to the appellant's position for the reasons set out by his Honour.
- 118 Therefore, of the perhaps four specified reasons for Mr Johnston's dismissal, part only of one reason was made out on the evidence before the Commission at first instance. That fact alone places the appellant in a very difficult position in seeking to persuade the Full Bench that the Commission was in error in finding that Mr Johnston's dismissal for all the specified reasons was unfair. Putting it at its best from the appellant's perspective, if Mr Johnston's failure to comply with a lawful instruction to leave the testing location encompassed leaving the site with Mr Fairbrass, the appellant goes too far in its submission that this conduct alone justified the dismissal of Mr Johnston.
- 119 It is notorious, as the appellant itself recognises, that not all misconduct justifies dismissal. The appellant's drug and alcohol programme is undoubtedly a serious policy (as the decision of the Commission in Court Session which approved the drug and alcohol policy makes clear: *BHP Iron Ore Pty Ltd v. CMETSWU* (1998) 78 WAIG 2593). However, it is not the case that every breach of a serious policy is necessarily itself serious. There is much in the submission of Mr Schapper that the breach in this case was a breach of form and not substance. The policy provides on page 10 (AB137) under the heading "Handling Positive Results" that the employee is to be transported home by the employee's supervision and that this role cannot be delegated. This is said to be part of the appellant's duty of care towards its employees. In this case, Mr Fairbrass had not returned a positive result; rather, he had not taken the test; and although the supervisor did not take Mr Fairbrass home, there is no suggestion that some incident occurred when Mr Johnston took Mr Fairbrass home which was a consequence of the appellant being in breach of its duty of care. The appellant suffered no detriment from Mr Johnston's actions. Neither did Mr Fairbrass, he having requested Mr Johnston to take him home. Thus, while the drug and alcohol policy is a serious policy, the breach of it was not a serious breach. Far from warranting dismissal, there is much to be said for the Commissioner's own finding that counselling was appropriate.
- 120 I agree entirely with the comments of his Honour in relation to ground 4. Whether the reasoning of Sharkey P and Kenner C, my colleagues with me on the Full Bench in *Portilla*, is or is not correct is a matter which ought be considered by a Full Bench when the facts of the appeal reveal section 23A(5)(b) as a central matter and where a Full Bench receives full submissions on the meaning of section 23A(5)(b) of the Act, a circumstance which did not occur in *Portilla*. That is not the case here. On the facts of this appeal, even if the reasoning is not correct, for the reasons given by his Honour Mr Johnston did not fail to mitigate his loss and the point is more of a moot point.

SENIOR COMMISSIONER J F GREGOR:

- 121 I have read the Reasons for Decision of His Honour the Acting President. I agree with the conclusions reached and the Orders proposed by him.

2006 WAIRC 03934

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	BHP BILLITON IRON ORE PTY LTD	APPELLANT
	-and-	
	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH	RESPONDENT
CORAM	FULL BENCH	
	THE HONOURABLE M T RITTER, ACTING PRESIDENT	
	CHIEF COMMISSIONER A R BEECH	
	SENIOR COMMISSIONER J F GREGOR	
DATE	FRIDAY, 10 MARCH 2006	
FILE NO/S	FBA 15 OF 2005	
CITATION NO.	2006 WAIRC 03934	

Decision	Appeal allowed in part, appeal otherwise dismissed.
Appearances	
Appellant	Mr A D Lucev (of Counsel), by leave and with him Ms K O'Rourke
Respondent	Mr D H Schapper (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 15 February 2006, and having heard Mr A D Lucev (of Counsel), by leave, and with him Ms K O'Rourke on behalf of the appellant and Mr D H Schapper (of Counsel), by leave, on behalf of the respondent, and the Full Bench having heard and determined the matter, and the reasons for decision having been delivered on 8 March 2006, it is this day, 10 March 2006, ordered as follows:-

- (1) The appeal is allowed in part.

- (2) Order 6 made by the Commission on 3 October 2005 is set aside.
 (3) The appeal is otherwise dismissed.

[L.S.]

By the Full Bench
 (Sgd.) M T RITTER,
 Acting President.

FULL BENCH—Unions—Application for Alteration of Rules—

2006 WAIRC 04092

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	APPLICANT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN	
HEARD	THURSDAY, 9 MARCH 2006	
DELIVERED	FRIDAY, 31 MARCH 2006	
FILE NO.	FBM 5 OF 2005	
CITATION NO.	2006 WAIRC 04092	

CatchWords	Industrial Law (WA) - Application to alter rules of organisation as to membership - Statutory requirements of <i>Industrial Relations Act 1979</i> (WA) (as amended) - Typographical error - Application granted - Request Registrar amend formatting errors - <i>Industrial Relations Act 1979</i> (WA) (as amended), Division 4 of Part II, s26, s26(1)(a), s55, s55(2), s55(3), s55(4), s55(4)(a), s55(4)(b), s55(4)(c), s55(4)(d), s55(4)(e), s55(5), s56, s58(3), s62(2), s62(4) - <i>Industrial Relations Commission Regulations 2005</i> , r69.
Decision	Application granted
Appearances	
Applicant	Mr W Claydon, as agent

Reasons for Decision

THE ACTING PRESIDENT:

The Application

- 1 The applicant is an organisation of employees that is registered under Division 4 of Part II of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*). Pursuant to s62(2) of *the Act*, the applicant seeks the authorisation of the Full Bench for the Registrar of the Commission to register an alteration to the rules of the applicant, that relates to the qualification of persons for membership of the applicant.
- 2 The proposed alterations are to repeal and replace Rule 6(a)(10) of the rules of the applicant.
- 3 Set out below is Rule 6 of the rules of the applicant in the form which the application sought it to be altered. Included also is the form of the present Rule 6(a)(10) which is to be replaced.

“6 – MEMBERSHIP

(a) *Membership shall be confined to any person who is:*

- (1) *employed as an officer under and within the meaning of the Public Service Act, 1978-80; or*
- (2) *employed under the Forests Act, the Main Roads Act or any Act now in force or hereafter enacted whereby any Board, Commission or other body is constituted to administer any such Act; or*
- (3) *otherwise employed in any of the established Branches of the Public Service, including State trading concerns, business undertakings and government institutions controlled by Boards; or*
- (4) *employed by the State of Western Australia; or*
- (5) *employed by the Crown or by any Minister of the Crown in right of the State of Western Australia; or*
- (6) *employed by any statutory body representing the State of Western Australia; or*
- (7) *employed by any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of the State of Western Australia; or*
- (8) *employed in either House of Parliament of the State of Western Australia either*
 - (i) *under the separate control of the President or Speaker or under their joint control; or*

- (ii) by a Committee appointed pursuant to the Joint Standing Rules and Orders of the Legislative Council and the Legislative Assembly.
- (9) employed by any company or corporation in which issued shares are held by or for or on behalf of or in the interest of the State of Western Australia, or, if there are no issued shares, in which the Governing body by whatever name called includes nominees appointed by or on behalf of or in the interest of the State of Western Australia.
- ~~(10) a salaried employee (being a professional, administrative, clerical, technical and supervisory employee) employed by the Board of the Western Australian Centre for Pathology and Medical Research and/or any other Western Australian State Government controlled person, enterprise or corporation who is presently or henceforth the employer of employees in the said Western Australian Centre for Pathology and Medical Research.~~
- (10) in accordance with the agreement dated 30 May 2005 between the Civil Service Association of Western Australia and the Health Services Union of Western Australia as to the division of future membership coverage, a salaried employee (being a professional, administrative, clerical, technical and supervisory employee) employed either –
- (i) by the Metropolitan Health service (sic) or by any other Western Australian State government person, enterprise or corporation in the Perth Dental Hospital and Community Dental health (sic) Services or any other entity or unit howsoever described or named which provides any of the services provided by the Perth Dental Hospital and Community Dental Service henceforth; or
- (ii) by the Metropolitan Health service (sic) or by any other Western Australian State government person, enterprise, corporation, agency or management unit for the provision of alcohol and drug addiction services in substitution of the operations and services provided by the Alcohol and Drug Authority.
- (11) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Metropolitan Health Service Board (“Board”) or by any other Western Australian State Government person, enterprise or corporation in the Perth Dental Hospital or any other such entity or unit howsoever described or named (including Perth Dental Hospital and Community Dental Services) which provides any of the services provided by Perth Dental Hospital or the Dental Services Branch of the Health Department of Western Australia as at 6 May 1998.
- (12) (a) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Board in the Graylands Selby - Lemnos and Special Care Health Services (“GSL”) who, as at 6 May 1998 were financial members of the CSA until such time as they resign, retire or are permanently transferred or redeployed from the GSL or cease to be a member of the CSA.
- (b) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of the Civil Service Association of WA (Incorporated).
- (bb) Provided further that save and except for the employees referred to in Rule 6(a)(11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to the Rules of the Hospital Salaried Officers’ of Western Australia (Union of Workers)) employed by the Boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of the Civil Service Association of Western Australia (Inc).”

4 The application to the Full Bench contained an explanatory note which sets out some of the background to and purpose of the application to alter the rules. The explanatory note is as follows:-

“Implementation of the recommendations of the Health Reform Taskforce has resulted in the reorganisation of the Path Centre, Dental Health Services and Alcohol and Drug Authority. The transfer of employees of the PathCentre and employees of hospital pathology services to “PathWest” a newly established organisation has resulted in a change in coverage areas agreed between the Civil Service Association of WA (Inc) and the union with coverage of hospital laboratory employees, the Health Services Union of Western Australia.

The Demarcation Agreement means the CSA would vacate the field with respect to employees employed by the newly formed PathWest, retain coverage of employees of Dental Health Services and those employees engaged in the provision of services related to alcohol and drug addiction in substitution of services provided by the Alcohol and Drug Authority.

The CSA Rules need to be amended to reflect the agreement with the Health Services Union of Western Australia. Attachment A outlines the amendment of the rules.

The amended Rule 6 will have two references to Dental Health Services: one in the new sub-rule (10) and another in the next sub-rule (11) which deals with arrangements as at 1998. Retaining this rule ensures the historical coverage between 1998 and now is not affected.”

5 The application was supported by a statutory declaration, declared on 8 March 2006, by Ms Toni Walkington, the General Secretary of the applicant. This declaration set out some of the relevant background and also confirmed the contents of an earlier unsworn statement which had been made by Ms Walkington on 23 December 2005. The statement was filed in the

Commission at or about the same time as the application to the Full Bench and also set out some of the relevant background and facts.

- 6 At the hearing of the application, there was no objection made by any person to the proposed rule alteration. Also, prior to the hearing, there was no indication given to the Full Bench by any person that there would be any such objection.
- 7 As stated, the application is made pursuant to s62(2) of the Act. By s62(4) of the Act, the contents of s55, s56 and s58(3) apply, with such modifications as are necessary, to and in relation to an application by an organisation for an alteration of a rule of the kind contemplated by s62(2). Before dealing with the statutory requirements necessary to satisfy the Full Bench that authorisation for the rule alteration should be provided to the Registrar, I will set out the relevant factual background.

Factual Background

- 8 Rule 9 of the rules of the applicant is the rule which provides for the alteration of the “constitution” of the applicant. It reads as follows:-

“9 - ALTERATION OF CONSTITUTION

- (a) *No amendment, addition to, variation, rescission, or substitution of this Constitution and Rules shall be made unless:*
- (i) *it has been passed by a majority of two thirds of the members eligible to vote and voting at a special general meeting convened for the purpose of considering such changes, provided that the quorum for such a meeting shall be one percent (1%) of financial members at the date of calling the meeting, or*
- (ii) *it has been approved by a simple majority of members voting in a referendum conducted in accordance with Rule 21, or*
- (iii) *it has been passed by a majority of two thirds of the members of the Council in attendance and voting at a meeting of the Council, provided that notice of the proposed amendment, addition to, variation, rescission, or substitution has been posted to each Council member, at least twenty one (21) days prior to the meeting:*
- and unless a notice of the proposed alteration and the reasons therefore, is posted or delivered to each and every financial member of the Association.*
- (b) *Should a special general meeting convened in accordance with sub-rule 9(a)(i) lapse for want of a quorum, the proposed changes shall be considered by the next meeting of Council, in accordance with sub-rule 9(a)(iii).*
- (c) (i) *In the notice to members referred to in subrule (a) members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Registrar to reach him no later than 21 days after the date of receipt of the notice.*
- (ii) *In the notice to members referred to in subrule (a) and with respect to any proposed alteration of the rule relating to the qualification of persons for membership of the union, members are to be informed that they or any of them may object to making of the application for the proposed alteration and/or object to the proposed alteration by forwarding a written objection to the Registrar to reach him no later than 21 days after the date of receipt of the notice.*
- (d) *No alteration to any of the rules of the Association shall be or become effective until the Registrar has given to the Association a certificate that the alteration has been registered.*
- (e) *Any amendment, addition, variation, recession or substitution to the Constitution and Rules shall be published in the Civil Service Journal upon receipt by the Association from the Registrar of the certificate referred to in subrule (d) of this rule.”*

- 9 The present alteration to the rules was sought to be made by using the procedure set out in Rule 9(a)(iii). Rule 9(c) refers to in a number of places to the “Registrar”. This word is not defined in the rules. I am satisfied, however, from the text of the rule and the context in which the word appears that the reference to the “Registrar” must mean the Registrar of the Commission.
- 10 The statement of Ms Walkington discloses that the rule alteration was passed unanimously at a meeting of the council of the applicant on 30 November 2005. The statement also provides that notice of the proposed alterations was posted to each council member of the applicant prior to 9 November 2005; that is at least 21 days prior to the council meeting on 30 November 2005 and in accordance with Rule 9(a)(iii) of the rules of the applicant. The statement of Ms Walkington annexes the minutes of the council meeting held on 30 November 2005 which record that a quorum of council members was present as required by Rule 12(j)(iii) of the rules of the applicant. The minutes also record the unanimous resolution of the meeting to pass the proposed alteration to the membership eligibility rule.
- 11 Ms Walkington’s statement also discloses that, in accordance with Rule 9 of the rules of the applicant, the members of the applicant were informed that they could object to the proposed alteration by forwarding a written objection to the Registrar to reach him no later than 21 days after the receipt of the notice. The notice was provided to members by the mailing to them of the CSA Journal which contained a notice of the proposed rule alteration. Ms Walkington’s statement discloses that the journal was sent on or about 23 December 2005 to each member’s last known address, being the current address on the applicant’s register of members.
- 12 In the notice which was sent to members, as contained in the CSA Journal, there was a typographical error. This error was that Rule 6(bb) was instead designated as being Rule 6(b). None of the relevant wording was however altered. In my opinion, this typographical error does not change the character of the notice sent to members. It was still a notice of the proposed alteration and thereby satisfied Rule 9(a)(iii) of the rules of the applicant. The notice also contained an error in the numbering and lettering of what were designated as Rules 6(a)(12)(a) and 6(a)(12)(b). This is further referred to in paragraph [15]. I do not think this error affected the character of the notice sent.
- 13 Ms Walkington’s statement discloses that, as at 31 January 2006, the applicant has 13,602 members. It also discloses that, to date, neither Ms Walkington nor any other official of the applicant has received any query or objection from members about the proposal to alter the eligibility rules.
- 14 The proposed amended rule refers to an agreement dated 30 May 2005 between the applicant and the Health Services Union of Western Australia. As the terms of this agreement are relevant to the present application and also an understanding of the new proposed Rule 6(10), I will set out the contents of the agreement below. (The agreement was annexed to the statement of Ms Walkington.)

“AGREEMENT**BETWEEN:**

The Civil Service Association of Western Australia (Inc) (“CSA”)

AND

The Health Services Union of Western Australia (Union of Workers) (“HSU”)

PREAMBLE

This agreement is founded on the basis of the Deed of Agreement between the HSOA (Now renamed HSU) and the CSA, dated 21st August 1998 and generally relies on the definitions contained therein, and in particular on the definition of “Public Hospital Health Service”, provided that this agreement is intended to take the parties beyond the matters agreed in the above deed to a new level of understanding between the parties in regard to both the present and the future.

The parties - CSA and HSU - acknowledge that:

1. *The Department of Health has an agenda to reform health services in Western Australia; and*
2. *The reform process is likely-to-have impacts on their membership coverage, awards and agreements in the Health and related or ancillary sectors.*

The parties agree to resolve membership award and agreement coverage issues as set out below.

DENTAL SERVICES

1. *The CSA and the HSU agree that the CSA has exclusive coverage of PACTS employees employed by the MHS or by any other Western Australian State Government person, enterprise or corporation in Perth Dental Hospital and Community Dental Services (POH and CDS) or any other such entity or unit howsoever described or named which provides any of the services provided by the PDH and CDS henceforth into the future.*
2. *Provided that where from time to time the provision of dental services is devolved from the management and control of the PDH and CDS to the management and control of an individual Public Hospital Health Service such that the individual Public Hospital Health Service has permanent management control of employees and the provision of dental services at that Public Hospital Health Service only, then union eligibility, award and industrial coverage for such employees may be determined by the identity of the employer of persons providing services at the said Public Hospital Health Service.*
3. *The CSA shall make application to amend the scope of the GOSAC award along the following lines.*

Clause 4. Scope Insert the words:

“Provided further that this Award shall also apply to Government Officers eligible for membership of the Civil Service Association Inc who are employed by the Board of the Metropolitan Health Services at Perth Dental Hospital and Community Dental Services, or any other employer or entity in substitution of the MHS or the Department of Health.”

Schedule B Delete:

“Salaried Officers of the Perth Dental Hospital other than Dentists, Dental Therapists and Dental Clinic Assistants.”

4. *The CSA will also seek to amend the GOSAC general agreement to reflect the proposal to amend the GOSAC award.*
5. *The HSU will not oppose any application by the CSA to change the GOSAC award or the GOSAC agreement as detailed in 3 and 4 above.*

ALCOHOL AND DRUG AUTHORITY (ADA)

1. *The CSA and the HSU agree that if the ADA comes under the management and control of the MHS or any other Western Australian State Government person, enterprise, corporation, agency or management unit and the ADA remains an identifiable unit in terms of operations and services, the CSA shall continue to have exclusive coverage of employees at the ADA henceforth into the future, and the HSU shall, when requested by the CSA, take all necessary steps and actions open to it pursuant to the Act to secure such exclusive coverage by the CSA.*
2. *Provided that where from time to time the provision of alcohol and drug services is devolved from the management and control of the ADA to the management and control of an individual Public Hospital Health Service such that the individual Public Hospital Health Service has permanent management control of employees and the provision of alcohol and drug services at that Public Hospital Health Service only, then union eligibility, award and industrial coverage for such employees may be determined by the identity of the employer of persons providing services at the said Public Hospital Health Service.*
3. *Further in the event that the management and control of the services provided by the ADA were to be transferred to a Non Government Organisation and the ADA remains an identifiable unit in terms of its operations and services, the CSA shall continue to have exclusive coverage of employees at the ADA and the HSU shall, when requested by the CSA, take all necessary steps and actions open to it pursuant to the Act to secure such exclusive coverage by the CSA.*

PATHOLOGY SERVICES

The CSA and the HSU agree that the HSU will have exclusive coverage of Pathology Services. The CSA and the HSU will consent to any rule changes and award/agreement changes necessary to affect the HSU’s exclusive coverage of Pathology Services.

A transitional agreement will be reached to facilitate the efficient and effective transfer of members that will include a financial settlement to the CSA, agreed timelines and the exchange of membership details.

If the delivery of pathology services were to change in the future, then coverage would be determined by the rules of each Union.

HEALTH CORPORATE NETWORK (HCN)

The CSA agrees not to seek coverage of employees working in the HCN including those employees currently employed by the Department of Health and in other areas of CSA coverage who undergo a change of employer to an Health Service as part of the formation of a shared service centre for corporate services in Health.

PRINCIPLES FOR RESOLVING COVERAGE IN OTHER AREAS

In the event that a service or function is changed by the Western Australian government affecting the callings and coverage of the CSA and HSU, and employees are redeployed, relocated, transferred or otherwise transmitted from one employer to another within or outside the Metropolitan Health Service or any other Western Australian State Government person, enterprise, entity or authority or corporation, the parties agree to hold discussions to manage and resolve issues of membership, award and agreement coverage in accordance with the following principles.

The CSA and the HSU will seek to reach agreement on coverage based on an assessment of whether or not the area remains an identifiable unit in terms of its operations and services. Such assessment will be based on the following factors:

1. *the level of independent management control;*
2. *the existence of an identifiable separate budget;*
3. *the degree of integration or otherwise with existing health service organisations (i.e., employment vehicles or devices); and*
4. *the callings involved and the work to be performed.*

Regardless of the employing vehicle or device in use or to be used, the CSA and the HSU will take into consideration the additional factors:

1. *If the service or function to be changed retains its identity or characteristics as a discrete entity or unit in terms of its operations and services, within which staff are to be employed or managed, then if the staff of the previous service or unit were covered by one particular union or one union is more dominant numerically than the other, in coverage of the staff who become part of the new service or unit, then that union shall retain membership and award coverage of the new service, unless that union decides to relinquish that coverage.*
2. *If the service or function to be changed does not retain its identity or characteristics as a discrete entity or unit in terms of its operations and services but rather the original service is integrated into a unit or service to become a part of a larger integrated service or unit where that service or function is delivered by a Public Hospital Health Service, then membership and award coverage should be conceded normally to the HSU, and where that service or function is delivered by the Department of Health then membership and award coverage should be conceded normally to the CSA, unless the CSA or the HSU, having conceded coverage, decides to relinquish it."*

- 15 A notice of the application to alter the rules was published in the Western Australian Industrial Gazette (WAIG) on 25 January 2006 ((2006) 86 WAIG 207). The publication in the WAIG did not contain the same typographical error to Rule 6(bb) as contained in the notice to members in the CSA Journal, referred to earlier. The publication did however contain another error in the numbering and lettering of Rules 6(a)(12), 6(b) and 6(bb). These errors did not affect the publication of the words of or numbering/lettering in the proposed alteration of Rule 6(a)(10). The errors will be referred to again later in these reasons.

Statutory Requirements

- 16 The application to the Full Bench was made in accordance with Regulation 69 of the *Industrial Relations Commission Regulations 2005* in that each of the documents referred to in that regulation were filed with the Commission.
- 17 S55(2) of *the Act* refers to the publication of, in this case and by reference to s62(4), a notice of the application to alter the rules. As stated, this occurred in the WAIG on 25 January 2006. The error referred to in paragraph [15] above did not alter the character of the publication from being other than a publication of a notice of the application to alter the rules. s55(3) of *the Act* provides that an application shall not be listed for hearing before the Full Bench until the expiration of 30 days from the day on which the publication of the notice referred to in s55(2) has occurred. This subsection has been complied with, as the application was not heard until 8 March 2006, which is in excess of 30 days after the date of publication of the notice in the WAIG.
- 18 S55(4) of *the Act* provides that the Full Bench shall refuse an application unless it is satisfied that:
- (a) *the application has been authorised in accordance with the rules of the organisation;*
 - (b) *reasonable steps have been taken to adequately inform the members —*
 - (i) *of the intention of the organisation to apply for registration;*
 - (ii) *of the proposed rules of the organisation; and*
 - (iii) *that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,**and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;*
 - (c) *in relation to the members of the organisation —*
 - (i) *less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or*
 - (ii) *a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;*
 - (d) *in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and*
 - (e) *rules of the organisation relating to elections for office —*
 - (i) *provide that the election shall be by secret ballot; and*

(ii) conform with the requirements of section 56(1),

and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.”

- 19 As set out above, the application has been authorised in accordance with the rules of the applicant, thereby satisfying the requirement contained in s55(4)(a) of *the Act*. Additionally, the facts referred to earlier satisfy me that reasonable steps have been taken to adequately inform the members of the applicant of the three matters set out in s55(4)(b) of *the Act*, as modified for the purposes of considering a rule alteration application. Accordingly, I am satisfied that members have been afforded a reasonable opportunity to make an objection.
- 20 With respect to s55(4)(c) of *the Act*, the facts set out in Ms Walkington’s statutory declaration and statement establish that less than 5% of the members of the organisation have objected to the alteration of the rules. In fact, no-one has objected to the making of the application. Accordingly, I am satisfied that the requirement contained in s55(4)(c) has been complied with.
- 21 I am also satisfied that s55(4)(d) of *the Act* has been complied with. I make this finding on the basis of the contents of the rules relating to notice being provided to the members, as set out earlier, and the action which was taken by the applicant to provide notice to the members, providing a reasonable opportunity to object to the proposed rule alteration.
- 22 Rule 55(4)(e) of *the Act* does not apply, given that the rules for election of office bearers are not proposed to be altered by the present application.
- 23 S55(5) of *the Act* provides that:-
- “...the Full Bench shall refuse an application by the organisation under this section if a registered organisation whose rules relating to membership enable it to enrol as a member some or all of the persons eligible, pursuant to the rules of the first-mentioned organisation, to be members of the first-mentioned organisation unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in section 6, to permit registration.”
- 24 We were informed by the applicant’s representative that this subsection did not apply to the present application.
- 25 The contents of s56 of *the Act* are not relevant to the present application which does not seek to amend the rules of the applicant with respect to elections or secret ballots. Also, s58(3) of *the Act*, which provides for applications for authorisation of exclusionary membership rules, is not relevant to the present application.
- 26 Due to all of the above, the statutory requirements relevant to an application for the alteration to the rules of the applicant, in this instance, have been complied with.

Consideration and Additional Matters

- 27 S62(2) of *the Act* does not set out any additional criteria to guide the Full Bench in determining whether to give the authorisation referred to. The Full Bench should act, of course, in accordance with s26 of *the Act* and, in particular, as provided for in s26(1)(a), according to equity, good conscience and the substantial merits of the case. In my opinion, these considerations lead to the conclusion that the application ought to be granted in this instance. This is because all of the statutory requirements have been complied with. The rules of the applicant authorise the alteration to the rule which is sought and no-one has objected to the application. The facts contained in the explanatory note to the application set out that there are good reasons which support the alteration sought.
- 28 Accordingly, I would grant the application and authorise the Registrar to register the alteration to the rules of the applicant. The alteration should not however be in the same form as the notice published in the WAIG, due to the errors referred to in paragraph [15] above. I will now explain the genesis of the error and what I think should occur because of it.
- 29 During the course of the preparation of this matter for hearing, the registry discovered that there were typographical errors contained in the applicant’s rules, as presently contained in the registry. This arose because of an incorrect formatting of the rules by the registry, following the orders made by the Full Bench on 21 August 1998 in application No 1543 of 1998, as contained in the order set out at (1998) 78 WAIG 3421.
- 30 The rules, as published and maintained by the registry, following these orders, were in error in the following ways. The orders inserted a new Rule 6(a)(11) into the rules. This was correctly published. However, a new Rule 6(a)(12) was inserted as Rule 6(a)(12)(a). This was an incorrect action. Also incorrectly, the formatting of the rules was adjusted so that Rule 6(b) became Rule 6(a)(12)(b) and Rule 6(bb) became Rule 6(a)(12)(bb).
- 31 Finally, the formatting in Rule 6(c) – (f) was also adjusted so that each of these sub-rules appeared to be sub-rules of Rule 6(a)(12) and not simply Rule 6. This was also an incorrect action.
- 32 These incorrect actions were not corrected in subsequent applications to amend the rules of the applicant. For example, those set out in (2000) 80 WAIG 2462 and (2004) 84 WAIG 422.
- 33 Accordingly, in my opinion, the order which should be made in the present application is an order that the rules of the applicant be altered to reflect the form of the notice published in the WAIG, except that the rule published as Rule 6(a)(12)(a) should instead become Rule 6(a)(12), Rule 6(a)(12)(b) should become Rule 6(b) and Rule 6(a)(12)(bb) become Rule 6(bb).
- 34 I would also suggest and will request that the rules maintained and published by the registry are amended in such a way as to remove the formatting errors referred to above, in Rule 6(c) – (f).
- 35 During the course of the hearing on 8 March 2006, it was discussed with the applicant’s representative as to whether an amendment was required to the present application, given that the application, referred in the proposed Rule 6(a)(10) to the Health Services Union of Western Australia. This naming of the union left out the words “(Union of Workers)”, after the words “Western Australia”. The omitted words are part of the formal name of the union known as the Health Services Union. The Full Bench also pointed out to the applicant’s representative that the proposed rule contained some incorrect non-capitalisation in the names “Metropolitan Health service” and “Community Dental health Services” in the proposed altered rule, as included in this sentence.
- 36 The hearing of the application was adjourned so that the applicant’s representative could take instructions on whether a formal amendment application was required. In accordance with a direction made by the Full Bench, the applicant’s representative, 7 days later, advised in effect that the applicant did not seek to amend the application, unless the Full Bench thought it necessary to do so. In my opinion, it is not necessary for the applicant to amend the application. This is because although the matters referred to indicate some sloppiness in the presentation of the rule alteration application, it does not alter the meaning or

understanding of the proposed new rule in any way. The non-capitalisation can simply be corrected, in my opinion, in the rules to be published by the Registrar and authorisation is provided for this purpose. I do not think the reference to the "*Health Services Union*" needs to be amended to add "*(Union of Workers)*". This is because it is clear, especially by reference to the terms of the agreement quote earlier, which union is being referred to.

37 In my opinion, therefore, the application should be altered and an order made in the manner outlined in paragraphs [33] and [36] above.

COMMISSIONER P E SCOTT:

38 I have had the benefit of reading the reasons for decision of His Honour, the Acting President. I agree with those reasons and have nothing to add.

COMMISSIONER S M MAYMAN:

39 I have the advantage of reading the draft reasons for decision of His Honour, the Acting President. I agree with those reasons and have nothing further to add.

2006 WAIRC 03924

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	APPLICANT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN	
DATE	THURSDAY, 9 MARCH 2006	
FILE NO/S	FBM 5 OF 2005	
CITATION NO.	2006 WAIRC 03924	

Decision	Order and directions given
Appearances	
Applicant	Mr W Claydon as agent

Order and Directions

This matter having come on for hearing before the Full Bench on 9 March 2006, and having heard Mr W Claydon, as agent on behalf of the applicant, it is this day, 9 March 2006, ordered and directed that:-

- (1) The hearing and determination of this application herein be adjourned sine die.
- (2) The applicant within seven (7) days of the date of this order is to either file in the Registry of the Commission an application seeking to amend application FBM 5 of 2005 filed in the Registry of the Commission on 23 December 2005 or advise the Full Bench that it will not be seeking to amend the application.

By the Full Bench
(Sgd.) M T RITTER,
Acting President.

[L.S.]

2006 WAIRC 04119

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	APPLICANT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN	
DATE	WEDNESDAY, 5 APRIL 2006	
FILE NO/S	FBM 5 OF 2005	
CITATION NO.	2006 WAIRC 04119	

Decision	Application granted
Appearances	
Applicant	Mr W Claydon as agent

Order

This matter having come on for hearing before the Full Bench on 9 March 2006, and having heard Mr W Claydon as agent, on behalf of the applicant organisation, and the Full Bench having heard and determined the matter, and reasons for decision having been delivered on 31 March 2006, it is this day, 5 April 2006, ordered that the Registrar be authorised to register an alteration to the rules of the above-named applicant organisation so as to delete and replace rule 6(a)(10), and reformat the rules, as follows:-

“6 – MEMBERSHIP

- (a) Membership shall be confined to any person who is:
- (1) employed as an officer under and within the meaning of the Public Service Act, 1978-80; or
 - (2) employed under the Forests Act, the Main Roads Act or any Act now in force or hereafter enacted whereby any Board, Commission or other body is constituted to administer any such Act; or
 - (3) otherwise employed in any of the established Branches of the Public Service, including State trading concerns, business undertakings and government institutions controlled by Boards; or
 - (4) employed by the State of Western Australia; or
 - (5) employed by the Crown or by any Minister of the Crown in right of the State of Western Australia; or
 - (6) employed by any statutory body representing the State of Western Australia; or
 - (7) employed by any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of the State of Western Australia; or
 - (8) employed in either House of Parliament of the State of Western Australia either
 - (i) under the separate control of the President or Speaker or under their joint control; or
 - (ii) by a Committee appointed pursuant to the Joint Standing Rules and Orders of the Legislative Council and the Legislative Assembly.
 - (9) employed by any company or corporation in which issued shares are held by or for or on behalf of or in the interest of the State of Western Australia, or, if there are no issued shares, in which the Governing body by whatever name called includes nominees appointed by or on behalf of or in the interest of the State of Western Australia.
 - (10) in accordance with the agreement dated 30 May 2005 between the Civil Service Association of Western Australia and the Health Services Union of Western Australia as to the division of future membership coverage, a salaried employee (being a professional, administrative, clerical, technical and supervisory employee) employed either -
 - (i) by the Metropolitan Health Service or by any other Western Australian State government person, enterprise or corporation in the Perth Dental Hospital and Community Dental Health Services or any other entity or unit howsoever described or named which provides any of the services provided by the Perth Dental Hospital and Community Dental Service henceforth; or
 - (ii) by the Metropolitan Health Service or by any other Western Australian State government person, enterprise, corporation, agency or management unit for the provision of alcohol and drug addiction services in substitution of the operations and services provided by the Alcohol and Drug Authority.
 - (11) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Metropolitan Health Service Board ("Board") or by any other Western Australian State Government person, enterprise or corporation in the Perth Dental Hospital or any other such entity or unit howsoever described or named (including Perth Dental Hospital and Community Dental Services) which provides any of the services provided by Perth Dental Hospital or the Dental Services Branch of the Health Department of Western Australia as at 6 May 1998.
 - (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Board in the Graylands Selby - Lemnos and Special Care Health Services ("GSL") who, as at 6 May 1998 were financial members of the CSA until such time as they resign, retire or are permanently transferred or redeployed from the GSL or cease to be a member of the CSA.
- (b) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of the Civil Service Association of WA (Incorporated).
- (bb) Provided further that save and except for the employees referred to in Rule 6(a)(11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to the Rules of the Hospital Salaried Officers' of Western Australia (Union of Workers)) employed by the Boards of any public hospital constituted under the Hospital and Health

Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of the Civil Service Association of Western Australia (Inc).”

[L.S.]

By the Full Bench
(Sgd.) M T RITTER,
Acting President.

PRESIDENT—Matters dealt with

2006 WAIRC 04094

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION INTEGRATED GROUP LTD	APPLICANT
	-and-	
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS AND SKILLED RAIL SERVICES PTY LTD	RESPONDENTS
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT	
HEARD	THURSDAY, 9 MARCH 2006	
DELIVERED	MONDAY, 3 APRIL 2006	
FILE NO.	PRES 2 OF 2006	
CITATION NO.	2006 WAIRC 04094	

CatchWords	Industrial Law (WA) - Application to stay operation of order - Stay of order principles - Consequences of granting/not granting stay order - WorkChoices legislation - Application dismissed - <i>Industrial Relations Act 1979</i> (as amended), s49(11) - <i>Workplace Relations Act 1996</i> (Cth), s170VQ(4), Part VIE
Decision	Application dismissed
Appearances	
Applicant	Mr N Ellery (of Counsel), by leave
Respondents	Mr D H Schapper (of Counsel), by leave, on behalf of the Construction, Forestry, Mining and Energy Union of Workers Mr M C Borlase, as agent, on behalf of Skilled Rail Services Pty Ltd

PARTIES	SKILLED RAIL SERVICES PTY LTD	APPLICANT
	-and-	
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS AND INTEGRATED GROUP LTD	RESPONDENTS
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT	
HEARD	THURSDAY, 9 MARCH 2006	
DELIVERED	MONDAY, 3 APRIL 2006	
FILE NO.	PRES 3 OF 2006	
CITATION NO.		

CatchWords	Industrial Law (WA) - Application to stay operation of order - Stay of order principles - Consequences of granting/not granting stay order - WorkChoices legislation - Application dismissed - <i>Industrial Relations Act 1979</i> (as amended), s49(11) - <i>Workplace Relations Act 1996</i> (Cth), s170VQ(4), Part VIE
Decision	Application dismissed
Appearances	
Applicant	Mr M C Borlase, as agent
Respondents	Mr D H Schapper (of Counsel), by leave, on behalf of the Construction, Forestry, Mining and Energy Union of Workers Mr N Ellery (of Counsel), by leave, on behalf of Integrated Group Ltd

*Reasons for Decision (Extempore, Revised from the Transcript)***THE ACTING PRESIDENT:**

- 1 Before me today are two applications pursuant to s49(11) of the *Industrial Relations Act 1979* (as amended) (*the Act*). Both applications seek the stay of the operation of an order made by the Commission on 27 February 2006.
- 2 The order made by the Commission was for the making of a new award which was the *Iron Ore Production and Processing (Locomotive Drivers) Award 2006*, and the award was made in accordance with a schedule that set out the terms of the award.
- 3 Two appeals have been filed against the making of that order and that award by Integrated Group Ltd, firstly, and Skilled Rail Resources Pty Ltd, secondly. Both of those parties are named as respondents to the award and opposed the making of the award.
- 4 The award, according to the area and scope clause, applies to locomotive drivers working on the BHP Billiton Iron Ore Pty Ltd railroad who are employed by any person or company other than BHP Billiton Iron Ore Pty Ltd, and to all employers employing such persons. As I have said, the award was made by order on 27 February 2006 after hearings both last year and this year. The Commission published three sets of reasons; one in November 2005; one in January 2006; and one in February 2006, with which the order was made.
- 5 Both of the present applicants have filed notices of appeal. The notices of appeal are not identical in their grounds but, to some extent, they cover the same ground without going to the detail of those grounds of appeal.
- 6 Both of the applicants clearly satisfy the first requirement of s49(11) of *the Act* which is that they have sufficient interest in applying to the Commission for a stay as the respondents to the award and as the current appellants. Given the notices of appeal they clearly have that characterisation.
- 7 The parties today seem to be in agreement as to the principles which ought to apply to the granting or refusing of a stay. These principles are set out in some detail in my reasons in *John Holland Group Pty Ltd v CFMEU* (2005) 85 WAIG 3918. I will not repeat all of what was said in those reasons. I bear in mind, in particular, the reference to the decision of the *Federal Commissioner of Taxation and Myer Emporium Limited (No 1)* (1986) 160 CLR 220 where Dawson J of the High Court said at page 222 that the discretion:-

"... to order a stay of proceedings is only to be exercised where special circumstances exist which justify a departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal ... Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory ... Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of reasonably recovering moneys paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it would not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed."

- 8 I also referred, in the *John Holland* reasons to the decision of the Full Court of the Supreme Court of Western Australia, constituted by Murray and Parker JJ, of *Eastland Technology Australia Pty Ltd and Others v Whisson* (2003) 28 WAR 308. Their Honours at page 311 set out the applicable principles in a number of dot points which were distilled from the relevant authorities. These are:-

"• The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.

• It is for the applicant for a stay to move the court to a favourable exercise of its discretion.

• It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.

• The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.

• If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.

• If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted."

- 9 I have regard in particular to the fourth dot point.
- 10 I will apply these principles in considering this matter. As stated none of the parties have suggested that I should do otherwise.
- 11 Accordingly, the key issue to look at in whether to grant the stay or not is the consequences of the granting of the stay or not granting the stay in the context of the preservation of the integrity of the applicant's appeals today.
- 12 There was some discussion by the parties before me as to the strength or otherwise of the grounds of appeal of both applicants. I have said also in the *John Holland* decision that it is unnecessary to form a firm view as to the extent of the merits of the appeals because it would be inappropriate to do so at this stage, having regard to what might be the fuller arguments to be heard by the Full Bench. I do have to be satisfied, however, that there is a serious question, or serious questions to be tried before a stay could be granted.
- 13 Having regard to all of the arguments heard today, I am prepared to assume at this stage that there is a serious question to be tried. I make the comment in this way because I am satisfied that the application for the stay should be refused on other grounds.
- 14 I make this comment having regard to all of the arguments made today by Mr Ellery and Mr Borlase. In particular, I have regard to the written submissions which were provided by Mr Ellery and which are supported by Mr Borlase.
- 15 At paragraphs 4 and 5 of those written submissions there is reference to the fact that the appeals could be determined in a speedy fashion. It was noted that there are related appeals listed to be heard on 24 March 2006. Both applicants have indicated that they wish for these appeals to be heard at the same time before the same Full Bench, and there is an undertaking to provide the appeal books to the Commission by 14 March 2006 to assist in that process.

- 16 As pointed out during submissions, there are some difficulties to the appeals being heard on that date. They may not be insurmountable difficulties, but it is not simply a matter that I can determine today, partly because it is for the Chief Commissioner to allocate Commissioners to hear appeals. It is not a matter simply for the President to determine, but I accept what the applicants today say, that they will endeavour to have the matters heard on the 24 March 2006, if possible, and if not, as soon thereafter as they can arrange. That is a matter, to some extent, in support of the granting of the stay, but is not decisive.
- 17 The applicants also refer to the fact that there are no current employees who are employed by either of the applicants who would be affected by the terms of the award. This is because of the fact that all of their present employees are engaged under Australian Workplace Agreements and because of the contents of s170VQ(4) of the *Workplace Relations Act 1996* (Cth). Accordingly the award has no immediate impact on their employment.
- 18 This is a matter which, in my view, cuts both ways, and does not of itself necessarily support the application for a stay. In support of the application the present applicants put it that if the stay is granted there are no fruits of the litigation which are denied to the respondent. On the other hand, it can be said that there is nothing which the present applicants need to do pursuant to the award which affects them in any way.
- 19 The next point that is made by the applicants is contained in paragraphs 11 and 14 of the written submissions filed by Mr Ellery's client. It is said that:-
"If the stay is not granted the award would have effect for the purposes of the "No Disadvantage Test" if Integrated sought to engage any more employees pursuant to AWAs pending the outcome of any appeal."
- 20 Reference is made to Part VIE of the *Workplace Relations Act 1996* (Cth). The written submissions contend that:-
"Necessarily, any new employees would therefore be paid considerably higher wages and conditions than employees currently employed. This would lead to confusion, disruption and disputation in the workplace, and is therefore undesirable."
- 21 Mr Borlase, in his submissions, elaborates upon this point by reference to paragraph 5 of the written submissions of the respondent which have been filed in these proceedings. It is also said in Mr Ellery's submissions that the alternative is that the applicant could choose not to hire any new employees to avoid the outcome his submission referred to. He submits that is hardly a desirable or fair result.
- 22 I take into account these points made, but the difficulty with them for present purposes, and in considering whether the appeal could be rendered nugatory if a stay is not granted, is the speculative nature of the submissions. In referring to the submissions as speculative I mean no disrespect to the arguments made, but by necessity they are based on speculation as to whether the applicants will or might engage other employees during the period over which a stay would be operable. The matters referred to are the subject of no evidence before the Commission, and I cannot really take these matters any further, other than to consider them as a possibility, but could not put it any higher than that.
- 23 Because of its speculative nature, and the fact that it is simply a possibility, I cannot accept the applicants' submission that as a result of these matters the subject matter of the litigation would be irretrievably altered in the interim up to the determination of the appeal. That submission, it seems to me, is based on too many degrees of speculation to uphold it.
- 24 All parties have also referred to the pending WorkChoices legislation. The relevant aspects of the WorkChoices legislation are not presently in effect. I think it is notorious that statements have been made by the Minister for Employment and Workplace Relations that the relevant parts are likely to come in effect in late March 2006. I take into account that statement for the purpose of these applications.
- 25 There was also some discussion, at least with Mr Schapper, as to whether one should have regard to the effect, or possible effect, of the WorkChoices legislation in the present matter. In my view, on this occasion, and for the purposes of granting a stay, or not granting a stay, it is necessary to have a look, to the extent one can, at the impact or possible impact of the WorkChoices legislation.
- 26 The reason for this is the necessity in these applications to cast an eye to the future to try to determine what the consequences are of a stay being granted or not being granted. And for those purposes possible impacts of other legislation needs to be taken into account.
- 27 In this regard it is important, I think, to note aspects of the submissions made by Mr Schapper for the respondent. In particular, I have regard to what he says in paragraphs 8 and 9 of his written submissions. There it is submitted:-
"8. *If the award is in force at the commencement of the legislation the rates in it will become an Australian Fair Pay and Conditions Standard: s9OZD. The scope of the AFPCS will be the same as the scope of the award: 9OZD(1)(f) and will apply to any new employee, AWA or otherwise: s89A(1), 89B*
9. *Thus, through this mechanism, the pay provisions of the award will effectively continue to apply. But this is so only if the award is in force at the date of commencement of the legislation. If it is stayed pending the appeal it will not be in force if, as appears likely, commencement is during the period of the stay. Subsequent dismissal of the appeal and lifting of the stay will not alter the fact that it was not in force at the date of commencement. On the other hand if it is not stayed but the appeal is subsequently upheld and the appeal quashed, it is well arguable that the award was not in force at commencement."*
- 28 The sections referred to are to sections of the *Workplace Relations Act 1996* (Cth). Neither of the applicants submitted that what Mr Schapper there set out was not going to be a possible effect of the WorkChoices legislation.
- 29 It was said on the applicants' behalf that there could be permanent consequences affecting their clients too if they were to employ people and the *Workplace Relations Act 1996* (Cth) took into account the award as an award in force at the present time, or in late March 2006, but where the award was later set aside on appeal.
- 30 I accept that there are possible ramifications for the applicants as well and that some of those may have an enduring quality, but it seems to me in a situation where there may be possible effects one way or the other way of an enduring nature, then the appropriate course is to keep to the status quo. That is consistent with the authorities which state that the respondent is entitled to the fruits of their litigation.
- 31 Because of the difficulties with the applicant's submissions as to whether they may or may not hire any employees during the relevant intervening periods, I cannot, in my view, take the matter any further, to say that there will necessarily be some impact upon the applicants if a stay is not granted such that the grant of a stay should occur. That is to say, overall I am not satisfied

that the integrity of the appeals will be compromised to the relevant extent if stays are not granted, such that it would be appropriate to order the granting of a stay. I do not think that the appeals will be rendered nugatory if the stay is not granted.

32 For these reasons, therefore, I am of the view that both applications ought to be dismissed.

2006 WAIRC 03928

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INTEGRATED GROUP LTD

APPLICANT

-and-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS;
SKILLED RAIL SERVICES PTY LTD

RESPONDENTS

CORAM THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE FRIDAY, 10 MARCH 2006
FILE NO/S PRES 2 OF 2006
CITATION NO. 2006 WAIRC 03928

Decision Application dismissed.
Appearances
Applicant Mr N Ellery (of Counsel), by leave
Respondents Mr D H Schapper (of Counsel), by leave on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Mr M C Borlase as agent, on behalf of Skilled Rail Services Pty Ltd

Order

This matter having come on for hearing before me on 9 March 2006, and having heard Mr N Ellery (of Counsel), by leave, on behalf of the applicant and Mr D H Schapper (of Counsel), by leave on behalf of the first named respondent, and Mr M C Borlase as agent, on behalf of the second named respondent, and my reasons for decision given ex tempore and to be edited and published at a future date, it was, on 9 March 2006, ordered that application No PRES 2 of 2006 be dismissed.

[L.S.]

(Sgd.) M T RITTER,
Acting President.

2006 WAIRC 03929

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SKILLED RAIL SERVICES PTY LTD

APPLICANT

-and-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS;
INTERGRATED GROUP LTD

RESPONDENTS

CORAM THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE FRIDAY, 10 MARCH 2006
FILE NO/S PRES 3 OF 2006
CITATION NO. 2006 WAIRC 03929

Decision Application dismissed.
Appearances
Applicant Mr M C Borlase, as agent
Respondents Mr D H Schapper (of Counsel), by leave, on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Mr N Ellery (of Counsel), by leave, on behalf of Integrated Group Ltd

Order

This matter having come on for hearing before me on 9 March 2006, and having heard Mr M C Borlase as agent, on behalf of the applicant and Mr D H Schapper (of Counsel), by leave on behalf of the first named respondent, and Mr N Ellery (of Counsel), by leave, on behalf of the second named respondent, and my reasons for decision given ex tempore and to be edited and published at a future date, it was, on 9 March 2006, ordered that application No PRES 3 of 2006 be dismissed.

[L.S.]

(Sgd.) M T RITTER,
Acting President.**AWARDS/AGREEMENTS—Application for—****2006 WAIRC 04104****F.C.L. CONSTRUCTION / CFMEUW INDUSTRIAL AGREEMENT 2005-2008**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	APPLICANT
	-v-	
	THE MASON FAMILY TRUST T/A FCL CONSTRUCTION	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR	
DATE	TUESDAY, 4 APRIL 2006	
FILE NO	AG 176 OF 2005	
CITATION NO.	2006 WAIRC 04104	

Result	Discontinued
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Order

WHEREAS on 27th July 2005 The Construction, Forestry, Mining and energy Union of Workers applied to register an industrial agreement pursuant to s.41 of the *Industrial Relations Act, 1979*; and

WHEREAS on 29th March 2006 The Construction, Forestry, Mining and Energy Union of Workers lodged a Notice of Discontinuance and the Commission decided to discontinue the application.

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.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.**2006 WAIRC 04101****GFWA CONTRACTING / CFMEUW INDUSTRIAL AGREEMENT 2005-2008**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	APPLICANT
	-v-	
	GFWA CONTRACTING PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR	
DATE	TUESDAY, 4 APRIL 2006	
FILE NO	AG 253 OF 2005	
CITATION NO.	2006 WAIRC 04101	

Result	Discontinued
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Order

WHEREAS on 24th October 2005 The Construction, Forestry, Mining and energy Union of Workers applied to register an industrial agreement pursuant to s.41 of the *Industrial Relations Act, 1979*; and

WHEREAS on 21st March 2006 The Construction, Forestry, Mining and Energy Union of Workers lodged a Notice of Discontinuance and the Commission decided to discontinue the application.

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.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 04103

GROVE CONSTRUCTION SERVICES / CFMEUW INDUSTRIAL AGREEMENT 2005-2008

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

GLENMORE TRUST AND FRAWLEY FAMILY TRUST T/A GROVE CONSTRUCTION SERVICES

RESPONDENT

CORAM SENIOR COMMISSIONER J F GREGOR

DATE TUESDAY, 4 APRIL 2006

FILE NO AG 205 OF 2005

CITATION NO. 2006 WAIRC 04103

Result Discontinued

Order

WHEREAS on 23rd August 2005 The Construction, Forestry, Mining and energy Union of Workers applied to register an industrial agreement pursuant to s.41 of the *Industrial Relations Act, 1979*; and

WHEREAS on 30th March 2006 The Construction, Forestry, Mining and Energy Union of Workers lodged a Notice of Discontinuance and the Commission decided to discontinue the application.

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.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 04137

INGHAMS ENTERPRISES SECURITY OFFICERS ENTERPRISE AGREEMENT (WA) 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

INGHAMS ENTERPRISES PTY LTD

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE THURSDAY, 6 APRIL 2006

FILE NO/S AG 19 OF 2006

CITATION NO. 2006 WAIRC 04137

Result Discontinued

Order

WHEREAS on 9 February 2006 the Applicant applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979*; and

WHEREAS the matter was set down for hearing on 10 April 2006; and

WHEREAS on 5 April 2006 the Applicant lodged a Notice of Discontinuance and the Commission decided to discontinue the proceedings and the hearing was vacated;

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.

[L.S.]

(Sgd.) J L HARRISON,
 Commissioner.

2006 WAIRC 04050

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PUBLIC TRANSPORT AUTHORITY

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST
 AUSTRALIAN BRANCH

RESPONDENT

CORAM COMMISSIONER J H SMITH
DATE FRIDAY, 24 MARCH 2006
FILE NO/S A 2 OF 2006
CITATION NO. 2006 WAIRC 04050

Result New award made
Representation
Applicant Mr D C McLane and Ms J Bishop
Respondent Mr G W Ferguson and Mr R Christison

Order

Having heard Mr McLane and Ms Bishop on behalf of the Applicant and Mr Ferguson & Mr Christison 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 Public Transport Authority (Transwa) Award 2006 be made in accordance with the following schedule and that such award shall have effect from the beginning of the first pay period commencing on or after Friday, 17 March 2006.

[L.S.]

(Sgd.) J H SMITH,
 Commissioner.

SCHEDULE

1. – AWARD STRUCTURE

1.1 - TITLE

1.1.1 This Award shall be known as the Public Transport Authority (Transwa) Award 2006.

1.2 – ARRANGEMENT

1. AWARD STRUCTURE
 - 1.1 TITLE
 - 1.2 ARRANGEMENT
 - 1.3 AREA AND SCOPE
 - 1.4 TERM
 - 1.5 INTRODUCTION OF CHANGE
 - 1.6 DEFINITIONS
2. CONTRACT OF EMPLOYMENT
 - 2.1 CONTRACT OF EMPLOYMENT
 - 2.2 STAND DOWN
 - 2.3 EMPLOYEES PERFORMING HIGHER DUTIES
 - 2.4 CHARGES AGAINST EMPLOYEES
3. HOURS OF WORK
 - 3.1 HOURS OF DUTY AND 38 HOUR WEEK
 - 3.2 OVERTIME PAYMENTS
 - 3.3 MEAL AND REST BREAKS
 - 3.4 MINIMUM TIME OFF DUTY
 - 3.5 GUARANTEED WEEK'S WORK
4. CLASSIFICATION AND PAY RATES
 - 4.1 MINIMUM ADULT AWARD WAGE
 - 4.2 CLASSIFICATION AND PAY RATES
 - 4.3 PAYMENT OF WAGES

5. ALLOWANCES
 - 5.1 SHIFT WORK
 - 5.2 TEMPORARY TRANSFER ALLOWANCE
 - 5.3 ON CALL ALLOWANCE
 - 5.4 UNIFORMS AND PROTECTIVE CLOTHING
 - 5.5 AWAY FROM HOME AND MEAL ALLOWANCES
 - 5.6 HELD AWAY FROM HOME ALLOWANCE
 - 5.7 FREE PASSES, PRIVILEGE TICKETS ETC
6. LEAVE
 - 6.1 PUBLIC HOLIDAYS
 - 6.2 ANNUAL LEAVE
 - 6.3 ANNUAL LEAVE LOADING
 - 6.4 ANNUAL LEAVE LIST
 - 6.5 BEREAVEMENT LEAVE
 - 6.6 SICK LEAVE
 - 6.7 CARER'S LEAVE
 - 6.8 PARENTAL LEAVE
 - 6.9 LEAVE TO ATTEND UNION BUSINESS
 - 6.10 LONG SERVICE LEAVE
 - 6.11 WITNESS AND JURY SERVICE LEAVE
 - 6.12 CULTURAL AND CEREMONIAL LEAVE
 - 6.13 BLOOD AND PLASMA DONORS LEAVE
 - 6.14 STUDY LEAVE
 - 6.15 PURCHASED LEAVE – 48/52 WAGES ARRANGEMENT
 - 6.16 EMERGENCY SERVICES LEAVE
 - 6.17 DEFENCE FORCE RESERVES LEAVE
 - 6.18 PAID LEAVE FOR ENGLISH LANGUAGE TRAINING
 - 6.19 LEAVE WITHOUT PAY
7. DISPUTE RESOLUTION PROCEDURE
8. REGISTERED ORGANISATION MATTERS
 - 8.1 RIGHT OF ENTRY
 - 8.2 FACILITIES FOR WORKPLACE DELEGATES
 - 8.3 CONSULTATION
9. MARSHALLING
10. RAILCAR OR LOCOMOTIVE CONFIGURATIONS
11. KNOWLEDGE OF ROADS
12. PREPARING AND STABLING ENGINES
13. WHERE TO GO FOR FURTHER INFORMATION
14. OTHER LAWS AFFECTING EMPLOYMENT
15. NAMED PARTIES TO THE AWARD

1.3 - AREA AND SCOPE

- 1.3.1 This Award extends to and binds the Public Transport Authority of Western Australia and The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch and applies to employees engaged by the Authority within Transwa in any of the classifications contained in clause 4. - Classification and Pay Rates of this Award.

1.4 - TERM

- 1.4.1 The term of this award will operate for a period of twenty-four months from the date it is made and will remain in force until suspended, cancelled or replaced.

1.5 - INTRODUCTION OF CHANGE

- 1.5.1 Employer's Duty to Notify:

- (a) Where the employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and their union.
- (b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs. Provided that where the Award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

- 1.5.2 Employer's Duty to Discuss Change:

- (a) The employer shall discuss with the employees affected and their union the introduction of the changes referred to in subclause 1.5.1 hereof, the effects the changes are likely to have on employees, the measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or their union in relation to the changes.
- (b) The discussion shall commence as early as practicable after a firm decision has been made by the employer to make the changes referred to in subclause 1.5.1 hereof.
- (c) For the purposes of such discussion, the employer shall provide 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 affect employees, provided that the employer shall not be required to disclose confidential information which would be inimical to the employer's interests.

1.6 – DEFINITIONS

- 1.6.1 "ARTBIU" and Union means The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch.
- 1.6.2 "Authority" and "PTA" means The Public Transport Authority of Western Australia.

- 1.6.3 “Award” means the Public Transport Authority (Transwa) Award 2006.
- 1.6.4 “Base rate of pay” means the ‘ordinary time’ hourly rate of pay multiplied by 38 which is set out in the table in clause 4.2 – Classification and Pay Rates of this Award.
- 1.6.5 “Casual Employee” means an employee engaged by the hour and paid a loading of 20% on ordinary time hours in lieu of all forms of leave entitlements except for bereavement leave.
- 1.6.6 “Competency” means knowledge and skills and the application of the knowledge and skills to the standards of performance required in the workplace consistent with the relevant criteria under the Australian Qualifications Framework (AQF) guidelines.
- 1.6.7 “Employer” means the Public Transport Authority of Western Australia.
- 1.6.8 “Full Time Employee” means an employee employed on not less than a 38 hour per week basis.
- 1.6.9 “Part Time Employee” means an employee employed for less than 38 hours per week who enjoys, on a pro-rata basis, all of the entitlements of a full time employee.
- 1.6.10 “Penalty Rates” means the pay rate of ‘time and a half’ which is 1.5 times the ‘ordinary time’ hourly rate of pay, and the pay rates of ‘double time’ and ‘double time and a half’ which are 2 times and 2.5 times the ‘ordinary time’ hourly rate of pay respectively.
- 1.6.11 “Rostered Days and Shifts” means the days or shifts that have been rostered to make up the roster cycle.
- 1.6.12 “Transwa” is an integral part of the PTA and the operator of the WA Government’s regional rail and country road coach passenger services, operating diesel powered railcars over the WestNet rail network and road coaches in areas of country WA.
- 1.6.13 “Commission” and “WAIRC” means the Western Australian Industrial Relations Commission.

2. - CONTRACT OF EMPLOYMENT

2.1 – CONTRACT OF EMPLOYMENT

- 2.1.1 The employer shall advise each employee, prior to the time of engagement, if they are to be employed as a permanent full time employee or a permanent part-time employee or a casual employee.
- 2.1.2 Probation for new employees –
- (a) A new employee’s appointment to a position in Transwa with the Public Transport Authority will be subject to a probationary period of three months, which may be extended up to another three months by express agreement between the parties.
- (b) Subject to satisfactory performance an employee’s appointment will be confirmed at the conclusion of the probationary period.
- (c) During the probationary period, if the employee’s performance is not satisfactory, the employer may terminate the contract of employment by giving the employee one week’s notice or payment in lieu of notice.
- 2.1.3 Notice of Termination by Employer
- (a) The employment of any employee (other than a casual employee) may be terminated by the following notice period provided that an employee has not been dismissed on the grounds of serious misconduct in which case the employee shall be paid up to the time of dismissal.

Employee’s Period of Continuous Service with the Employer	Period of Notice
Not more than one (1) year	At least one (1) week
More than one (1) year but not more than (3) years	At least two (2) weeks
More than three (3) years but not more than five (5) years	At least three (3) weeks
More five (5) years	At least four (4) weeks

- (b) An employee who at the time of being given notice is over forty five (45) years of age and has completed two (2) years’ continuous service with the employer shall be entitled to one (1) weeks additional notice.
- 2.1.4 Payment in lieu of notice prescribed in 2.1.3(a) and (b) shall be made if an appropriate notice period is not given. The employment may be terminated by part of the period specified and part payment in lieu thereof.
- 2.1.5 In calculating any payment in lieu of the notice the employer shall pay the employee the ordinary wages for the period of notice had the employment not been terminated.
- 2.1.6 The period of notice an employee must give to their employer, is the same as applies to the employer, except the extra week for being forty- five (45) years of age; provided the employer and the employee may agree to a shorter period of notice.
- 2.1.7 The employer may summarily dismiss an employee deemed guilty of gross misconduct or neglect of duty and the employee shall not be entitled to any notice or payment in lieu of notice.
- 2.1.8 Nothing in this Award shall be construed to reduce the wage of any employee below the rate actually received on the date this Award is issued.

2.2 – STAND DOWN

- 2.2.1 Where on any day or part of a day, the employer is unable to provide useful work for the employee as a result of:
- (a) Industrial action, whether or not on the part of the employer’s employees; or
- (b) Any cause outside the employer’s control,
- the employer is entitled to stand down the employee and not pay the employee for the day or part of a day.
- 2.2.2 Subject to the employer’s approval the employee may elect to have the day or part day paid as annual leave provided the employee has such leave entitlement.
- 2.2.3 Any period for which the employee is not paid under the provisions of Clause 2.2.1 will count as service for the accrual of leave to which the employee would otherwise be entitled under this award, provided that the employee resumes work as required at the end of such period.

2.3 - EMPLOYEES PERFORMING HIGHER DUTIES

- 2.3.1 An employee engaged on duties carrying a higher rate than the employee's ordinary classification shall be paid the higher rate as follows:
- 2.3.2 Where the employee is engaged for more than one half day or shift they shall be paid for the day or shift.
- 2.3.3 Where the employee is employed for one-half or less than one half of one day or shift they shall be paid the higher rate for the time actually worked.
- 2.3.4 Any acting of less than twenty minutes shall not be counted or paid.
- 2.3.5 The conditions applicable to the higher duties shall apply.
- 2.3.6 Any employee required to perform work in a lower grade for any shift or portion thereof shall not have their wages reduced whilst employed in such lower capacity.

2.4 - CHARGES AGAINST EMPLOYEES

- 2.4.1 The employer may reprimand, fine, suspend from duty, reduce in grade, dismiss or remove an employee from their duties provided that the notification to the employee of any such action shall always be in writing and shall state the reason for the action being taken.
- 2.4.2 An employee shall provide if called upon, with the least possible delay, any report or statement which may be required by the employer.
- 2.4.3 When an employee against whom a charge is pending has made a statement to the employer and that statement has been taken down in writing, the employee shall be provided with a copy of the statement.
- 2.4.4 If in the opinion of the employer, the action of any employee should lead to a charge or discipline, the following process shall be commenced within seven days of the employer's first knowledge of the actions occurrence.
- 2.4.5 The employee shall be notified at the time the employer commences the disciplinary process that the disciplinary process has been commenced against him or her.
- 2.4.6 When a charge has been made against an employee, the employee shall be supplied with a copy of the charge and any reports upon which it is based. No charge shall in any case be laid after the expiration of 30 days from the date of the occurrence.
- 2.4.7 If a final decision in any case in which a charge has been made against an employee is not given within three (3) calendar months of the occurrence first coming to the knowledge of the employer or within fourteen (14) days of the final determination of any charge relating to the occurrence brought against the employee by a party other than the employer (whichever is the later) the charge in question shall lapse.
- 2.4.8 An employee who is suspended from duty for any reason shall not be kept under suspension in excess of six (6) rostered days following the date on which the employee was suspended except in cases where dismissal follows suspension. An employee shall be paid for any time under suspension in excess of six days, provided the employee has not delayed the submission of the employee's explanation of the offence for which the employee was suspended.
- 2.4.9 Where an employee exercises the right to challenge the employer's decision by invoking the Dispute Resolution Procedure clause of this Award, no deduction shall be made from the employee's wages in respect of any fine until a final decision has been made.
- 2.4.10 Where an employee has been fined an amount exceeding one day's pay, the amount to be deducted from any fortnight's pay shall not be greater than one day's pay, except with the consent of the employee concerned.
- 2.4.11 Where, owing to absence from duty of an employee through sickness or other authorised absence, it is not possible to notify the employee within the period prescribed in sub clause 2.4.4 that the employee has been reported, the provision shall be regarded as having been complied with if the employee is so notified within seven (7) days of resuming duty following such absence. In such cases, the period in which the final decision as per sub-clause 2.4.7 may be made shall be extended to three (3) calendar months from the date of the employee's resumption of duty following absence.

3. - HOURS OF WORK

3.1 - HOURS OF DUTY AND 38 HOUR WEEK

- 3.1.1 The ordinary hours of employment for Full Time Employees shall be thirty-eight (38) hours per week and shall consist of five shifts worked between Monday and Saturday inclusive which shall constitute a week's work.
- 3.1.2 Rosters, when first posted, shall show one rostered day off between Monday and Saturday. No shift shall be less than seven hours. The employer shall arrange, as far as practicable, shifts that shall not exceed eight and a half hours and, except in cases of emergency or where relief cannot be provided, an employee shall not be required to remain on duty for more than ten (10) hours.
- 3.1.3 Notwithstanding the provisions of sub clause 3.1.1 the thirty eight hour (38) week shall be worked in accordance with the following provisions;
- (a) The calendar year will be divided into thirteen (13) 4 weekly cycles.
 - (b) The ordinary hours of employment in each cycle will be 160 hours on a forty (40) hour week basis.
 - (c) Eight (8) hours in each cycle (2 hours per week) will be accumulated for subsequent clearance as an extra day off.
 - (d) Subject to reasonable notice of not less than five days, the accumulated extra days off are to be taken in one or two parts at the employer's discretion provided that a lesser period of notice may be given with the consent of the employee.
 - (e) Extra days off may be taken in anticipation of the credit time to be worked in any one-leave year subject to the provisions of paragraph (d) hereof.
 - (f) The employer shall grant, upon receipt of a written request from an employee, to clear extra days off when taking annual leave and or public holidays as provided for in this Award.

- (g) At the end of the leave year, or on the termination of the employee's services if sooner, an adjustment to the employee's entitlements will be made for any extra days off taken during the leave to which the employee, through subsequent service, has not become entitled.
- 3.1.4 A rostered day off shall be 24 hours commencing 0001 hours to 2400 hours on the day designated as the rostered day off.
- 3.1.5 Part Time Employees may be rostered to work up to five shifts between Monday and Saturday inclusive which shall constitute a week's work.
- 3.1.6 Part Time Overtime Payment
- (a) All time worked in excess of 7.6 rostered ordinary hours of duty daily shall be paid at the rate of time and a half for the first three hours and double time thereafter, provided that all time paid at the rate of double time shall stand alone and be paid for in addition to the week's work.
- (b) Overtime shall be calculated on the daily or weekly basis, whichever of these alternatives gives the greater amount.

3.2 - OVERTIME PAYMENTS

- 3.2.1 Public Holidays
- (a) Employees required to work on a Public Holiday shall be paid for all time worked at the rate of time and a half for the first 8 hours worked on any shift on that day and at the rate of double time and a half for all time worked in excess of eight hours on any shift in lieu of all other penalties which may be payable for work on that day under this award, provided that a minimum payment of seven (7) hours shall be paid to the employee concerned.
- (b) In addition to payment described in (a) above an employee required to work on a Public Holiday shall be paid a further eight hours, provided that the employee may elect in lieu of being paid for that eight hours, to be granted a day's holiday with pay which may be cleared with the annual leave or taken at some subsequent date when the employee so agrees.
- 3.2.2 Where an employee is called upon to commence, or works any part of, a shift during such employee's rostered day off the employee shall be paid at the rate of double time for all time worked for that shift.
- 3.2.3 Daily – Weekly
- (a) All time (exclusive of Sunday time) worked in excess of forty hours in any one week shall be paid at the rate of time and a half.
- (b) All time worked in excess of 8 hours in any one of the first five shifts in a week shall be paid for at the rate of time and one half for the first three hours and double time thereafter, provided that all time paid at the rate of double time shall stand alone and be paid for in addition to the week's work.
- (c) Overtime provided for in (a) and (b) of this sub clause shall not be paid twice but payment shall be calculated on the daily or weekly basis, whichever of these alternatives gives the greater amount.
- (d) The overtime rates shall be computed on the rate applicable to the day on which the overtime is worked provided that double time shall be the maximum.
- 3.2.4 Sunday and Saturday
- (a) All time worked on a Sunday shall be paid at the rate of double time, and all ordinary time worked on Saturdays by shift workers shall be paid at time and a half. For the purposes of this sub-paragraph "shift workers" means employees whose usual hours of duty commence and complete other than during the period 0700 hours and 1730 hours.
- (b) Employees employed after 1230 hours on Saturday shall be paid at the rate of time and a half for all time worked on that day prior to and after 12.30 hours.
- (c) All time worked (exclusive of Sunday time) worked in excess of forty (40) hours in any one-week shall be paid at the rate of time and a half.
- (d) Where an employee works a continuous shift Sunday into Monday, such shift, unless it extends into four hours on Monday, will not be counted as one of the five week day shifts.
- (e) No employee shall be brought on duty on a Sunday for less than seven hours' work.

3.3 - MEAL AND REST BREAKS

- 3.3.1 An employee, on shift, shall be entitled to a paid crib break of twenty minutes in duration without deduction of pay, arranged to be taken after the completion of the third and before the completion of the fifth hours of duty.
- 3.3.2 A second meal break of not less than fifteen minutes shall be allowed after an employee has been on duty nine hours, without deduction of pay, when it reasonably expected that such duty will continue for at least a further hour.

3.4 - MINIMUM TIME OFF DUTY

- 3.4.1 Each driver shall be allowed off duty for a minimum of twelve hours, except as provided hereunder.
- 3.4.2 Notwithstanding the provisions of Clause 3.4.3, the period off duty shall be calculated from the actual time the employee is released from duty by the employer.
- 3.4.3 When an employee is brought on duty without the prescribed period of rest, such employee shall be paid continuous duty as from the time the employee booked on the previous shift for which the employee had less than the stipulated rest period. This shall not apply where the time by which the rest period falls short of the prescribed time does not exceed sixty (60) minutes, in which case the employee shall be paid at the double rate for the time between the actual rest period and the minimum period of the rest prescribed in this Award.
- 3.4.4 No employee shall be called or booked up for duty without having the prescribed period of rest while there is another qualified employee available who has had the prescribed rest.

3.5 - GUARANTEED WEEK'S WORK

- 3.5.1 The employer shall guarantee to each fulltime employee a full week's work of up to forty (40) hours, exclusive of Sunday work, except during such period as by reason of any action on the part of any section of its employees or for any cause

beyond the employer's control, it is unable wholly or partially to carry on the running of the trains. Each week shall stand by itself.

- 3.5.2 Where in any week an employee is on annual leave, long service leave, workers' compensation, leave without pay, or days in lieu of public holidays worked, the guarantee provided in sub clause 3.4.1 shall be reduced by 0.4 hours in respect of each day's absence.

4. - CLASSIFICATION AND PAY RATES

4.1 - MINIMUM ADULT AWARD WAGE

- 4.1.1 No Adult employee shall be paid less than the Minimum Adult Wage unless otherwise provided by this clause.
- 4.1.2 The Minimum Adult Wage for a full time adult employee is \$484.40 per week payable on and after 7th July 2005.
- 4.1.3 The Minimum Adult Award Wage of \$484.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case Decisions.
- 4.1.4 Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.
- 4.1.5 Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this Award to the Minimum Adult Award Wage of \$484.40 per week.
- 4.1.6 (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.
- (b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Wage.
- 4.1.7 Subject to this clause the Minimum Adult Award Wage shall:
- (a) apply to all work in ordinary hours;
- (b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this Award.
- 4.1.8 The rates of pay in this Award include the minimum weekly wage for adult employees payable under the 2005 State Wage Case Decision. Any increase arising from the insertion of the Minimum Adult Award Wage will be offset against any equivalent amount in rates of pay received by employees whose wage and conditions of employment are regulated by this Award, which are above 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 enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under the previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the Minimum Adult Award Wage.
- 4.1.9 Adult Apprentices
- (a) Notwithstanding the provisions of this clause, an apprentice, twenty-one (21) years of age or over, shall not be paid less than \$406.70 per week.
- (b) The rate paid at (a) hereof above is payable on superannuation and during any period of paid leave prescribed by this Award.
- (c) Where in this Award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of the apprenticeship.
- (d) Nothing in this sub-clause shall operate to reduce the rate of pay fixed by this Award for an adult apprentice in force immediately prior to 5 June 2003.

4.2- CLASSIFICATION AND PAY RATES

- 4.2.1 The following wage rates shall apply to the classifications below:

Position	Flat Hourly Rate	38 Hour Weekly Rate
Railcar Driver Coordinator	\$30.63	\$1163.80
Railcar Driver	\$27.47	\$1043.70
Depot Supervisor	\$19.67	\$747.27
Road Coach Operators L6	\$18.84	\$715.81
Senior Passenger Assistant L6	\$18.84	\$715.81
Road Coach Operator Assistant L5	\$18.15	\$689.85
Operations Assistant L5	\$18.15	\$689.85
Passenger Assistant L3	\$16.27	\$618.27

- 4.2.2 The following provisions apply to trainees:

- (a) The wage rate applicable to Trainees' shall be 85% of the wage rate applicable to the classification of a railcar driver for which the employee is being trained.
- (b) This rate will apply to a Trainee for the duration of the training period until the trainee has passed the assessment in accordance with the Driver Training Program.
- (c) Trainees shall be required to undertake training during shift work hours, Sunday to Saturday.

- 4.2.3 The rates of pay in this Award include arbitrated safety net adjustments available under the arbitrated Safety Net Adjustment Principle.

- 4.2.4 These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by the employee since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.
- 4.2.5 Increases in the rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

4.3 - PAYMENT OF WAGES

- 4.3.1 Subject to the following provisions of sub clause 4.3.2 wages shall be paid fortnightly no later than each alternate Thursday.
- 4.3.2 All employees' wages will be paid into accounts (nominated by each employee) with a savings bank, trading bank (cheque account), building society or credit union.
- 4.3.3 The employer shall provide for each employee a pay advice slip in respect of each payment of wages. Such slip shall detail the gross wages payable, including the composition, deductions made and net wage paid. Such slip shall be provided to the employee on or before each payday.

5. - ALLOWANCES

5.1 - SHIFT WORK

- 5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of \$2.01 an hour on all time paid at ordinary rate.
- 5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of \$2.33 an hour on all time paid at ordinary rate.
- 5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of \$2.01 an hour on all time paid at ordinary rate.
- 5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of \$2.33 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
- 5.1.5 In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

5.2 - TEMPORARY TRANSFER ALLOWANCE

- 5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:
- (a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of \$1.20 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled, and in addition:
- (b) When the period of relief is for one week or less the allowance of \$5.59 per shift shall be paid in recognition of the disruption to the employee's normal roster.
- 5.2.2 The rates referred to in this sub clause will be adjusted from time to time in accordance with the Taxi Control Board metropolitan rates.

5.3 - ON CALL ALLOWANCE

- 5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of \$3.33 per hour for all time on call.
- 5.3.2 The allowance will not be paid during the time the employee is paid working time following recall to duty.
- 5.3.3 Employees required to be on call will first be selected from volunteers. Where there are no volunteers then an employee may be directed to be on call.
- 5.3.4 To be eligible for payment, the employee must be contactable, and available for return to duty within one hour. An employee who is not contactable or fails to respond, will not be paid the allowance for the period the employee was required to be on call.

5.4 - UNIFORMS AND PROTECTIVE CLOTHING

- 5.4.1 The following uniforms and protective clothing shall be supplied by the employer without cost:
- (a) Initial Issue of 3 pairs long trousers or 1 pair long trousers, 2 pairs shorts and 3 pairs walk socks, 3 shirts either long or short sleeves, 1 pullover, 1 Castro fleecy lined three quarter jacket and 1 leather belt;
- (b) Each year thereafter 2 pairs long trousers or 1 pair long trousers, 2 pairs shorts and 3 pairs walk socks, 3 shirts either long or short sleeves;
- (c) In addition, 1 pullover each two years, 1 Castro fleecy lined three quarter jacket each 4 years and 1 leather belt on an as required basis, but not more than one every two years
- 5.4.2 Employees operating a steam cleaner shall be provided with suitable protective clothing, including rubber boots.
- 5.4.3 Wet weather suits, head covering and safety footwear shall be supplied to all drivers, driver's assistants, locomotive trainees and permanent cleaners.

5.5 - AWAY FROM HOME AND MEAL ALLOWANCES

- 5.5.1 The employer will pay for suitable over night accommodation for Railcar Drivers, Coordinator and Road Coach Operators when on roster and required to stay away from home.
- 5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of \$22.00 for each 8 hour period and, where less than 8 hours is worked, at the rate of \$5.50 for each 2 hour period or part thereof worked.

5.5.3 Employees, other than those on over night accommodation provided for above, will when required to be away from home be paid the "Travelling, Transfer and Relieving Allowance" from the Public Service Award 1992".

5.5.4 The Employer may require evidence of expenses incurred by the employee.

5.6 - HELD AWAY-FROM-HOME ALLOWANCE

5.6.1 Any employee who works and/or travels to a foreign station other than on temporary transfer and then is released from duty and who, before twelve hours shall have elapsed from such release, is not required to commence duty preparatory to departure from such foreign station for another station at which the employee is to be again released from duty, shall be paid held away-from-home allowance for all time in excess of twelve hours at ordinary time.

5.6.2 The amounts accruing under subclause 5.6.1 hereof may be counted towards the guaranteed week's work but shall not be included for the purpose of overtime calculation.

5.6.3 The aforesaid allowance shall be paid for at the rate appropriate to the work performed on the forward journey provided that an employee returning as a passenger to their home station shall be paid the allowance at the employee's classified rate.

5.6.4 Any allowance under this clause shall not be payable in respect to any time during which the employee is otherwise allowed payment (except for expenses), provided that the employee shall be paid whichever amount is to the employee's greatest advantage, nor shall such allowance be payable in any case where detention is the result of any act or omission of an employee or of other circumstances for which the employer cannot reasonably be held responsible.

5.6.5 Any dispute arising under this clause shall be determined by the Commission pursuant to the Dispute Settlement Procedure of this Award.

5.7 - FREE PASSES, PRIVILEGE TICKETS ETC

5.7.1 Free intrastate station to station passes, free privilege tickets, including free rail travel to and from work, and concessional privilege tickets shall be made available to employees and their dependants. These entitlements shall be in accordance with the conditions specified in the Pass Manual, or its successor Manual, a copy of which shall be supplied to the Union. The entitlements existing at the date of this award shall not be reduced without agreement between the PTA and the union.

5.7.2 Where agreement cannot be reached between the parties any dispute under this clause shall be determined by the WAIRC.

6. - LEAVE

6.1 - PUBLIC HOLIDAYS

6.1.1 The following days or days observed in lieu shall be allowed as holidays without deduction of pay namely:

- (a) New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day;
- (b) 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 sub clause.

6.1.2 When any of the days mentioned in 6.1.1 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 not be a holiday.

6.1.3 When any of the days mentioned in 6.1.1 above falls on an employee's rostered day off the employer and the employee may agree that the employee receive:

- (a) An additional day's wage; or
- (b) Another day off may be allowed within twenty-eight (28) days of the award holiday; or
- (c) An additional day off may be taken in conjunction with a period of annual leave.

6.1.4 A "Day's Wage" shall be calculated by multiplying the employee hourly rate by 7.6 hours at ordinary time earnings.

6.2 - ANNUAL LEAVE

6.2.1 Regular Day Shift Employees shall, except as herein provided, be entitled to a period of four (4) consecutive weeks leave with payment at the employee's ordinary rate of wage plus a leave loading of seventeen and a half percent (17.5%) shall be allowed annually to an employee by the employer.

6.2.2 Entitlements to annual leave accrue pro rata on a weekly basis.

6.2.3 Seven Day Shift Employees who work other than regular day shift shall be entitled and allowed an additional week's leave on full pay inclusive of leave loading of twenty (20%) percent.

- (a) This provision shall also apply to any other employee whose ordinary hours of work can be extended over Saturdays and Public Holidays and whose hours of duty vary throughout the twenty-four (24) hours of the day and who may be called upon to work Sundays.
- (b) Notwithstanding anything elsewhere contained herein this sub-clause shall not apply to any employee whose ordinary hours of work must be completed between Monday and Friday inclusive and not on Public Holidays.

6.2.4 Where an employee with twelve (12) months' continuous service is engaged for part of a qualifying twelve (12) monthly period as a seven day shift employee, such employee shall be entitled to have the period of annual leave to which the employee is otherwise entitled under this clause increased by one-twelfth of a week for each completed month the employee is continually so engaged and shall be paid for the annual leave plus the extra leave at the employee's ordinary rate of wage, plus a loading calculated at eighteen and three quarter (18.75%) percent for the annual leave taken.

6.3 - ANNUAL LEAVE LOADING

6.3.1 If it gives a greater amount than the amount of loading calculated in accordance with Clause 6.2.1 or 6.2.2 or 6.2.3 as the case may be, an employee shall be entitled to payment of -

- (a) Shift penalties Monday to Friday inclusive; and
- (b) A Saturday penalty,

Which the employee would have received for ordinary time had the employee not proceeded on annual leave.

6.4 - ANNUAL LEAVE LIST

- 6.4.1 Every year prior to 31 July, a statement shall be posted in each shed showing the date on which each employee will go on annual leave and resume duty. The annual leave for such shall be calculated up to 30 June each year and only leave up to that date shall be granted each year, except in cases where leave has been allowed to accumulate.
- 6.4.2 Employees are not to be booked on annual leave for more than one year in succession between 30 April and 1 September except at the request of the employee. Holiday lists are not to be departed from except for reasons of sickness, accident or traffic requirements not foreseeable at the date of preparing lists.
- 6.4.3 Unless at the request of a employee, an employee shall not be rostered to clear further annual leave within four (4) months of resuming duty following long service leave.
- 6.4.4 With the approval of the head of branch, any employee may exchange dates with another.
- 6.4.5 An employee shall take the whole of such leave taken at the one time each year provided that, with the consent of the employer, leave may be allowed to accumulate for two (2) years.

6.5 - BEREAVEMENT LEAVE

- 6.5.1 Subject to 6.5.3 on the death of:
- (a) The spouse or de facto partner of an employee;
 - (b) The child or stepchild of an employee;
 - (c) The brother, sister, step brother or sister of an employee;
 - (d) The parent, step parent or grandparent of an employee; or
 - (e) Any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,
- An employee, including a casual, is entitled to leave up to and including the day of the funeral of such person and will be paid bereavement leave of up to two (2) days. The two (2) days need not be consecutive.
- 6.5.2 Bereavement leave is not to be taken during a period of any other kind of leave, or at a time when the employee is not rostered for duty.
- 6.5.3 An employee who claims to be entitled to paid leave in accordance with 6.5.1 is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to the death that is the subject of the leave sought and the relationship of the employee to the deceased person.

6.6 - SICK LEAVE

- 6.6.1 In the event of an employee being sick, the employee may be paid up to 76 hours sick leave for each completed year of service for ordinary time lost from duty as a result of such sickness, except for seven day or twenty four hour rostered employees whose entitlement is 80 hours.
- 6.6.2 Sick leave will be paid for the actual rostered time lost due to sickness.
- 6.6.3 An employee who claims to be entitled to paid sick leave is to provide to the employer evidence that would satisfy a reasonable person of the entitlement for:
- (a) any absence due to sickness which occurs after two separate absences without a certificate in any one year; and
 - (b) absences due to sickness for two or more consecutive days.
- 6.6.4 Part-time employees accrue sick leave pro rata according to ordinary hours worked.
- 6.6.5 Paid sick leave will be debited in accordance with the rostered hours the employee would have worked had the employee not been absent.
- 6.6.6 Notwithstanding any other provisions of this clause, the employer may at the time the employee calls in sick, request the employee to provide evidence that would satisfy a reasonable person of the authenticity of any absence claimed to result from illness. The evidence may be required regardless of whether or not the employee claims payment for the absence.
- 6.6.7 Unused sick leave will accumulate from year to year.
- 6.6.8 An employee unable to attend work as required must notify the employee's supervisor at least three hours before the employee's required starting times or in sufficient time to allow alternative arrangements to be made.
- 6.6.9 An employee who is absent from duty and whose next rostered working shift commences prior to 1200 must inform the employee's supervisor of the employee's availability for duty by no later than 1500 hours the previous day. Where the employee's next rostered shift commences at or after 1200 hours the employee must inform the supervisor of the employee's availability for duty by 0500 hours on the same day.
- 6.6.10 If an employee falls sick while on annual leave and produces at the time satisfactory medical evidence that the employee is or was confined to their place of residence or hospital for a period of at least one week the employee may, with the approval of the employer, be granted at a time convenient to the employer additional leave equivalent to the period of sickness falling within the rostered period of annual leave.

6.7 - CARER'S LEAVE

- 6.7.1 An employee is entitled to use up to five (5) days of sick leave per year to be the primary care giver for the employee's spouse or de-facto partner, child including adult child, parent, sibling or grandparent or member of the employee's household who is injured or ill and in need of immediate care and attention. If requested, the employee must supply evidence that would satisfy a reasonable person of the entitlement to such leave.

6.8 - PARENTAL LEAVE

- 6.8.1 In this Clause:
- (a) "Adoption", in relation to a child, is a reference to a child who:
 - (i) is not the natural child or the step-child of the employee or the employee's partner;

- (ii) is less than 5 years of age; and
- (iii) has not lived continuously with the employee for 6 months or longer;
- (b) "Continuous service" means service under an unbroken contract of employment and includes:
 - (i) any period of parental leave; and
 - (ii) any period of leave or absence authorised by the employer;
- (c) "Expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;
- (d) "Parental leave" means leave provided for by sub clause 6.8.2(a);
- (e) "Partner" means a spouse or de-facto partner.

6.8.2 Entitlement to Parental Leave

- (a) Subject to sub clause 6.8.4, 6.8.5(a) and 6.8.6(a), an employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of –
 - (i) the birth of a child to the employee or the employee's partner; or
 - (ii) the placement of a child with the employee with a view to the adoption of the child by the employee.
- (b) An employee is not entitled to take parental leave unless the employee –
 - (i) has, before the expected date of birth or placement, completed at least 12 months continuous service with the employer;
 - (ii) has given the employer at least 10 weeks written notice of the employee's intention to take leave, and
- (c) An employee is not entitled to take parental leave at the same time as the employee's partner but this paragraph does not apply to one weeks parental leave –
 - (i) taken by the partner parent immediately after the birth of the child; or
 - (ii) taken by the employee and the employee's partner immediately after a child has been placed with them with a view to their adoption of the child.
- (d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except the period of one week's leave referred to in paragraph (c).

6.8.3 A Female employee who is pregnant and who has given notice of the employee's intention to take parental leave, other than for a adoption, is to start the leave 6 weeks before the expected date of birth unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.

6.8.4 An employee who has given notice of the employees intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's partner, as the case may be, is pregnant and the expected date of the birth.

6.8.5 Notice of Partner's Parental Leave

- (a) An employee who has given notice of the employee's intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.
- (b) Any notice given under paragraph (a) is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.

6.8.6 Notice of Parental Leave Details

- (a) An employee who has given notice of the employee's intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave no less than four weeks before the proposed commencement date.
- (b) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.
- (c) The starting and finishing dates of a period of parental leave are to be agreed between the employee and the employer.

6.8.7 Return to Work after Parental Leave

- (a) An employee shall confirm the employee's intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of the period of parental leave.
- (b) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave.
- (c) If the position referred to in paragraph (b) is not available, the employee is entitled to an available position –
 - (i) for which the employee is qualified; and
 - (ii) that the employee is capable of performing, most comparable in status and pay to that of the employee's former position without loss of income.
- (d) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of the position referred to in paragraph (a), that paragraph applies only in respect of the position held by the employee immediately before taking the acting or temporary position.

6.8.8 Absence on parental leave does not break the continuity of service of an employee and is not taken into account when calculating the period of service for the purpose of this Award.

6.8.9 Any absence from duty during a pregnancy for medical reasons relating to that pregnancy and certified by a suitably qualified medical practitioner will not be debited against the 52 week maternity entitlement.

6.8.10 Transfer to a Safe Job

- (a) Where, in the opinion of a duly qualified 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 attached to that job until the commencement of parental leave.
- (b) If the transfer to a safe job is not practicable, the employee may, or the employer may require the employee to, take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as maternity leave for the purposes of sub clauses 6.8.7, 6.8.8, 6.8.9 and 6.8.10 of this clause.
- 6.8.11 Variation of Period of Parental Leave
- (a) Provided the addition does not extend the parental leave beyond 52 weeks, the period may be lengthened once only, with the agreement of the employer, by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened.
- (b) The period of 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.
- 6.8.12 Cancellation of Parental Leave
- (a) Parental Leave applied for but not commenced, shall be cancelled when the pregnancy of an employee or the employee's partner, as the case may be, terminates other than by the birth of a living child.
- (b) Where the pregnancy of an employee or an employee's partner, as the case may be, then on parental leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that from the date of notice in writing by the employee to the employer that the employee desires to resume work.
- 6.8.13 Special Maternity Leave
- (a) Where the pregnancy of an employee not then on parental leave terminates after 28 weeks other than by the birth of a living child she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work, or
- (b) For the purpose of sub clause 6.8.8, 6.8.13 and 6.8.14 hereof, maternity leave shall include special maternity leave.
- (c) An employee returning to work after the completion of a period of leave taken pursuant to this sub clause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to sub clause 6.8.10, to the position the employee held immediately before such transfer.
- 6.8.14 Parental Leave and Other Leave Entitlements
- Provided the aggregate of leave including leave taken pursuant to sub clauses 6.8.10 and 6.8.13 hereof does not exceed 52 weeks:
- (a) 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 the employee is then entitled.
- (b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during absence on parental leave.
- 6.8.15 Termination of Employment
- (a) An employee on parental leave may terminate the employee's employment at any time during the period of leave by notice given in accordance with the Award.
- (b) An Employer shall not terminate the employment of an employee on the ground of the employee's absence on maternity leave or, in the case of a female employee, her pregnancy, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.
- 6.8.16 Replacement Employees
- (a) A replacement employee is an employee specifically engaged as a result of an employee taking paternity leave.
- (b) Before an employer engages a replacement employee under this sub clause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
- (c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this clause, the employer shall advise that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
- (d) Nothing in this sub clause shall be construed as requiring an employer to engage a replacement employee.
- (e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employee's employment continues beyond the 12 months qualifying period.
- 6.9 - LEAVE TO ATTEND UNION BUSINESS
- 6.9.1 The employer shall grant paid leave during working hours to an employee:
- (a) Who is required to give evidence before an Industrial Tribunal.
- (b) Who is a union nominated representative of the employees and is required to attend negotiations and/or conferences between the union and employer.
- (c) When prior agreement between the union and the employer has been reached for the employee to attend official meetings preliminary to negotiations or industrial hearings.
- (d) Who is a union nominated representative of employees and is required to attend joint union/management consultative committees or working parties.
- 6.9.2 The granting of leave pursuant to 6.9.1 of this sub-clause shall only be approved:

- (a) Where an application for leave has been submitted by an employee in a reasonable time in advance;
 - (b) For the minimum period necessary to enable the union business to be conducted or evidence to be given;
 - (c) For those employees whose attendance is essential; and
 - (d) When the operation of the organisation is not being unduly affected and the convenience of the employer impaired.
- 6.9.3 Leave of absence will be granted at the ordinary rate of pay and the employer shall not be liable for any expenses associated with an employee attending to union business. Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.
- 6.9.4 Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for union business.
- (a) An employee shall not be entitled to paid leave to attend union business other than prescribed by this clause.
 - (b) The provisions of this clause shall not apply when an employee is absent from work without the approval of the employer.

6.10 - LONG SERVICE LEAVE

- 6.10.1 An employee shall be entitled to thirteen (13) weeks paid Long Service Leave on the completion of ten years continuous service and an additional thirteen (13) weeks paid Long Service Leave for each subsequent period of seven (7) years of continuous service completed by the employee.
- 6.10.2 Where a public holiday falls within an employee's period of Long Service Leave such day shall be deemed to be a portion of the Long Service Leave and no other payment or benefit shall apply.
- 6.10.3 Long Service Leave may be taken in periods of four (4) weeks or more at a mutually agreed time.
- 6.10.4 Long Service Leave shall be paid at the employee's rate of pay as prescribed in Clause 4 Rates of Pay.
- 6.10.5 An employee will be entitled to pro rata Long Service Leave only if employment is terminated:
- (a) By the employer for other than disciplinary reasons;
 - (b) Due to the retirement of the employee on the grounds of ill health;
 - (c) Due to the death of the employee, in which case the payment would be made to the employee's estate;
 - (d) Due to the employee's retirement at age of 55 years or over provided 12 months continuous service has been completed prior to the day from which the retirement takes effect;
 - (e) For the purpose of entering an In Vitro Fertilisation Program provided the employee has completed three (3) years service and produces written confirmation from an appropriate medical authority of the dates of involvement in the program; or
 - (f) Due to the employee's resignation for pregnancy provided the employee has completed more than three (3) years and produces certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner.
- 6.10.6 For the purpose of determining Long Service Leave entitlement, the expression "continuous service" included any period during which the employee is absent on paid leave but does not include any period exceeding two (2) continuous weeks during which the employee is absent on parental leave or leave without pay.
- 6.10.7 Continuity of service shall not be broken by the absence of the employee on any form of approved paid leave or by the standing down of an employee under the terms of this Award.
- 6.10.8 The employer may direct an employee to take Long Service Leave entitlement. It will be taken within twelve (12) months of the direction and at a time agreed between the employer and the employee.
- 6.10.9 Where a time cannot be agreed within the 12-month period, the employer will determine the date on which the employee will be required to start Long Service Leave provided that the employer shall give at least 30 days notice to the employee of the day on which the Long Service Leave is to commence.

6.11 - WITNESS AND JURY SERVICE LEAVE

- 6.11.1 An employee subpoenaed or called as a witness to give evidence in any proceeding shall, as soon as practicable, notify the manager or supervisor who shall notify the employer.
- 6.11.2 Where an employee is subpoenaed or called as a witness to give evidence in an official capacity, that employee shall be granted by the employer leave of absence with pay, but only for such 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 subject to the satisfaction of the employer. The employee is not entitled to retain any witness fee but shall pay all fees received into Consolidated Fund. The receipt for such payment with a voucher showing the amount of fees received shall be forwarded to the employer.
- 6.11.3 An employee subpoenaed or called as a witness to give evidence in an official capacity shall, in the event of non-payment of the proper witness fees or travelling expenses, as soon as practicable after the default notify the employer.
- 6.11.4 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 employee's civic duty. The employee is not entitled to retain any witness fee but shall pay all fees received into Consolidated Fund.
- 6.11.5 An employee subpoenaed or called as a witness under any other circumstances other than specified in sub clauses 6.11.2 and 6.11.4 shall be granted leave of absence without pay except when the employee makes an application to clear accrued leave in accordance with award provisions.
- 6.11.6 An employee required to serve on a jury shall, as soon as practicable after being summonsed to serve, notify their supervisor or manager who shall notify the employer.
- 6.11.7 An employee required to serve on a jury shall be granted, by the employer, leave of absence on full pay but only for such period as is required to enable the employee to carry out duties as a juror.

- 6.11.8 An employee granted leave of absence on full pay is not entitled to retain any juror's fees but shall pay all fees received into Consolidated Fund. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the employer.

6.12 - CULTURAL AND CEREMONIAL LEAVE

- 6.12.1 Cultural and/or ceremonial leave shall be available to all employees.
- 6.12.2 Such leave shall include leave to meet the employee's customs, traditional law and to participate in cultural and ceremonial activities.
- 6.12.3 Employees are entitled to time off without loss of pay for cultural or ceremonial purposes subject to agreement between the employer and employee and sufficient leave credits being available.
- 6.12.4 The employer will assess each application for ceremonial or cultural leave on its merits and give consideration to the personal circumstances of the employee seeking the leave.
- 6.12.5 The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off.
- 6.12.6 Cultural or ceremonial leave may be taken as whole or part days off. Each day, or part thereof, shall be deducted from:
- (a) the employee's annual leave entitlements (where applicable); or
 - (b) accrued days off.
- 6.12.7 Time off without pay may be granted by arrangement between the employer and the employee for cultural or ceremonial purposes.

6.13 - BLOOD AND PLASMA DONORS LEAVE

- 6.13.1 Subject to operational requirements, employees shall be entitled to absent themselves from the workplace in order to donate blood and/or plasma in accordance with the following general conditions:
- (a) Prior arrangements with the supervisor has been made and at least two days notice has been provided; or
 - (b) The employee is called upon by the Red Cross Blood Centre.
- 6.13.2 The notification period shall be waived or reduced where the line manager is satisfied that operations would not be unduly affected by an employee's absence.
- 6.13.3 Employees shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.
- 6.13.4 Employees shall be entitled to two (2) hours of paid leave per donation for the purpose of donating blood or plasma to the Red Cross Blood Centre.

6.14 - STUDY LEAVE

- 6.14.1 Conditions for granting time off
- (a) An employee may be granted time off with pay for part-time study purposes at the discretion of the employer.
 - (b) Part-time employees are entitled to study leave on the same basis as full time employees. Employees working shift work or on fixed term contracts also have the same access to study leave as all other employees.
 - (c) Time off with pay may be granted up to a maximum of five (5) hours per week, including traveling time, where subjects of approved courses are conducted during normal working hours. The equivalent applies if studying by correspondence.
 - (d) Employees who are obliged to attend educational institutions for compulsory block sessions may be granted time off with pay, including travelling time, up to the maximum annual amount allowed to an employee in paragraph (c) of this subclause.
 - (e) Employees shall be granted sufficient time off with pay to travel to, and sit for, the examinations of any approved course of study or for the mature age entrance examination for tertiary admission conducted by the Tertiary Institution Service Centre.
 - (f) In every case, the approval of time off to attend lectures and tutorials will be subject to:
 - (i) the employer's convenience;
 - (ii) the course being undertaken on a part-time basis;
 - (iii) employees undertaking an acceptable formal study load in their own time;
 - (iv) employees making satisfactory progress with their studies; and
 - (v) the course being relevant to the employee's career in the public sector and being of value to the state.
 - (g) A service agreement or bond will not be required.
- 6.14.2 Payment of fees and other costs
- (a) Cadets and trainees
 - (i) Employers are to meet the payment of higher education administrative charges for cadets and trainees who, as a condition of their employment, are required to undertake studies at a post secondary institution. Employees who, of their own volition, attend such institutions to gain higher qualifications will be responsible for the payment of fees.
 - (ii) This assistance does not include the cost of textbooks or Guild and Society fees.
 - (iii) An employee who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.
 - (b) All employees

Notwithstanding paragraph (a) of this subclause, the employer has the discretion to reimburse an employee for the full or part of any reasonable costs of enrolment fees, Higher Education Contribution Surcharge, compulsory textbooks, compulsory computer software, and other necessary study materials. Half of the value of the agreed costs shall be reimbursed immediately following production of written evidence of successful completion of the

subject for which reimbursement has been claimed. The employer and employee may agree to alternative reimbursement arrangements.

6.14.3 Approved courses

- (a) (i) First degree or Associate Diploma courses at a post secondary institution.
- (ii) Diploma courses and two year full time certificate courses at Technical and Further Education (TAFE).
- (iii) Secondary courses leading to the Tertiary Entrance Examination (see paragraph (i) of subclause 6.14.4 or courses preparing students for the mature age entrance conducted by the Tertiary Institutions Service Centre.
- (iv) Courses recognised by the National Authority for the Accreditation of Translators and Interpreters (NAATI) in a language relevant to the needs of the public sector.
- (b) Except as outlined in paragraph (d) of this subclause, employees are not eligible for study assistance if they already possess one of the qualifications specified in subclause 6.14.3(a)(i) of this clause.
- (c) An employee who has completed a Diploma through TAFE is eligible for study assistance to undertake a degree course at any of the tertiary institutions in subparagraph 6.14.3(a)(i). An employee who has completed a two year full-time Certificate through TAFE is eligible for study assistance to undertake a Diploma course specified in subclause 6.14.3(a)(ii) of this clause or a degree or Associate Diploma course specified in subclause 6.14.3(a)(i) of this clause.
- (d) Assistance towards additional qualifications including second or higher degrees may be granted in special cases in a specialist area of benefit to the public sector as well as the employee.

6.14.4 For the purposes of this clause:

- (a) In determining the employer's convenience, employers should give due emphasis to the employee's career aspirations.
- (b) An acceptable part-time study load should be regarded as not less than five (5) hours per week of formal tuition, or the equivalent if studying by correspondence, with at least half of the total formal study commitment being undertaken in the employee's own time except in special cases such as where the employee is in the final year of study and requires less time to complete the course, or the employee is undertaking the recommended part-time year or stage and this does not entail five (5) hours formal study.
- (c) The relevance of a course should be determined from a public sector rather than an employer perspective. For instance, an employee may be undertaking a course of study which is of no special relevance to the employee's work or employer but which may well be particularly significant in some other section of the public sector.
- (d) A first degree or Associate Diploma course does not include the continuation of a degree or Associate Diploma towards a higher postgraduate qualification.
- (e) In cases where employees are studying subjects that require fortnightly classes, the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.
- (f) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes when compared with the time usually taken to travel home from the employee's normal place of work.
- (g) An employee shall not be granted more than five (5) hours time off with pay per week except in exceptional circumstances where the employer may decide otherwise.
- (h) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.
- (i) Study leave for attendance at courses leading to the Tertiary Entrance Examination will generally only be granted if the employee has already unsuccessfully attempted to enter tertiary studies through the mature age entrance examination conducted by the Tertiary Institutions Service Centre. However, this condition will not apply if a pass in certain subjects is a prerequisite for entry into an intended course of non-tertiary study or training that meets the requirements specified in this clause.

6.14.5 Subject to the provisions of subclause 6.14.6 of this clause, the employer may grant an employee full time study leave with pay to undertake:

- (a) post graduate degree studies at Australian or overseas tertiary education institutions; or
- (b) study tours involving observations and/or investigations; or
- (c) a combination of postgraduate studies and study tours.

6.14.6 Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:

- (a) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of subclause 6.14.1 to 6.14.5 of this clause and the Leave Without Pay provisions of this award.
- (b) It must be a highly specialised course with direct relevance to the employee's profession.
- (c) It must be highly relevant to the employer's corporate strategies and goals.
- (d) The expertise or specialisation offered by the course of study should not already be available through other employees employed within the organisation.
- (e) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an employee is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.
- (f) A fixed term contract employee may not be granted study leave with pay for any period beyond the employee's approved period of engagement.

- 6.14.7 Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.
- 6.14.8 Where an outside award is granted and the studies to be undertaken are considered highly desirable by an employer, financial assistance to the extent of the difference between the employee's normal wage and the value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria, then part or full payment of wages may be approved at the discretion of the employer.
- 6.14.9 The employer supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.
- 6.14.10 Where recipients are in receipt of a living allowance, this amount should be deducted from the employee's wages for that period.
- 6.14.11 Where the employer approves full time study leave with pay, the actual wage contribution forms part of the employer's approved average staffing level funding allocation. Employers should bear this in mind if considering temporary relief.
- 6.14.12 Where study leave with pay is approved and the employer also supports the payment of transit costs and/or an accommodation allowance, the employer will gain approval for the transit and accommodation costs as required.
- 6.14.13 Where employees travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the employer together with some local transit and accommodation expenses providing it meets the requirements of subclause 6.14.6 of this clause. Each case is to be considered on its merits.
- 6.14.14 The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for employees under this award.

6.15 - PURCHASED LEAVE – 48/52 WAGES ARRANGEMENT

- 6.15.1 The employer and an employee may agree to enter into an arrangement whereby the employee can purchase up to four (4) weeks additional leave.
- 6.15.2 The employer will assess each application for 48/52 wage arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement.
- 6.15.3 Access to this entitlement will be subject to the employee having satisfied the employer's accrued leave management policy.
- 6.15.4 The employee can agree to take a reduced wage spread over the 52 weeks of the year and receive the following amounts of additional purchased leave:

Number of weeks wages spread over 52 weeks	Number of weeks purchased leave
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

- 6.15.5 The purchased leave will not be able to be accrued. The employee is to be entitled to pay in lieu of the additional leave not taken. In the event that the employee is unable to take such purchased leave, their wage will be adjusted on the last pay period in January to take account of the fact that time worked during the year was not included in the wage.
- 6.15.6 Where an employee who is in receipt of a higher duties allowance provided for in the relevant award proceeds on any period of additional purchased leave, the employee shall not be entitled to receive payment of the allowance for any period of purchased leave.
- 6.15.7 In the event that a part time employee's ordinary working hours are varied during the year, the wage paid for such leave taken will be adjusted on the last pay in January to take into account any variations to the employee's ordinary working hours during the previous year.

6.16 - EMERGENCY SERVICES LEAVE

- 6.16.1 Subject to operational requirements, paid leave of absence shall be granted by the employer to an employee who is an active volunteer member of State Emergency Service, St John Ambulance Brigade, Volunteer Fire and Rescue Service, Bush Fire Brigades, Volunteer Marine Rescue Services Groups or FESA Units in order to allow for attendances at emergencies as declared by the recognised authority.
- 6.16.2 The employer shall be advised as soon as possible by an employee, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.
- 6.16.3 The employee must complete a leave of absence form immediately upon return to work.
- 6.16.4 The application form must be accompanied by a certificate from the emergency organisation certifying that the employee was required for the specified period.
- 6.16.5 An employee who, during the course of an emergency, volunteers their services to an emergency organisation shall comply with subclauses 6.16.2, 6.16.3 and 6.16.4 of this clause.

6.17 - DEFENCE FORCE RESERVES LEAVE

- 6.17.1 The employer must grant leave of absence for the purpose of defence service to an employee who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.
- 6.17.2 Leave of absence may be paid or unpaid in accordance with the provisions of this clause.
- 6.17.3 Application for leave of absence for defence service 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 provide a certificate of attendance to the employer.

6.17.4 Paid leave

- (a) An employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for defence service, subject to the conditions set out hereunder.
- (b) Part-time employees shall receive the same paid leave entitlement as full-time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.
- (c) On written application, an employee shall be paid wages in advance when proceeding on such leave.
- (d) Casual employees are not entitled to paid leave for the purpose of defence service.
- (e) An employee is entitled to paid leave for a period not exceeding 105 hours on full pay in any period of twelve months commencing on 1 July in each year.
- (f) An employee is entitled to a further period of leave not exceeding 16 calendar days in any period of twelve months commencing on July 1. Pay for this leave shall be at the rate of the difference between the normal remuneration of the employee and the Defence Force payments to which the employee is entitled if such payments do not exceed normal wages. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered 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.

6.17.5 Unpaid leave

- (a) Any leave for the purpose of defence service that exceeds the paid entitlement prescribed in subclause 6.17.4 of this clause shall be unpaid.
- (b) Casual employees are entitled to unpaid leave for the purpose of defence service.

6.17.6 Use of other leave

- (a) An employee may elect to use annual or long service leave credits for some or all of their absence on defence service, in which case they will be treated in all respects as if on normal paid leave.
- (b) An employer cannot compel an employee to use annual leave or long service leave for the purpose of defence service.

6.18 - PAID LEAVE FOR ENGLISH LANGUAGE TRAINING

- 6.18.1 Leave during normal working hours without loss of pay shall be granted to employees from a Non-English speaking background 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 or industry to attend English training conducted by an approved and authorised Authority. The selection of employees for training will be determined by consultation between the employer and the union.
- 6.18.2 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 subclause 6.18.3 hereof shall be agreed between the employer, the union, and the Adult Migrant Education Service or other approved Authority conducting the training.
- 6.18.3 Subject to appropriate needs assessment, participation in training will be on the basis of minimum of 100 hours per employee per year.
- 6.18.4 The agreed desired proficiency level will take account of the vocational needs of an employee in respect of communication, safety, welfare, and productivity within his/her current position as well as those positions to which he/she may be considered for promotion or redeployment. It will also take account of issues in relation to training, retraining and multi-skilling, award restructuring, industrial relations and safety provisions, and equal opportunity employment legislation.

6.19 - LEAVE WITHOUT PAY

- 6.19.1 Subject to the provisions of subclause 6.19.2, the employer may grant an employee leave without pay for any period and is responsible for that employee on their return.
- 6.19.2 Every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:
 - (a) The work of the employer is not inconvenienced; and
 - (b) All other leave credits of the employee are exhausted.
- 6.19.3 An employee on a fixed term appointment may not be granted leave without pay for any period beyond that employee's approved period of engagement.
- 6.19.4 The employer may grant an employee on leave without pay to undertake full time study subject to a yearly review of satisfactory performance. Leave without pay for this purpose shall not count as qualifying service for leave purposes.
- 6.19.5 Subject to the provisions of subclause 6.19.2 of this clause, the employer may grant an employee who has been awarded a sporting scholarship by the Australian Institute of Sport leave without pay.

7. - DISPUTE RESOLUTION PROCEDURE

- 7.1.1 Subject to the Industrial Relations Act 1979 (as amended) in the event of a problem, grievance, question, dispute, claim or difficulty that effects one or more employees, or arises from the employees work or contract of employment, the following procedure shall apply:
 - (a) At first instance the matter shall be raised with the employer's supervisor or manager as appropriate.
 - (b) In the event that the matter is unresolved it may be raised at the Company level by the individual concerned, or the union delegate or union official involved.
 - (c) The parties will attempt to resolve the matter prior to either party referring the matter to the "Commission".
 - (d) If the matter is still not resolved it may be referred to the "Commission" for determination and, if necessary, arbitration.

8. - REGISTERED ORGANISATION MATTERS

8.1 - RIGHT OF ENTRY

- 8.1.1 An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work for the purpose of holding discussions at the premises with any relevant employees who wish to participate in those discussions.
- 8.1.2 An “authorised representative” means a person who holds an authority in force under Part II of Division 2G of the Industrial Relations Act 1979.
- 8.1.3 A “relevant employee” means an employee who is a member of an organisation or who is eligible to become a member of the organisation.
- 8.1.4 The authorised representative shall give at least twenty four (24) hours’ notice to the employer.
- 8.1.5 Notwithstanding 8.1.4, the Union may apply to waive the requirement to give the employer concerned notice of an intended exercise of power if the Commission is satisfied that to give such notice would defeat the purpose for which the power is intended to be exercised.
- 8.1.6 An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work for the purpose of investigating any suspected breach of the Industrial Relations Act 1979, The Minimum Conditions of Employment Act 1993, the Occupational Safety and Health Act 1984, or an award, order, industrial agreement or employer –employee agreement that applies to any such employee.
- 8.1.7 An authorised representative in this clause has the same meaning as in 8.1.2.
- 8.1.8 For the purpose of investigating any breach, the authorised representative may:
- (a) Subject to 8.1.4 and 8.1.6, require the employer to produce for the representative’s inspection, during working hours at the employer’s premises or at any mutually convenient time and place, any employment records of employees or other documents, other than workplace agreements or employer-employee agreements, kept by the employer that are related to the suspected;
 - (b) Make copies of the entries in the employment records or documents related to the suspected breach; and
 - (c) During working hours, inspect or view any work, material, machinery, or appliance that is relevant to the suspected breach.
- 8.1.9 The employer is not required to produce an employment record of any employee if the employee is a party to an employee-employer agreement and has made a written request to the employer that the record not be available for inspection by an authorised representative.
- 8.1.10 An authorised representative is not allowed to enter premises where relevant employees work for the purpose of investigating a suspected breach of an employer-employee agreement to which a relevant employee is a party unless the authorised in writing by that relevant employees to carry out the investigation.
- 8.1.11 An authorised representative is not entitled to require the production of employment records or other documents unless, before exercising the power, the authorised representative has given the employer concerned;
- (a) If the records or other documents are kept on the employer’s premises, at least twenty four (24) hours written notice; or
 - (b) If the records or other documents are kept elsewhere, at least forty- eight (48) hours written notice.
- 8.1.12 An authorised representative shall, upon request of the occupier of the premises, show their authority before entering the premises.

8.2 - FACILITIES FOR WORKPLACE DELEGATES

- 8.2.1 The PTA recognises the rights of the ARTBIU to organise and represent their members.
- 8.2.2 ARTBIU delegates have a legitimate role and function in assisting the ARTBIU in the tasks of recruitment, organising, communication and representing the interests of the ARTBIU members within the Public Transport Authority to whom this Agreement applies.
- 8.2.3 The employer recognises union delegates in the Public Transport Authority and will allow them to carry out their role and functions. Subject to prior approval, the PTA shall provide ARTBIU delegates with the following:
- (a) Paid time off from normal duties to perform their functions as ARTBIU delegates such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the Joint Consultative Committee and to attend to union business.
 - (b) Access to facilities required for the purpose of carrying out their duties. Facilities may include, but not be limited to; the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal employer protocols.
 - (c) A noticeboard for the display of union materials including broadcast email facilities.
 - (d) Paid access to periods of leave for the purpose of attending union training courses.
 - (e) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of union membership with them.
 - (f) Access to awards, agreements, orders, policies and procedures.
 - (g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.
- 8.2.4 The Employer recognises that it is paramount that ARTBIU delegates are not threatened or disadvantaged in any way as a result of their role as a union delegate.

8.3 - CONSULTATION

- 8.3.1 The parties recognise the need for effective communication to improve the business and operational performance and working environment in the Public Transport Authority.
- 8.3.2 The parties acknowledge that decisions will continue to be made by the employer who is responsible and accountable to Government for the effective and efficient operation of the Public Transport Authority.
- 8.3.3 Where the employer proposes to make changes likely to affect existing practices, working conditions or employment prospects of employees, the union and employees affected shall be notified by the employer as early as possible.

- 8.3.4 For the purposes of discussion the employer shall provide to the employees concerned and the union relevant information about the changes, including the effect of the changes on employees, provided the employer shall not be required to disclose any information that is confidential. In the context of discussions, the union and employees are able to contribute to the decision making process.

9. - MARSHALLING

- 9.1.1 Employees will carry out any marshalling required in the operation of the train. The marshalling may be performed at stations, sidings or depots at any time during the shift.

10. - RAILCAR OR LOCOMOTIVE CONFIGURATIONS

- 10.1.1 Employees will operate railcars or locomotives in any required configuration including, but not limited to, single or multiple railcars or the recovery locomotive.

11. - KNOWLEDGE OF ROADS

- 11.1.1 Where an employee is required to learn the road only, this will be achieved by a combination of:
- (a) Being rostered with a qualified employee who has knowledge of the roads; and or
 - (b) The use of simulators; and or
 - (c) Any other agreed acceptable method.
- 11.1.2 Should the requirements of the service necessitate that the driver shall run over a road with which the driver is not fully acquainted the driver shall be provided with a pilot. Such pilot shall be either a district superintendent-(provided such officer has been a driver in the employer's service), a locomotive inspector, driver, or driver's assistant authorised to drive. In cases where a driver is removed from one depot to another, the driver shall be given access to facilities to learn the road without loss of driver's pay.

12. - PREPARING AND STABLING ENGINES

- 12.1.1 Each driver shall, if required to do the work, be granted the appropriate allowance for preparing and stabling Rail Cars as agreed by mutual consent between the employer and the Union or, failing such agreement, as shall be prescribed by the Commission.

13. - WHERE TO GO FOR FURTHER INFORMATION

- 13.1.1 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch
2/10 Nash Street, EAST PERTH W.A. 6004
Telephone: 9225 6722
Facsimile: 9225 6733
Email: general@rtbuwa.asn.au
- 13.1.2 Department of Consumer and Employment Protection
Labour Relations, 3rd Floor Dumas House, 2 Havelock Street, WEST PERTH W.A. 6005
Telephone: 9222 7700
Facsimile: 92227777
Email: labourrelations@docep.wa.gov.au
Wage Line: 1300 655 266

14. - OTHER LAWS AFFECTING EMPLOYMENT

- 14.1.1 (a) Industrial Relations Act 1979 (WA)
(b) Minimum Conditions of Employment Act 1993 (WA)
(c) Workplace Relations Act 1996 (Cth)
(d) Occupational Safety and Health Act 1984 (WA)
(e) Equal Opportunity Act 1984 (WA)

15. - NAMED PARTIES TO THE AWARD

- 15.1.1 The named parties to this award are:
- (a) The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch; and
 - (b) The Public Transport Authority of Western Australia, or its successor.

2006 WAIRC 04102

TOTAL CORROSION CONTROL/CFMEUW COLLECTIVE AGREEMENT 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

TOTAL CORROSION CONTROL PTY LTD

RESPONDENT

CORAM SENIOR COMMISSIONER J F GREGOR

DATE TUESDAY, 4 APRIL 2006

FILE NO AG 25 OF 2006

CITATION NO. 2006 WAIRC 04102

Result Discontinued

Order

WHEREAS on 13th February 2006 The Construction, Forestry, Mining and energy Union of Workers applied to register an industrial agreement pursuant to s.41 of the *Industrial Relations Act, 1979*; and

WHEREAS on 21st March 2006 The Construction, Forestry, Mining and Energy Union of Workers lodged a Notice of Discontinuance and the Commission decided to discontinue the application.

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.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

AWARDS/AGREEMENTS—Variation of—

2006 WAIRC 03937

AIR CONDITIONING AND REFRIGERATION INDUSTRY (CONSTRUCTION AND SERVICING) AWARD NO. 10 OF 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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 SERVICES UNION OF AUSTRALIA

APPLICANTS

-v-

DIRECT ENGINEERING SERVICES PTY LTD, KELVIN INDUSTRIES PTY LIMITED, HONEYWELL PTY LTD AND OTHERS

RESPONDENTS

CORAM SENIOR COMMISSIONER J F GREGOR
DATE MONDAY, 13 MARCH 2006
FILE NO APPL 984 OF 2005
CITATION NO. 2006 WAIRC 03937

Result Vary Award

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Mr A. Talbert for The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and there being no appearance for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders:

THAT the Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 13th March 2006.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

SCHEDULE

1. **Clause 12. – Overtime: Delete subclause (3)(f) of this clause and insert in lieu the following:**
 - (f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$9.60 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with each such meal by the employer or be paid \$6.50 for each meal so required.
2. **Clause 17. – Car Allowance: Delete subclause (3) of this clause and insert in lieu the following:**
 - (3) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S
OWN VEHICLE ON EMPLOYER'S BUSINESS
MOTOR CAR**

Area Details	Engine Displacement (in cubic centimetres)		
	Rate per kilometre (Cents)		
Distance Travelled Each Year on Employer's Business	Over	1600cc -	1600cc and
	2600cc	2600cc	Under
Metropolitan Area	70.7	63.3	55.2
South West Land Division	72.4	65.0	56.5
North of 23.5o South Latitude	79.6	71.6	62.2
Rest of the State	74.8	67.1	58.3
Motor Cycle (in all areas)	24.4¢ per kilometre		

3. Clause 18. – Allowance for Travelling and Employment in Construction Work: Delete subclause (2)(a), (b) and (c) of this clause and insert in lieu the following:

- (a) On places within a radius of 50 kilometres from the General Post Office, Perth - \$15.10 per day.
- (b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – 79 cents per kilometre.
- (c) Subject to the provisions of paragraph (d) hereof, work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 79 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

4. Clause 19. – Distant Work: Delete subclauses (6) and (7) of this clause and insert in lieu the following:

- (6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of \$30.70 for any week-end the employee returns home from the job, but only if -
 - (a) The employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;
 - (b) The employee is not required for work during that weekend;
 - (c) The employee returns to the job on the first working day following the weekend; and
 - (d) The employer does not provide, or offer to provide, suitable transport.
- (7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$13.60 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

5. Clause 29. – Wages:

A. Delete subclauses (4) and (5) of this clause and insert in lieu the following:

- (4) (a) In addition to the appropriate rates of pay prescribed in this clause, an employee shall be paid -
 - (i) \$40.10 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project.
 - (ii) \$36.20 per week if engaged on a multi-storey building, but only until the exterior walls have been erected and 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 storeys.
 - (iii) \$21.30 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this award.
- (b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.
- (5) Leading Hands:
In addition to the appropriate total wage prescribed in this clause a leading hand shall be paid -

	\$
(a) If placed in charge of not less than three and not more than 10 other employees	22.70
(b) If placed in charge of more than 10 and not more than 20 other employees	34.60
(c) If placed in charge of more than 20 other employees	44.70

B. Delete subclause (8)(a)(i) and (ii) of this clause and insert in lieu the following:

- (i) \$12.50 per week to such tradesperson or second-class sheetmetal employee;
- or
- (ii) in the case of an apprentice a percentage of \$12.50 being the percentage which appears against the year of apprenticeship in subclause (3) hereof, for the purpose of such tradesperson, second-class sheetmetal employee or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson, second-class sheetmetal employee or as an apprentice.

2006 WAIRC 04044

ANIMAL WELFARE INDUSTRY AWARD NO. 8 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESAUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION OF
WESTERN AUSTRALIAN BRANCH**APPLICANT**

-v-

MR P S ADAMS AND OTHERS

RESPONDENTS**CORAM**

COMMISSIONER J H SMITH

DATE

WEDNESDAY, 23 MARCH 2006

FILE NO/S

APPL 397 OF 2004

CITATION NO.

2006 WAIRC 04044

Result

Award varied

Representation**Applicant**

Ms S Northcott

Respondents

Mr M O'Connor (as agent on behalf of the Respondents for whom warrants have been filed)

No appearance by or on behalf of any other Respondents

Order

Having heard Ms Northcott on behalf of the Applicant, Mr O'Connor as agent on behalf of the Respondents for whom warrants have been filed, and there being no appearance by or on behalf of any other Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

That the Animal Welfare Industry Award No. 8 of 1968 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on and from 24 March 2006.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

SCHEDULE
1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof:**2. - ARRANGEMENT**

1. Title
2. Arrangement
3. Area and Scope
4. Term
5. Contract of Service
6. Types of Employment
7. Hours
8. Overtime
9. Meal Money
10. Public Holidays
11. Annual Leave
12. Sick Leave
13. Long Service Leave
14. Location Allowance
15. Supported Wage System for Employees with Disabilities
16. Travelling Time and Expenses
17. Employment Records
18. Rates of Pay
19. Minimum Adult Award Wage -
20. Protective Clothing and Uniforms
21. Call Back
22. Traineeships
23. Work on Saturdays, Sundays and Public Holidays
24. Night Work
25. Bereavement Leave
26. Parental Leave
27. Payment of Wages
28. Definitions
29. Superannuation
30. Dispute Settlement Procedures
31. Right of Entry

- 32. Other Laws Affecting Employment
- 33. Where to go for Further Information

Schedule A - Parties to the Award

Schedule B - Respondents

2. Clause 3. – Scope: Delete this clause and insert the following in lieu thereof:

3. - AREA AND SCOPE.

This award shall apply throughout the state of Western Australia to all employees employed in any classification referred to in clause 18 – Rates of Pay in the veterinary industries of animal welfare, animal care, animal breeding or animal homes and to all employers employing such employees.

3. Clause 4. – Term: Delete this clause and insert the following in lieu thereof:

4. - TERM

The term of this award shall be for a period of six months.

4. Clause 5. – Contract of Service: Delete this clause and insert the following in lieu thereof:

5. - CONTRACT OF SERVICE.

- (1) The employer may direct an employee to carry out such duties as are within the limits of the employee’s skill, competence and training.
- (2) Notice of Termination by Employer
 - (a) The employment of any employee (other than a casual employee, who shall be engaged by the hour) may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of serious misconduct in which case shall only be paid up to the time of dismissal.

<u>PERIOD OF CONTINUOUS SERVICE</u>	<u>PERIOD OF NOTICE</u>
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 has completed two years' continuous service, shall be entitled to one week's additional notice.
- (c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause shall be made if the appropriate notice period is not given or required to be worked. The 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 shall pay the employee the ordinary wages for the period of notice had the employment not been terminated or payment in lieu of notice shall be calculated using the employee’s weekly ordinary time earnings.
- (3) Notice of Termination by Employee

One weeks notice shall be necessary for an employee to terminate his or her engagement or the forfeiture or payment of one week’s pay by the employee to the employer in lieu of notice.
- (4) Probation

The employer may engage the employee on a probationary period for not longer than three months during which time it will be possible for either the employer or employee to end the contract with one day’s notice.
- (5) Termination, Redundancy or Introduction of Change

In circumstances of termination, redundancy or introduction of change, employees are entitled to a statement of employment, job search leave, consultation, redundancy pay and other matters as provided in the General Order 2005 WAIRC 01715 (85(WAIG)1667), as amended, varied or replaced from time to time.

5. Clause 6. – Casual Employees: Delete this title and clause and insert the following in lieu thereof:

6. - TYPES OF EMPLOYMENT

- (1) Prior to engagement, an employer will inform each employee of the terms of their engagement, and in particular stipulate whether they are full-time, part-time or casual. This advice must be confirmed in writing within two weeks of commencement of employment.
- (2) Full-time employees will be engaged for an average of thirty-eight hours per week in accordance with clause 7. – Hours of Work.
- (3) Part-Time Employment
 - (a) An employer may employ part-time employees in any classification in this award.
 - (b) A part-time employee is an employee who:
 - (i) works less than full-time hours of 38 per week; and
 - (ii) has reasonably predictable hours of work; and
 - (iii) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
 - (c) At the time of engagement the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.
 - (d) Any agreed variation to the regular pattern of work will be recorded in writing.
 - (e) An employer is required to roster a part-time employee for a minimum of three (3) consecutive hours on any shift.

- (f) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with sub clause 3 of this clause.
- (g) All time worked in excess of the hours as mutually arranged will be overtime and paid for at the rates prescribed in clause 8 - Overtime, of this award.
- (h) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.
- (4) Casual Employees
- (a) A casual employee is to be one engaged and paid as such. A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty-eighth of the weekly award wage prescribed in clause 18 – Rates of Pay for the work being performed plus a casual loading of 20 per cent in lieu of sick leave, annual leave and public holidays.
- (b) A casual employee shall be employed for a minimum of three (3) consecutive hours on each occasion.
- 6. Clause 7. – Hours: Delete this title and clause and insert the following in lieu thereof:**
7. - HOURS.
- (1) (a) 38 hours shall constitute a week's work and shall be worked on not more than five (5) consecutive days of the week.
- (b) The ordinary hours shall be worked between the hours of 7.00 a.m. and 7.00 p.m. unless otherwise agreed between the employer, employee and the Union.
- (c) Except where provided elsewhere in this clause, the ordinary hours shall be worked within a 20-day four-week cycle with 0.4 of an hour of each day worked accruing as an entitlement to take the 20th day in each cycle as an Accrued Day Off.
- (2) By agreement between an employer and their employees covered by this award, the ordinary hours of an employee in lieu of the provisions of subclause (1) of this clause, may be worked:
- (a) with two hours of each week's ordinary hours of work accruing as an entitlement to a maximum of 12 Accrued Day(s) Off in each 12-month period. The Accrued Day(s) Off shall be taken at a time mutually acceptable to the employer and the employee.
- (b) Within a 10-day, two-week cycle, with an adjustment to hours worked to enable 76 hours to be worked over nine days of the two-week cycle and an entitlement to take the 10th day in each cycle as an Accrued Day Off.
- (c) Within a five-day, one-week cycle, of 38 hours.
- (d) Nothing in this clause shall be construed to prevent the employer and the majority of employees affected in a workplace or part thereof reaching an agreement to operate any method of working a 38 hour week provided that agreement is reached in accordance with the following procedure:
- (i) the Union will be notified in writing of the proposed variations prior to any change taking place;
- (ii) the proposed variations for each workplace or part thereof shall be explained to the employees concerned and written notification of proposals will be placed on the notice board at the worksite;
- (iii) the parties will then consult with each other on the changes with a view to reaching agreement;
- (iv) where the majority of Union members do not support the agreement then the issues will be referred to the Commission for conciliation and, if necessary, arbitration.
- (3) An employer and employee may by agreement substitute the Accrued Day Off the employee is to take off for another day; in which case the Accrued Day Off shall become an ordinary working day.
- (4) The employer shall give at least one week's notice from the first day of a cycle of the standard ordinary hours at which they require the employee to commence and cease work. Work performed outside the hours notified shall be paid for at overtime rates except in cases of emergency or staff illness or accident which prevent such notification.
- (5) Where a rostered day off falls on a public holiday prescribed in Clause 10 - Public Holidays of this award, the next working day shall be taken as the rostered day off, provided that by mutual agreement between the employer and the employee another working day may be substituted.
- (6) (a) A meal break of not less than half an hour nor more than one hour shall be allowed between the fourth and fifth hour of work unless otherwise agreed by the employer and the employee in times of emergency or staff accident or illness.
- (b) Employees called upon to work during the ordinary meal break shall be paid overtime rates for all such work, provided that in the case of emergency, where it is necessary to work up to 15 minutes into a meal break, this provision shall not apply.
- (c) All employees shall be allowed a tea break of ten minutes daily between the second and third hour from starting time each day. Such tea break shall be counted as time worked
- (7) Any dispute between an employer and the Union over the operation of this clause must be dealt with in accordance with Clause 31 – Dispute Settlement Procedures.
- (8) Where RDO's are allowed to accumulate, the employer may require that they be taken within 12 months of the employee becoming entitled to an RDO.
- 7. Clause 8. – Overtime: Immediately following subclause (4), insert the following new subclause as follows:**
- (5) Requirement to work reasonable overtime:
- (a) Subject to subclause (5)(b) an employer may require an employee to work reasonable overtime at overtime rates.
- (b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
- (i) any risk to employee health and safety;
- (ii) the employee's personal circumstances including any family responsibilities;
- (iii) the needs of the workplace or enterprise;

- (iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and
- (v) any other relevant matter.

8. Clause 11. – Annual Leave: Delete this title and clause and insert the following in lieu thereof:

11. - ANNUAL LEAVE

- (1) An employee is entitled, for each year of continuous service, to a period of four (4) weeks annual leave with payment at the employee's ordinary rate of wage. Entitlements to annual leave will accrue at the rate of 2.923 hours per week for each completed week of service.
- (2) (a) During a period of annual leave an employee shall receive a loading of 17.5% calculated on the employee's ordinary wage for that period of leave.
- (b) Provided that where the employee would have received any additional rates for the work performed in ordinary hours as prescribed by this award, had the employee not been on leave during the relevant period and such additional rates would have entitled the employee to a greater amount than the loading of 17.5 percent, then such additional rates shall be added to the employee ordinary rate of wage in lieu of the 17.5 percent loading.
Provided further, that if the additional rates would have entitled the employee to a lesser amount than the loading of 17.5 percent, then such loading of 17.5 percent shall be added to the employee's ordinary rate of wage in lieu of the additional rates.
- (c) The loading prescribed by this clause shall not apply to proportionate leave on termination.
- (3) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, that day shall be added to the employees annual leave entitlement.
- (4) (a) An employee whose employment terminates and who has not taken the leave prescribed under this clause shall be given payment in lieu of that leave at the rate of 2.923 hours pay at their ordinary rate of wage for each completed week of service.
- (b) In addition to any payment to which the employee may be entitled to annual leave loading under paragraph (a) hereof an employee whose employment terminates after the employee has completed a twelve month qualifying period and has not been allowed leave prescribed under this Award in respect of that qualifying period shall be given payment in lieu of that leave. Or, in a case where the employee has taken part of the leave in lieu of so much of that leave as has not been taken unless-
 - (i) the employee has been justifiably dismissed for misconduct; and
 - (ii) the misconduct for which the employee has been dismissed occurred prior to the completion of that qualifying period.
- (5) Employees continue to accrue annual leave while on paid leave including but not limited to:
 - (a) on annual leave
 - (b) on long service leave
 - (c) observing a public holiday prescribed by this award
 - (d) on sick leave
 - (e) on bereavement leave.
- (6) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee. Provided further that the maximum number of single day absences allowable during any twelve month accrual period shall be five.
No employee shall be required to take annual leave unless two weeks' prior notice is given.
- (7) Where an employer and employee have not agreed when the employee is to take their annual leave, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave which accrued more than 12 months before that time; provided the employee provides at least two weeks notice.
- (8) (a) Notwithstanding anything else herein contained, an employer who observes a Christmas close-down for the purpose of granting annual leave may require an employee to take the annual leave accrued in the 12 month period up to their anniversary.
- (b) An employer who requires employees to take their annual leave over a Christmas close-down must provide at least 14 days notice to the employees required to take such leave.
- (c) In the event of an employee being employed by an employer for a portion only of a year they shall only be entitled subject to subclause (5) of this clause, to such leave on full pay as is proportionate to their length of service during that period with such employer. If such leave is not equal to the leave given to the other employees, the employee shall not be entitled to work or pay whilst the other employees are on leave on full pay.
- (9) (a) At the request of an employee, and with the consent of the employer, annual leave prescribed by this clause may be given and taken in advance of being accrued by the employee in accordance with subclause (1).
- (b) If the service of an employee terminates and the employee has taken a period of leave in accordance with this subclause and if the period of leave so taken exceeds that which would become due pursuant to subclause (4) of this clause, the employee shall be liable to pay the amount representing the difference between the amount received by them for the period of leave taken in accordance with this subclause and the amount which would have accrued in accordance with subclause (4) of this clause. The employer may deduct this amount from monies due to the employee by reason of the other provisions of this Award at the time of termination.
- (c) The annual leave loading provided by subclause (2)(a) of this clause, shall not be payable when annual leave is taken in advance pursuant to the provisions of this subclause. The loading not paid, for the period of leave taken in advance, shall be payable to the employee at the end of the first pay period following the employee accruing the leave taken in advance.

9. Clause 12. – Absence through Sickness: Delete this title and clause and insert the following in lieu thereof:

12. – SICK LEAVE.

- (1) (a) An employee who is unable to attend or remain at their place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.
- (b) Entitlement to payment shall accrue at a rate of one twenty sixth of a week for each completed week of service with the employer.
- (c) If in the first or successive years of service with the employer an employee is absent on the ground of personal ill health or injury for a period longer than their entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service.
- (2) The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this clause may be claimed by the employee if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during the year at the time of the absence.
- (3) (a) The employee shall as soon as reasonably practicable advise the employer of his or her inability to attend for work, the nature of the illness or injury and the estimated duration of absence. Provided that such advice, other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.
- (b) An employee claiming entitlement under this clause is to provide the employer evidence that would satisfy a reasonable person of the entitlement.
- (4) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when they are absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.
- (b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to their place of residence or a hospital as a result of their personal ill health or injury for a period of seven consecutive days or more and produces a certificate from a registered medical practitioner that they were so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if they are unable to attend for work on the working day next following their annual leave.
- (c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day.
- (d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of clause 11 - Annual Leave.
- (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken. Provided that the annual leave loading prescribed in Clause 11- Annual Leave shall not be paid if the employee had already received leave loading payment with respect to the replaced annual leave.
- (5) Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with Clause 13. – Long Service Leave, the paid sick leave standing to the credit of the employee at the date of transmission from service with the transmittor shall stand to the credit of the employee at the commencement of service with the transmittor and may be claimed in accordance with the provisions of this clause.
- (6) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and Injury Management Act 1981 nor to employees whose injury or illness is the result of the employee's own misconduct.
- (7) The provisions of this clause do not apply to casual employees.
- (8) (a) An employee who works 40 ordinary hours each week during a particular work cycle shall be paid the wage the employee have received the employee not been at work during the absence.
- (b) An employee who works 38 ordinary hours each week during a particular work cycle shall be paid in respect of any absence the normal pay the employee would have received had such employee been at work during the absence.
- (c) An employee shall not be entitled to claim payment for non-attendance on the ground of personal ill-health or injury nor will the employee's sick leave entitlements be reduced if such personal ill-health or injury occurs on a day when an employee is absent on an Accrued Day Off in accordance with the provisions of subclauses (1) and (2) of Clause 7 - Hours of this award unless such illness is for a period of seven consecutive days or more and in all other respects complies with the requirements of subclause (5) of this clause.
- (9) An employee whilst on paid sick leave shall continue to accrue an entitlement to an Accrued Day Off as prescribed in subclauses (1) and (2) of Clause 7 - Hours of this award.

10. Clause 12. – Sick Leave: immediately following subclause (9) of this clause, insert the following new subclauses as follows:

Carer's Leave

- (10) An employee is entitled to use, each year, up to five (5) days of the employees entitlement to sick leave, to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of the immediate care and attention.
- (11) A member of the employee's family mentioned within subclause (11) means any of the following
- (a) the employee's partner or de facto partner;
- (b) a child of whom the employee has parental responsibility as defined by the Family Court Act 1997;

- (c) an adult child of the employee;
- (d) a parent, sibling or grandparent of the employee;
- (e) any other person who lives with the employee as a member of the employee's family.
- (12) By mutual agreement between the employer and employee an employee may be granted further sick leave credits for carer's leave.
- (13) An employee may take unpaid carer's leave by agreement with the employer.

11. Clause 13. – Long Service Leave: Delete this title and clause and insert the following in lieu thereof:

13. - LONG SERVICE LEAVE

Employees covered by this award shall be entitled to Long Service leave in accordance with the *Long Service leave General Order* of the *Western Australian Industrial Relations Commission*, that is published in part 1 (January) of each volume of the *Western Australian Industrial Gazette*", as varied from time to time.

12. Clause 14. – Right of Entry: delete this clause and insert a new clause 14. – Location Allowance as follows:

14. - LOCATION ALLOWANCE

- (1) Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	\$17.30
Argyle	\$45.60
Balladonia	\$17.40
Barrow Island	\$29.70
Boulder	\$7.20
Broome	\$27.70
Bullfinch	\$8.20
Carnarvon	\$14.20
Cockatoo Island	\$30.40
Coolgardie	\$7.20
Cue	\$17.70
Dampier	\$24.00
Denham	\$14.20
Derby	\$28.80
Esperance	\$5.20
Eucla	\$19.40
Exmouth	\$25.00
Fitzroy Crossing	\$34.80
Goldsworthy	\$15.40
Halls Creek	\$39.90
Kalbarri	\$6.00
Kalgoorlie	\$7.20
Kambalda	\$7.20
Karratha	\$28.60
Koolan Island	\$30.40
Koolyanobbing	\$8.20
Kununurra	\$45.60
Laverton	\$17.60
Learmonth	\$25.00
Leinster	\$17.30
Leonora	\$17.60
Madura	\$18.40
Marble Bar	\$43.80
Meekatharra	\$15.20
Mount Magnet	\$19.00

	PER WEEK
TOWN— <i>continued</i>	
Mundrabilla	\$18.90
Newman	\$16.60
Norseman	\$14.90
Nullagine	\$43.70
Onslow	\$29.70
Pannawonica	\$22.40
Paraburdoo	\$22.30
Port Hedland	\$23.90
Ravensthorpe	\$9.20
Roebourne	\$32.90
Sandstone	\$17.30
Shark Bay	\$14.20
Shay Gap	\$15.40
Southern Cross	\$8.20
Telfer	\$40.50
Teutonic Bore	\$17.30
Tom Price	\$22.30
Whim Creek	\$28.40
Wickham	\$27.60
Wiluna	\$17.60
Wittenoom	\$38.70
Wyndham	\$42.90
(2)	Except as provided in subclause (3) of this clause, an employee who has: <ul style="list-style-type: none"> (a) a dependent shall be paid double the allowance prescribed in subclause (1) of this clause; (b) a partial dependent shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependent is receiving by way of a district or location allowance.
(3)	Where an employee: <ul style="list-style-type: none"> (a) is provided with board and lodging by their employer, free of charge; or (b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act; <p style="margin-left: 40px;">such employee shall be paid $66\frac{2}{3}$ per cent of the allowances prescribed in subclause (1) of this clause.</p> <p style="margin-left: 40px;">The provisions of paragraph (b) of this subclause shall have effect on and from the 24th day of July, 1990.</p>
(4)	Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.
(5)	Where an employee is on annual leave or receives 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.
(6)	Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.
(7)	For the purposes of this clause: <ul style="list-style-type: none"> (a) “Dependant” shall mean - <ul style="list-style-type: none"> (i) a partner or defacto partner; or (ii) a child where there is no partner or defacto partner; <p style="margin-left: 40px;">who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.</p> (b) “Partial Dependant” shall mean a “dependent” as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.
(8)	Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.
13.	Clause 15. – Board of Reference: Delete this clause and number in its entirety.

14. Clause 16. – Under Rate Employees: Delete this title and clause and insert the following in lieu thereof:

15. - SUPPORTED WAGE SYSTEM FOR EMPLOYEES WITH DISABILITIES

- (1) Employees eligible for a supported wage
 This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:
 - (a) Supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability, as documented in Supported Wage System: Guidelines and Assessment Process.
 - (b) Accredited assessor means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
 - (c) Disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme.
 - (d) Assessment instrument means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.
- (2) Eligibility criteria
 - (a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.
 - (b) The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment.
 - (c) The Award does not apply to employers in respect of their facility, programme, undertaking service or the like which receives funding under the *Disability Services Act 1986* and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s.10 or s.12A of the *Disability Services Act 1986*, or if a part only has received recognition, that part.
- (3) Supported wage rates
 - (a) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:

Assessed capacity	% of prescribed award rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%
 - (b) Provided that the minimum amount payable shall be not less than as provided by the National Supported Wage System.
 - (c) Where a person's assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.
- (4) Assessment of capacity
 For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:
 - (a) the employer and a union party to the Award, in consultation with the employee or, if desired by any of these;
 - (b) the employer and an Accredited Assessor from a panel agreed by the parties to the Award and the employee.
- (5) Lodgement of assessment instrument
 - (a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Commission.
 - (b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.
- (6) Review of assessment
 The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

- (7) Other terms and conditions of employment
Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this Award paid on a pro rata basis.
- (8) Workplace adjustment
An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the areas.
- (9) Trial period
- In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except in some cases additional work adjustment time (not exceeding four weeks) may be needed.
 - During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
 - The minimum amount payable to the employee during the trial period shall be no less than as provided by the National Supported Wage System.
 - Work trials should include induction or training as appropriate to the job being trialled.
 - Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause 4 of this clause.

15. Clause 17. – Travelling Time and Expenses: Delete this number and clause and insert the following number, title and clause in lieu thereof:

16. – TRAVELLING TIME AND EXPENSES

- (1) Where an employee is sent to work from an employer's recognised place of business the employer shall pay all travelling time from such place of business to the job and if the employee is required to return the same day to the employer's place of business, the employer shall pay travelling to the place of business. An employee sent for duty to a place other than their regular place of duty shall be paid travelling expenses.
- (2) (a) Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance not less than that provided for in the schedules set out hereunder. Notwithstanding anything contained in this subclause, the employer and the employee may make any other arrangements as to car allowance no less favourable to the employee.
- (b) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.
- (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-& 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	75.3	65.5	57.9
South West Land Division	77.4	67.2	59.7
North of 23.5 ^o South Latitude	84.9	74.0	66.0
Rest of the State	79.9	69.4	61.6

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	26.0

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

16. Clause 18. – Time and Wages Record: Delete this number and clause and insert the following number, title and clause in lieu thereof:

17. - EMPLOYMENT RECORDS

- (1) A record shall be kept in the premises occupied by the employer wherein shall be recorded for each employee:
- On a daily basis:
 - start/finish time and daily hours including overtime;
 - paid time; and
 - breaks.

- (b) For each pay period:
 - (i) designation;
 - (ii) gross and net pay; and
 - (iii) deductions, including reasons for these deductions.
- (c) The following records must also be kept:
 - (i) employee's name
 - (ii) date of birth if under 21 years of age;
 - (iii) start date;
 - (iv) nature of work performed and classification;
 - (v) all leave paid, partly paid or unpaid;
 - (vi) relevant information for Long Service Leave calculations;
 - (vii) any industrial instrument including awards, orders or agreements that apply;
 - (viii) any additional information required by the industrial instrument; and
 - (ix) any other information necessary to show remuneration and benefits comply with the award.
- (2) The employer shall on the written request by a relevant person:
 - (a) produce to the person the employment records relating to the employee;
 - (b) let the person inspect the employment records;
 - (c) let the relevant person enter the premises of the employer for the purpose of inspecting the records;
 - (d) let the relevant person take copies of or extracts from the records.
- (3) A 'relevant person' means:
 - (a) the employee concerned;
 - (b) if the employee is a represented person, their representative;
 - (c) a person authorised in writing by the employee;
 - (d) an officer referred to in section 93 of the *Industrial Relations Act (1979)* (as amended) authorised in writing by the Registrar.
- (4) An employer shall comply with a written request not later than:
 - (a) at the end of the next pay period after the request is received; or
 - (b) the seventh day after the day on which the request was made to the employer.

17. Clause 19 – Rates of Pay: renumber this clause as clause 18.

18. Clause 19A – Minimum Wage – Adult Males and Females: Amend this number and clause as follows:

19. - MINIMUM ADULT AWARD WAGE

- (1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.
- (2) The Minimum Adult Award Wage for full time adult employees is \$484.40 per week payable on and from 4 June 2004.
- (3) The Minimum Adult Award Wage of \$484.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.
- (4) Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.
- (5) Juniors may be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision referred to in Clause 18. – Rates of Pay.
- (6)
 - (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.
 - (b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.
- (7) Subject to this clause the Minimum Adult Award Wage shall -
 - (a) apply to all work in ordinary hours.
 - (b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.
- (8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2003 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum adult award wage.

- (9) Adult Apprentices
- (a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than \$406.70 per week.
- (b) The rate paid in paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.
- (c) Where in an Award an additional rate is expressed as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of apprenticeship.
- (d) Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003.

19. Clause 20. – Protective Clothing and Uniforms: Delete this title and clause and insert the following clause in lieu thereof:

20. - PROTECTIVE CLOTHING AND UNIFORMS

- (1) Employees shall be supplied at the employer's expense with overalls or other suitable protective clothing and where necessary rubber boots and gloves. Where the employee is required to wear a uniform, the term uniform shall be taken to mean protective clothing but a uniform shall not be deemed a substitute for adequate protective clothing.
- (2) Where an employee is required to work in inclement weather the employee shall when necessary be supplied with suitable wet weather clothing.
- (3) The term 'uniform' shall include all items of clothing and footwear which are specified by the employer according to type or colour or according to the exclusion of ordinary clothing or footwear, to be worn.
- (4) (a) Where the employer requires a uniform to be worn, a supply of three such uniforms shall be provided by the employer at the employer's expense to the employee each year, or less on a fair wear and tear basis.
- (b) Uniforms supplied by the employer shall remain the property of the employer.
- (c) Should any dispute arise under this subclause, the matter shall be dealt with in accordance with the Dispute Resolution clause.
- (5) In lieu of the provision of uniforms the employer shall pay an allowance of \$5.02 per week.
- (6) Each employee shall be entitled to all reasonable laundry work at the expense of the employer but where the employer elects not to launder the uniforms, the employee shall be paid an allowance of \$1.31 per week.

20. Clause 22. – Part Time Employees: – Delete this clause and insert the following title and clause in lieu thereof.

22. - TRAINEESHIPS

A party to this award shall comply with the terms of the National Training Wage Award 2000 [AG790899; PR904174] and as varied from time to time as though it was a party bound by Clause 4 - Parties Bound of that award.

21. Clause 25. – Bereavement Leave: Delete subclause (1) and insert the following in lieu thereof, and renumber subclauses (2), (3) and (4) accordingly:

- (1) (a) Subject to subclause (2) of this clause, on the death of -
- (i) the partner or *de facto* partner of an employee;
- (ii) the child or step-child of an employee;
- (iii) the brother or sister of an employee;
- (iv) the parent step-parent or grandparent of an employee; or
- (v) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,
- an employee (including a casual employee) is entitled to paid bereavement leave of up to 2 days.
- (b) The 2 days need not be consecutive.
- (c) Bereavement leave is not to be taken during a period of any other kind of leave.
- (2) Proof in support of claim for leave
- An employee who claims to be entitled to paid leave in accordance with subclause (1) hereof is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to -
- (a) the death that is the subject of the leave sought; and
- (b) the relationship of the employee to the deceased person.

22. Clause 26. – Maternity Leave: Delete this title and clause and insert the following title and clause in lieu thereof:

26. – PARENTAL LEAVE

- (1) Subject to the terms of this clause employees are entitled to parental leave.
- (2) For the purposes of this clause "continuous service" is work for an employer on a regular and systematic basis (including any period of authorised leave or absence).
- (3) Definitions:
- In this clause -
- "adoption", in relation to a child, is a reference to a child who -
- (i) is not the child or the step-child of the employee or the employee's partner;
- (ii) is less than 5 years of age; and
- (iii) has not lived continuously with the employee for 6 months or longer;
- "continuous service" means service under an unbroken contract of employment and includes -

- (i) any period of parental leave; and
- (ii) any period of leave or absence authorised by the employer;

"expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;

"parental leave" means leave provided for by subclause (6)(a);

"partner" means a spouse or *de facto* partner.

(4) Entitlement to Parental Leave

- (a) Subject to subclauses (6), (7)(a) and (8)(a), an employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of -
 - (i) the birth of a child to the employee or the employee's partner; or
 - (ii) the placement of a child with the employee with a view to the adoption of the child by the employee.
- (b) An employee is not entitled to take parental leave unless the employee -
 - (i) has, before the expected date of birth or placement, completed at least 12 months' continuous service with the employer; and
 - (ii) has given the employer at least 10 weeks written notice of the employee's intention to take the leave.
- (c) An employee is not entitled to take parental leave at the same time as the employee's partner but this paragraph does not apply to one week's parental leave -
 - (i) taken by the employee and the employee's partner immediately after the birth of the child; or
 - (ii) taken by the employee and the employee's partner immediately after a child has been placed with them with a view to their adoption of the child.
- (d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except the period of one week's leave referred to in paragraph (c).

(5) Maternity leave to start 6 weeks before birth

A female employee who is pregnant and who has given notice of her intention to take parental leave is to start the leave 6 weeks before the expected date of birth, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.

(6) Medical certificate

An employee who has given notice of the employee's intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's partner, as the case may be, is pregnant and the expected date of birth.

(7) Notice of partner's parental leave

- (a) An employee who has given notice of the employee's intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.
- (b) Any notice given under paragraph (a) is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.

(8) Notice of parental leave details

- (a) An employee who has given notice of the employee's intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave no less than four weeks before the proposed commencement date.
- (b) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.
- (c) The starting and finishing dates of a period of parental leave are to be agreed between the employee and employer.

(9) Return to work after parental leave

- (a) An employee shall confirm the employee's intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of the period of parental leave.
- (b) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.
- (c) If the position referred to in paragraph (a) is not available, the employee is entitled to an available position -
 - (i) for which the employee is qualified; and
 - (ii) that the employee is capable of performing, most comparable in status and pay to that of the employee's former position.
- (d) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of the position referred to in paragraph (b), that paragraph applies only in respect of the position held by the employee immediately before taking the acting or temporary position.
- (e) Notwithstanding paragraphs (b) and (c) of this clause, an employer and an employee may agree to an alternative return to work such as part-time employment, having regard to
 - (i) applicable discrimination legislation,
 - (ii) the requirements of the employee,
 - (iii) the operational needs of the employer, and
 - (iv) any other relevant matter.

- (10) Effect of parental leave on employment
Absence on parental leave -
- (a) does not break the continuity of service of an employee; and
 - (b) is not to be taken into account when calculating the period of service for the purpose of this Award.
- (11) Sick Leave
Where an employee not then on maternity leave suffers an 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 duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed 52 weeks.
- (12) Transfer to a Safe-Job
Where in the opinion of a duly qualified 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 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 maternity leave for the purposes of this clause.
- (13) Variation of Period of Parental Leave
- (a) Provided the addition does not extend the parental leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be lengthened.
 - (b) The period of 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.
- (14) Cancellation of Parental Leave
- (a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee or the employee's partner, as the case may be, terminates other than by the birth of a living child.
 - (b) Where the pregnancy of an employee or an employee's partner, as the case may be, then on parental leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that the employee desires to resume work.
- (15) Special Maternity Leave
- (a) Where the pregnancy of a female employee not then on parental leave terminates after 28 weeks other than by the birth of a living child then:
 - (i) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work; or
 - (ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a duly qualified medical practitioner certifies as necessary before her return to work.
 - (b) For the purposes of subclauses (10), (16) and (17) hereof, maternity leave shall include special maternity leave.
 - (c) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.
Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which the employee 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.
- (16) Parental Leave and Other Leave Entitlements
Provided the aggregate of leave including leave taken pursuant to subclauses (12) and (15) hereof does not exceed 52 weeks:
- (a) 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 the employee is then entitled.
 - (b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during absence on parental leave.
- (17) Termination of Employment
- (a) An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.
 - (b) An employer shall not terminate the employment of an employee on the ground of the employee's absence on maternity leave or, in the case of a female employee, her pregnancy, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.
- (18) Replacement Employees
- (a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave.
 - (b) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

- (c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
- (d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.
- (e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employee's employment continues beyond the 12 months qualifying period.

23. Clause 28. – Definitions: Delete this clause and insert the following in lieu thereof:

- (1) "Accrued Day(s) Off" means the paid day(s) off accruing to an employee resulting from an entitlement to the 38 hour week as prescribed in Clause 7 - Hours of this award.
- (2) "Emergency" for the purposes of this award shall constitute a life threatening situation for an animal.
- (3) "Ordinary rate of pay" shall be the rate applicable as prescribed in Clause 18. – Rates of Pay and the rates prescribed by Clause 14. – Location Allowances and any other rate to which the employee is entitled in accordance with the contract of employment for ordinary hours of work.
- (4) "Union" shall mean the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.

24. Clause 29. – Superannuation: Delete this title and clause and insert the following in lieu thereof:

29. - SUPERANNUATION

Superannuation Legislation

- (1) (a) The Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993 legislation as varied from time to time governs the superannuation rights and obligations of the parties.
- (b) Notwithstanding (1)(a) above the following provisions apply.
- (2) Contributions
 - (a) The employer shall contribute a minimum of 9% of ordinary time earnings per employee in accordance with subclause (3).
 - (b) Employees' Additional Voluntary Contributions:

Where the rules of the fund allow an employee to make additional contributions to the fund the employer shall, where an election is made, upon the direction of the employee deduct contributions for the employee's wages and pay them to the fund in accordance with the direction of the employee and the rules of the fund.
- (3) Compliance, Nomination and Transition
 - (a) For the purposes of this clause -
 - (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. If the employee does not nominate a fund or scheme, or until such time as an employee nominates a fund or scheme, superannuation contribution shall be paid into the default fund.
 - (c) The default fund shall be Westscheme Super Fund.
 - (d) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme within fourteen (14) days.
 - (e) Each employee shall be eligible to receive contributions from the date of eligibility, notwithstanding the date the membership application was forwarded to the Fund.
 - (f) A nomination or notification of the type referred to in paragraphs (b) and (c) of subclause (3) 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.
 - (g) 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.
 - (h) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee.
 - (i) In the event that an employee has not, after 28 days of commencing employment, nominated a complying fund into which contributions may be made, the employer will forward contributions and employee details to the default scheme, Westscheme Super Fund.
 - (j) Except where the Trust Deed provides otherwise employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer.
 - (k) All contributions into the nominated Fund or scheme shall be paid on a quarterly basis/monthly and within thirty (30) days of the end of each month.
 - (l) For the purpose of this clause the employee's ordinary time earnings are as defined in the *Superannuation Guarantee (Administration) Act 1992* and shall include base classification rate, shift penalties together with any other all purpose allowance or penalty payment for work in ordinary time and shall include in respect of casual employee's the casual loading prescribed by this Award, but shall exclude any payment for overtime worked, vehicle allowances, fares or travelling time allowances (excluding travelling related to distant work) commission or bonus as well as –

- (i) periods of unpaid leave or unauthorized absences; or
- (ii) annual leave or any other payments paid out on termination.
- (m) The employer shall continue to contribute to the nominated fund or scheme on behalf of an employee in receipt of payments under the Workers' Compensation and Injury Management Act 1981 for not more than 52 weeks.

25. Clause 30. – Award Modernisation and Enterprise Consultation: Delete this title and clause and insert the following titles and clauses in lieu thereof:

30. - DISPUTE SETTLEMENT PROCEDURES

- (1) Subject to the provisions of the *Industrial Relations Act 1979 (WA)* (as amended) in the event of any dispute or matter arising under this award, the following procedure shall apply.
 - (a) Step 1
As soon as practicable after the dispute has arisen, it shall be considered jointly by the appropriate supervisor and the employee or employees concerned and, where requested, by representatives of the employer or employee(s).
 - (b) Step 2
If the dispute is not resolved it shall be considered jointly by the employer, the employee or employees concerned and, where requested, by representatives of the employer or employee(s).
 - (c) Step 3
The employer and the employee(s) concerned (and their representatives where requested) will attempt to resolve the dispute prior to it being referred to the Commission however, if the dispute is not resolved, it may then be referred to the Western Australian Industrial Relations Commission for assistance in its resolution.
- (2) At all times whilst a dispute or matter is being resolved in accordance with this clause, normal work will continue.

31. – RIGHT OF ENTRY

An authorized representative of the union shall be entitled to exercise right of entry in accordance with the provisions of the Industrial Relations Act 1979 or any other legislation that makes provision for right of entry.

32. – OTHER LAWS AFFECTING EMPLOYMENT

- (1) INDUSTRIAL RELATIONS ACT 1979
www.wairc.wa.gov.au
- (2) MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993
www.slp.wa.gov.au
- (3) WORKPLACE RELATIONS ACT 1996
www.airc.gov.au or link to <http://www.airc.gov.au/procedures/wra/wra.html>
- (4) SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992
www.austlii.edu.au/au/legis/cth/consol_act/sga1992430/
- (5) OCCUPATIONAL SAFETY AND HEALTH ACT 1984
www.safetyline.wa.gov.au
- (6) EQUAL OPPORTUNITY ACT 1984
www.oceo.wa.gov.au
- (7) TERMINATION, REDUNDANCY AND INTRODUCTION OF CHANGE
GENERAL ORDER
www.wairc.wa.gov.au (under General Orders)
2005 WAIRC 01715
Western Australian Industrial Gazette vol. 85, p. 1667.
- (8) LONG SERVICE LEAVE STANDARD PROVISIONS
www.wairc.wa.gov.au (under General Orders)

33. – WHERE TO GO FOR FURTHER INFORMATION

- (1) Liquor, Hospitality and Miscellaneous Union
Western Australian Branch
Telephone: 08 9388 5400
Facsimile: 08 9382 3986
Email: lhmuwa@lhmu.org.au
- (2) Chamber of Commerce and Industry of Western Australia
180 Hay Street
EAST PERTH WA 6004
Telephone: 08 9365 7555
Facsimile: 08 9365 7550

- (3) Western Australian Industrial Relations Commission
 Level 16, 111 St Georges Terrace
 PERTH WA 6000
 Telephone: 08 9420 4444
 Facsimile: 08 9420 4500
 Email: webmaster@wairc.wa.gov.au
 Web: www.wairc.wa.gov.au
 Toll Free: 1800 624 263
- (4) Department of Consumer & Employment Protection, Labour Relations
 3rd Floor, Dumas House
 2 Havelock Street
 WEST PERTH WA 6005
 Telephone: 08 9222 7700
 Facsimile: 08 9222 7777
 Email: labourrelations@docep.wa.gov.au
 Wageline: 1300 655 266

26. Schedule B. - Respondents: Delete this schedule and insert the following in lieu thereof:

SCHEDULE B. - RESPONDENTS

Ascot Veterinary Hospital
 297 Great Eastern Highway
 BELMONT WA 6104

St. Francis Veterinary Hospital
 7 Main Street,
 OSBORNE PARK WA 6017

Melville Animal Hospital
 34a Rome Road,
 MELVILLE WA 6156

Swanbourne Veterinary Hospital
 (formerly Messrs I.J. Miller and M.J Grandison)
 2 Devon Road,
 SWANBOURNE WA 6010

Royal Society for the Prevention of Cruelty to Animals
 7 Mallard Way
 Cannington WA 6107

27. Appendix s.49B – Inspection of Records Requirements: Delete this Appendix.

28. Appendix – Resolution of Disputes Requirement: Delete this Appendix

2006 WAIRC 03952

BREADCARTERS (COUNTRY) AWARD 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
 WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

ACME BAKERY AND OTHERS

RESPONDENTS

CORAM

COMMISSIONER J H SMITH

DATE

WEDNESDAY, 15 MARCH 2006

FILE NO/S

APPL 14 OF 2006

CITATION NO.

2006 WAIRC 03952

Result

Varied

Representation

Applicant

Mr N J Hodgson

Respondents

Mr J N Uphill (as agent on behalf of the Respondents for whom warrants have been filed)

Order

Having heard Mr Hodgson on behalf of the Applicant and Mr Uphill on behalf of the Respondents for whom warrants have been filed, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Breadcraters (Country) Award 1976 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 15 March 2006.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

 SCHEDULE
1. Clause - 6 – Wages: Delete subclause (3) Leading Hands and insert the following in lieu thereof:

(3) LEADING HANDS:

A leading hand appointed as such by the employer and placed in charge of:

- (a) Not less than three and not more than ten other workers shall be paid \$24.03 per week extra.
- (b) More than ten and not more than twenty other workers shall be paid \$35.88 per week extra.
- (c) More than twenty other workers shall be paid \$45.46 per week extra.

2. Clause 6 – Wages: Delete subclause (6) Collection of Monies and insert the following in lieu thereof:

(6) COLLECTION OF MONIES:

Breadcraters who are required in any week to collect monies and account for them as part of their duties are to be paid \$6.37 per week in addition to the rates before-mentioned.

2006 WAIRC 03967

BREADCARTERS' (METROPOLITAN) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

BAKING INDUSTRY EMPLOYERS' ASSOCIATION OF WESTERN AUSTRALIA

RESPONDENT**CORAM**

COMMISSIONER J H SMITH

DATE

THURSDAY, 16 MARCH 2006

FILE NO/S

APPL 15 OF 2006

CITATION NO.

2006 WAIRC 03967

Result	Award varied
Representation	
Applicant	Mr N J Hodgson
Respondent	Ms M Saraceni (of counsel for the Respondent) Mr J Uphill (as agent for whom warrants have been filed)

Order

Having heard Mr Hodgson on behalf of the Applicant, Ms Saraceni of counsel on behalf of the Respondent and Mr Uphill as agent on behalf of the Respondents for whom warrants have been filed, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Breadcraters' (Metropolitan) Award be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 15 March 2006.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

 SCHEDULE
1. Clause 2. - Arrangement: Between 7. Hours and 8. Overtime insert 7A. Shift Work:

7A. Shift Work

2. Clause 6. – Wages: Delete subclause (1) and insert the following in lieu thereof:

(1) The following shall be the total minimum rates of wages payable to employees covered by this award.

	Base Rate\$	Supple- mentary Payment\$	Safety Net Adjustment\$	Total Weekly Wage\$
Grade 1 Loader Yard person	314.30	44.90	159.00	518.20
Grade 2 Breadcarter in charge of rigid vehicle up to 4.5 tonnes Gross Vehicle Mass (GVM) or Gross Combination Mass (GCM) Loader in charge of automatic slicing and wrapping machine Breadcarter	327.70	46.80	159.00	533.50
Grade 3 Breadcarter in charge of rigid vehicle 4.5 to 13.9 tonnes GVM or GCM	334.40	47.80	159.00	541.20
Grade 4 Breadcarter in charge of rigid vehicle over 13.9 tonnes GVM or GCM up to 13 tonnes capacity	344.50	49.20	159.00	552.70
Grade 5 Breadcarter in charge of rigid vehicle and trailer up to 22.4 tonnes GCM over 10 and up to 15 tonnes capacity	351.10	50.20	159.00	560.30
Grade 6 Breadcarter in charge of articulated vehicle 3 or more axles over 22.4 tonnes GCM over 22 and up to 39 tonnes capacity	357.90	51.10	159.00	568.00

Leading Hands

A leading hand appointed as such by the employer and placed in charge of:

- (a) Not less than three and not more than ten other workers shall be paid \$24.03 per week extra.
- (b) More than ten and not more than twenty other workers shall be paid \$35.88 per week extra.
- (c) More than twenty other workers shall be paid \$45.46 per week extra.

3. **Clause 6. – Wages: Delete subclause (3) Casuals and insert the following in lieu thereof:**

(3) CASUALS

Casual hands shall be paid at the rate of 24 per cent in addition to the rates prescribed herein.

4. **Clause 6. – Wages: Delete subclause (4) and insert the following in lieu thereof:**

- (4) Breadcarters who are required in any week to collect monies and account for them as part of their duties are to be paid \$6.37 per week in addition to the rates before-mentioned.

5. **Clause 6. – Wages: Delete subclause (5)(a) and (b) and insert the following in lieu thereof:**

- (5) (a) Breadcarters, Loaders and Slicers who are required to commence working before 4.00 a.m. on any day shall be paid for each day so worked, an extra 30 per cent.
- (b) Breadcarters, Loaders and Slicers who are required to commence work between 4.01 a.m. and 7.00 a.m. on any day shall be paid an extra 15 per cent for each day so worked.

6. **Clause 6. – Wages: Delete subclause (6)**

7. **Insert a new Clause 7A. – Shift Work:**

7A. - SHIFT WORK

(1) DEFINITIONS

For the purposes of this clause:

"Afternoon Shift" means any shift finishing after 6.00 p.m. and at or before midnight.

"Continuous Work" means work carried on with consecutive shifts of men throughout the twenty-four hours of each of at least six consecutive days without interruption except during breakdowns or meal breaks or due to unavoidable causes beyond the control of the employer.

"Night Shift" means any shift finishing subsequent to midnight and at or before 8.00 a.m.

"Rostered Shift" means a shift of which the employee concerned has had at least forty eight hours notice.

(2) HOURS - CONTINUOUS WORK SHIFTS

This subclause shall apply to shift employees on continuous work as defined. The ordinary hours of shift employees shall average 38 per week inclusive of crib time and shall not exceed 152 hours in twenty-eight consecutive days. Provided that, where the employer and the majority of employees concerned agree, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days.

Subject to the following conditions, such shift employees shall work at such times as the employer may require:

- (a) A shift shall consist of not more than 10 hours inclusive of crib time. Provided that in any arrangement of ordinary working hours where the ordinary working hours are to exceed 8 on any shift the arrangement of hours shall be subject to the agreement of the employer and the majority of employees concerned.
- (b) Except at the regular change over of shifts, an employee shall not be required to work more than one shift in each twenty-four hours.
- (c) Twenty minutes shall be allowed to shift employees each shift for crib which shall be counted as time worked.

(3) HOURS - OTHER THAN CONTINUOUS WORK

This subclause shall apply to shift employees not on continuous work as herein before defined. Subject to **Error! Reference source not found.** - Hours the ordinary hours of work shall be an average of 38 per week.

- (a) The ordinary hours shall be worked continuously except for meal breaks at the discretion of the employer. An employee shall not be required to work for more than five hours without a break for a meal. Except at regular change-over of shifts an employee shall not be required to work more than one shift in each twenty-four hours.
- (b) Provided that the ordinary hours of work prescribed herein shall not exceed 10 hours on any day. Provided further than in any arrangement of ordinary working hours where the ordinary working hours are to exceed 8 hours on any day, the arrangement of hours shall be subject to the agreement of the employer and the majority of employees concerned.

(4) ROSTERS

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

(5) VARIATION BY AGREEMENT

Subject to (1) and (4) the method of working shifts may in any case be varied by agreement between the employer and the majority of employees concerned. The time of commencing and finishing shifts once having been determined may be varied by agreement between the employer and the majority of employees concerned to suit the circumstances of the establishment or in the absence of agreement by seven days' notice of alteration given by the employer to the employees.

(6) SHIFT ALLOWANCES

- (a) For ordinary hours of shift, shift employees shall be paid the following extra percentages of the rate prescribed for their respective classifications.

	Percent
Rotating afternoon shift	15
Permanent afternoon shift	17.5
Rotating night shift	20
Permanent night shift	30
Permanently working alternate night and afternoon shift:	
when on afternoon shift	17.5
when on night shift	30

- (b) Work on Saturday, Sunday or Public Holiday

Shift employees for work on rostered shift the major portion of which is performed on a Saturday, Sunday or public holiday shall be paid as follows:

Saturday - at the rate of time and one half

Sunday - at the rate of double time

Public Holidays - as prescribed in 9 - Holidays, at the rate of double time.

The penalty rates prescribed by this subclause for work on a Saturday, Sunday or Public Holiday shall be payable in lieu of the shift allowance prescribed in 6(a)

- (c) Non Continuous Work

Shift employees who work on any afternoon or night shift which does not continue for at least five consecutive afternoons or nights shall be paid at the rate of time and a half for the first three hours and double time thereafter for each such shift.

- (d) Rate when shift extends beyond midnight

Notwithstanding anything contained herein, each shift shall be paid for at the rate applicable to the day on which the major portion of the shift is worked.

Where shifts fall partly on a public holiday, that shift the major portion of which falls on such public holiday, shall be regarded as a public holiday shift.

(7) DAYLIGHT SAVING

Notwithstanding anything contained elsewhere in this Award, in any area where by reason of the legislation of a State summer time is prescribed as being in advance of the standard time of that State the length of any shift:

- (a) Commencing before the time prescribed by the relevant legislation for the commencement of a summer time period; and
- (b) Commencing on or before the time prescribed by such legislation for the termination of a summer time period, shall be deemed to be the number of hours represented by the difference between the time recorded by the clock at the beginning of the shift and the time so recorded at the end thereof, the time of the clock in each case to be set to the time fixed pursuant to the relevant State legislation.

(8) - OVERTIME

Shift employees for all time worked in excess of or outside the ordinary working hours prescribed by this Award or on a shift other than a rostered shift shall:

- (a) If employed on continuous shift work be paid at the rate of double time; or
- (b) If employed on other shift work at the rate of time and a half for the first three hours and double time thereafter except in each case when the time is worked:
 - By arrangement between the employees themselves; or
 - For the purpose of effecting the customary rotation of shifts; or
 - On a shift to which an employee is transferred on short notice as an alternative to standing the employee off in circumstances which would entitle the employer to deduct payment for a day in accordance with **Error! Reference source not found.**

Provided that when not less than 7 hours 36 minutes notice has been given to the employer by a relief employee that they will be absent from work and the employee whom they should relieve is not relieved and is required to continue to work on their rostered day off the unrelieved employee shall be paid double time.

(9) SHIFTWORK - MEAL TIMES

All shift employees whilst working on day, afternoon or night shift shall be entitled to a paid crib time of twenty minutes. Such crib time to be allowed and taken as prescribed. Unless the period of overtime is less than one and a half hours an employee before starting overtime after working ordinary hours shall be allowed a meal break of twenty minutes which shall be paid for at ordinary rates. An employer and employee may agree to any variation of this provision to meet the circumstances of the work in hand provided that the employer shall not be required to make any payment in respect of any time allowed in excess of twenty minutes.

10. - SHIFT WORK - ANNUAL LEAVE

In addition to the leave herein before prescribed, seven-day shift employees, that is employees working rostered shift necessitating regular rostered Saturday, Sunday and Public Holiday work as part of their ordinary hours, after each twelve months' continuous service shall be given an extra week's leave. Where an employee is engaged for part only of the twelve-monthly period as a seven-day shift employee, the extra leave, to which they shall be entitled, shall be the same proportion of a week as the proportion which the time they spent as a seven-day employee during the period bears to a year

7. Clause 24A. – Casual Employment: Delete subclause (3) and insert in lieu thereof the following:

- (3) A casual employee while working ordinary hours, shall be paid on an hourly basis 1/38th of the appropriate weekly wage rate prescribed by the award, plus 24% of ordinary time earnings for the work performed. A minimum payment of four hours is to be paid each day required.

2006 WAIRC 03978

BREADCARTERS' (METROPOLITAN) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESTRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH**APPLICANT**

-v-

BAKING INDUSTRY EMPLOYERS' ASSOCIATION OF WESTERN AUSTRALIA

RESPONDENT**CORAM**

COMMISSIONER J H SMITH

DATE

MONDAY, 20 MARCH 2006

FILE NO/S

APPL 15 OF 2006

CITATION NO.

2006 WAIRC 03978

Result

Correction Order issued

Correction Order

WHEREAS an error occurred in the Order dated Thursday, 16 March 2006 issued in APPL 15 of 2006 Citation Number [2006] WAIRC 03967, the Commission, in order to correct this error and pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the Schedule attached to that Order be completely deleted and the attached Schedule be inserted.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

SCHEDULE

1. Clause 6. – Wages: Delete subclause (1) and insert the following in lieu thereof:

(1) The following shall be the total minimum rates of wages payable to employees covered by this award.

	Base Rate\$	Supple- mentary Payment\$	Safety Net Adjustment\$	Total Weekly Wage\$
Grade 1 Loader Yardperson	314.30	44.90	159.00	518.20
Grade 2 Breadcarter in charge of rigid vehicle up to 4.5 tonnes Gross Vehicle Mass (GVM) or Gross Combination Mass (GCM) Loader in charge of automatic slicing and wrapping machine Breadcarter	327.70	46.80	159.00	533.50
Grade 3 Breadcarter in charge of rigid vehicle 4.5 to 13.9 tonnes GVM or GCM	334.40	47.80	159.00	541.20
Grade 4 Breadcarter in charge of rigid vehicle over 13.9 tonnes GVM or GCM up to 13 tonnes capacity	344.50	49.20	159.00	552.70
Grade 5 Breadcarter in charge of rigid vehicle and trailer up to 22.4 tonnes GCM over 10 and up to 15 tonnes capacity	351.10	50.20	159.00	560.30
Grade 6 Breadcarter in charge of articulated vehicle 3 or more axles over 22.4 tonnes GCM over 22 and up to 39 tonnes capacity	357.90	51.10	159.00	568.00

Leading Hands

A leading hand appointed as such by the employer and placed in charge of:

- (a) Not less than three and not more than ten other workers shall be paid \$24.03 per week extra.
- (b) More than ten and not more than twenty other workers shall be paid \$35.88 per week extra.
- (c) More than twenty other workers shall be paid \$45.46 per week extra.

2. Clause 6 – Wages: Delete subclause (4) and insert the following in lieu thereof:

(4) Breadcarters who are required in any week to collect monies and account for them as part of their duties are to be paid \$6.37 per week in addition to the rates before-mentioned.

2006 WAIRC 04009

BUILDING TRADES (CONSTRUCTION) AWARD 1987, NO. R 14 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MASTER BUILDERS ASSOCIATION OF WA

APPLICANT

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS AND OTHERS

RESPONDENTS**CORAM**

SENIOR COMMISSIONER J F GREGOR

DATE

THURSDAY, 23 MARCH 2006

FILE NO

APPL 986 OF 2005

CITATION NO.

2006 WAIRC 04009

Result

Vary Award

Order

HAVING heard Mr K. Richardson on behalf of the Applicant and Mr G. MacLean of Counsel on behalf of The Construction, Forestry, Mining and Energy Union of Workers; Mr L. Edmonds of Counsel on behalf of Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; Mr J. Daslik on behalf of the Housing Industry Association; Ms E. Clements on behalf of Department of Consumer and Employment Protection; Mr A. Davis on behalf of the Department of Employment and Training and Mr P. Joyce on behalf of the Minister for Education and Training, 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. R14 of 1978 be varied in accordance with the following Schedule and that such variation shall have effect commencing from the first pay period on and from 23rd March 2006.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

SCHEDULE

Clause 41. – Apprentices:

A. Immediately following subclause (1)(a)(iii) insert a new sub-paragraph as follows:

(iv)

Two year term	%
First Year	55
Second Year	75

Provided that these provisions do not apply in classifications under Clause 8(2)(ii) and (iii) of this Award.

The Western Australian Industrial Relations Commission shall conduct a review of the 2 year building industry apprenticeship no more than two years from the date of the award being amended to introduce the 2 year apprenticeship.

B. Delete paragraphs (b) –(d) inclusive and insert the following in lieu thereof:

(b) The Industrial Training Act 1975, as amended from time to time, and its Regulations shall prescribe apprenticeship trades and respective terms of apprenticeship.

(c) For the purposes of paragraph (a) hereof, the tradesperson's rate shall be the sum of the weekly rate prescribed in paragraph (a)(i) or (a)(ii) of subclause (2) of Clause 8. - Rates of Pay of this award and the special allowance prescribed in subclause (5) of the said clause.

(d) Industry and Tool Allowance (per week)

In addition to the above rate apprentices shall receive the appropriate amounts prescribed in subclauses (3), (6), (7) and (8) of Clause 8. - Rates of Pay, as part of the ordinary weekly wage for all purposes.

(e) Provision of Tools

An employer may, by agreement with the apprentice's parent or guardian, elect to provide the apprentice with a kit of tools and, subject to establishing the value of the tools at the time of so providing, deduct the tool allowance until the cost of the kit of tools is reimbursed.

In the event of an apprentice being dismissed or leaving his/her employment before the cost of the tool kit has been reimbursed, the employer shall be entitled to:

- (i) deduct from any monies owing the apprentice, the amount then owing; or
- (ii) by agreement retain tools at the originally nominated value to the amount still owing.

2006 WAIRC 04087

BUILDING TRADES (CONSTRUCTION) AWARD 1987, NO. R 14 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MASTER BUILDERS ASSOCIATION OF WA

APPLICANT

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

RESPONDENT

CORAM

SENIOR COMMISSIONER J F GREGOR

DATE

THURSDAY, 30 MARCH 2006

FILE NO.

APPL 986 OF 2005

CITATION NO.

2006 WAIRC 04087

Result

Correction

Correction Order

WHEREAS on 23rd March 2006 an Order in this matter was deposited in the Office of the Registrar; and

WHEREAS the said Order had an error; and

WHEREAS to correct the error delete the following:

Provided that these provisions do not apply in classifications under Clause 8(2)(ii) and (iii) of this Award.

and insert in lieu the following:

Provided that these provisions do not apply in classifications under Clause 8(2)(a)(ii) and (iii) of this Award.

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the Order made on 23rd March 2006 should be corrected to read as follows.

Provided that these provisions do not apply in classifications under Clause 8(2)(a)(ii) and (iii) of this Award.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 04049

CHILDREN'S SERVICES (PRIVATE) AWARD (NO A10 OF 1990)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN
BRANCH

APPLICANT

-v-

JAY BEE DAY CARE CENTRE AND OTHERS

RESPONDENT

CORAM

COMMISSIONER J L HARRISON

DATE

FRIDAY, 24 MARCH 2006

FILE NO/S

APPL 944 OF 2005

CITATION NO.

2006 WAIRC 04049

Result

Varied

Order

WHEREAS on 23 March 2006 the Commission issued a Minute of Proposed Order in this matter; and

WHEREAS on 24 March 2006 the Commission conducted a Speaking to the Minutes of Proposed Order; and

WHEREAS the parties agreed that some minor typographical errors contained in the minute of proposed order be rectified; and

WHEREAS on behalf of a number of respondents Ms S Laferla argued that the words "or all employers" should be added to the end of the proposed order 2 to be consistent with an interim order issued by Commissioner Smith of the federal commission (PR969192) relating to wages and conditions of the Child Care (Long Day Care) WA Award 2003 ("the federal award") to ensure that all employers and employees in the child care industry in Western Australia have the same rates of pay and conditions of employment; and

WHEREAS Ms K Reid argued that "all employers or at all" should be added at the end of the proposed order 2 to be consistent with Smith, C's interim order; and

WHEREAS the applicant argued that the order should issue in the form of the minute of proposed order and that any issues as to its later application should be dealt with at the time of hearing; and

WHEREAS having considered the submissions of both parties the Commission is of the view that the typographical errors as identified should be rectified and that no change should be made to the orders as proposed on the basis that any future issue of inconsistency with the terms and conditions contained in the federal award as a result of this variation being incorporated into the Children's Services (Private) Award (No A10 of 1990) ("the Award"), which applies to all employees and employers bound by the Award except those employers represented by Ms Reid, can be dealt with at a subsequent hearing;

NOW THEREFORE having heard Mr J Nicholas on behalf of the applicant, Ms S Laferla as agent on behalf of respondents on whose behalf warrants have been filed and Ms K Reid of counsel intervening by warrant on behalf of a number of employers bound by the award, the Commission, pursuant to the powers conferred under the *Industrial Relations Act, 1979*, hereby orders:

1. THAT the Children's Services (Private) Award (No A10 of 1990) 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 23 March 2006.
2. THAT this variation shall not apply to those employers bound by the Award which were represented by Ms Reid by warrant at the hearing held on 23 March 2006 and that further proceedings shall take place to determine whether or not the variation to the Award contained in order 1 above shall apply to these employers.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

SCHEDULE

1. Clause 1. – Title. Delete this clause and insert the following in lieu thereof:

This award shall be known as the Children's Services (Private) Award 2006 and shall replace the Children's Services (Private) Award No. A10 of 1990.

2. Clause 2. – Arrangement. Delete this clause and insert the following in lieu thereof:

1. Title
 - 1B. Minimum Adult Award Wage
 2. Arrangement
 - 2A. State Wage Principles - June 1991
 3. Area
 4. Scope
 5. Term
 6. Definitions
 7. Contract of Service
 8. Hours of Work
 9. Overtime
 10. Meal Breaks and Allowances
 11. Absence Through Sickness
 12. Location Allowances
 13. Annual Leave
 14. Public Holidays
 15. Long Service Leave
 16. Payment of Wages
 17. Time and Wages Record and Right of Entry
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 Appendix - S.49B - Inspection of Records Requirements

3. Clause 6 – Definitions. Delete this clause and insert the following in lieu thereof:

"Casual employee" shall mean an employee who is regularly employed for less than four weeks.

"Part time employee" shall mean an employee who is regularly employed for less than that prescribed in Clause 8. - Hours of Work of this award, for a full week's work.

"Union" shall mean shall mean the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.

"Year of experience" shall mean experience in the appropriate classification. Where there is a dispute as to whether the employee's previous experience shall count for determining the "year of experience" it may be determined by the Western Australian Industrial Relations Commission.

4. Clause 22 – Wages. Delete this clause and insert the following in lieu thereof:

- (1) The total minimum weekly rate of wage payable to persons employed pursuant to this award shall be:

	Classification	Pay Level	Relativity to C10	Per week \$
(a)	Children Services Employee Level 1 Grade One			
	Cleaner	1.1	90.6%	523.60
	Kitchen Hand	1.2	91.7%	530.30
	Grade Two (Cook/Gardener)			
	On commencement	1.3	92.5%	534.50
	after 1 year in the industry	1.4	93.9%	542.80
(b)	Children Services Employee Level 2			
	on commencement	2.1	90.6%	523.60
	after 1 year in the industry	2.2	92.2%	533.00
	after 2 years in the industry	2.3	93.9%	542.50
	after 3 years in the industry	2.4	95.5%	552.00
	E worker			
	on commencement	2.5	98.3%	568.20
after 1 year in the industry	2.6	99.6%	576.20	

Classification— <i>continued</i>		Pay Level	Relativity to C10	Per week \$
(c)	Children Services Employee Level 3			
	on commencement	3.1	100.0%	578.20
	after 1 year in the industry	3.2	105.0%	601.20
	after 2 years in the industry	3.3	110.0%	622.70
	CSE Level 3 holding AQF Certificate IV	3.4	115.0%	640.80
	CSE Level 3 holding AQF Diploma in Children's Services or CSE Level 3 who is an E Worker	3.5	Note 1	662.05
Note 1: Pay Level 3.5 is fixed at the mid-point between the Level 3.3 rate and the Level 4.1 rate				
			Relativity to C5	
(d)	Children Services Employee Level 4			
	on commencement	4.1	100.0%	701.40
	after 1 year in the industry	4.2	102%	713.20
	after 2 years in the industry	4.3	104%	724.90
(e)	Children Services Employee Level 5			
	on commencement	5.1	106.1%	737.30
	after 1 year in the industry	5.2	108.1%	749.10
	after 2 years in the industry	5.3	110.1%	760.80
	Note: An Assistant Director who holds an Advanced Diploma (AQF 6) must be paid no less than	5.4	Note 2	763.90
Note 2: Pay Level 5.4 has a 145% relativity to the pay level 3.1 [C10] rate.				
(f)	Children Services Employee Level 6			
	Grade 1			
	on commencement	6.1	128.6%	867.70
	after 1 year in the industry	6.2	130.6%	879.45
	after 2 years in the industry	6.3	132.6%	891.20
	Grade 2			
	on commencement	6.4	138.7%	927.10
	after 1 year in the industry	6.5	140.3%	936.50
	after 2 years in the industry	6.6	142.3%	948.30
	Grade 3			
	on commencement	6.7	144.4%	960.60
	after 1 year in the industry	6.8	146.4%	972.40
	after 2 years in the industry	6.9	148.4%	984.20
Note 3: A Director or Assistant Director who holds a Graduate Certificate in Child Care Management or equivalent will be paid an all-purpose allowance, calculated at 5% of the weekly rate for Assistant Director (Pay Level 5.3) ie				
				38.00
(g)	Pre-School Teachers			
	Step I	7.1	94.1%	669.50
	Step II	7.2	100.0%	701.40
	Step III	7.3	105.5%	733.20
	Step IV	7.4	110.2%	758.60
	Step V	7.5	114.9%	782.20
	Step VI	7.6	120.8%	814.10
	Step VII	7.7	127.2%	849.20
	Step VIII	7.8	132.5%	877.80
	Step IX	7.9	137.2%	903.40
	Step X	7.10	143.1%	935.30
	Step XI	7.11	149.0%	967.10
(2)	Acting Positions			
Where an employee is appointed to act as the Director of a Centre or Supervising Officer pursuant to the relevant child care regulations, he/she shall be paid for the whole of that period as Director or Supervising Officer.				
(3)	Incremental Progression			
(a)	Progression from one level to the next within a classification is subject to a children's services employee meeting the following criteria:			
	<ul style="list-style-type: none"> • competency at the existing level; • 12 months experience at that level (or in the case of employees employed for 19 hours or less per week, 24 months' experience) and in-service training as required; • demonstrated ability to acquire the skills which are necessary for advancement to the next pay point level. 			

- (b) Where an employee is deemed not to have met the requisite competency at their existing level at the time of appraisal, his/her incremental progression may be deferred for periods of three months at a time provided that:
- the employee is notified in writing as to the reasons for the deferral;
 - the employee has, in the twelve months leading to the appraisal, been provided with in-service training required to attain a higher pay point;
 - following any deferral, the employee is provided with the necessary training in order to advance to the next level.
- (c) Where an appraisal has been deferred for operational reasons beyond the control of either party, and the appraisal subsequently deems the employee to have met the requirements under this clause, any increase in wage rates will be back paid to the 12 month (or 24 month) anniversary date of the previous incremental progression.
- (d) An employee whose incremental advancement has been refused or deferred may seek to have the decision reviewed by lodging a written request through the dispute resolution procedure in Appendix – Resolution of Disputes Requirement of this award. If the review is successful, then the incremental advancement will be backdated to the original due date. The review process must be completed within two months of the request for the review being made.
- (e) An employee employed as a CSE Level 2 on completion of an accredited introductory child care course shall immediately progress by one additional level beyond that previously determined in accordance with subclause (3)(a) of this clause. Additional steps shall be determined in accordance with subclause (3)(a) of this clause.
- (f) On ceasing employment, the employee shall be given a written statement of the current level and step and the date of commencement at that level and step.

(4) Junior Rates

An employee under the age of 21 years who is employed as a Children Services Employee Level 2 shall be paid a percentage of the rate applicable to an adult employee, taking into account the provisions for progression specified in subclauses (3)(a) and (3)(b) of this clause. The percentages of the adult rate shall be:

Percentage of adult rate	%
At or under 16 years of age	50
At 17 years of age	60
At 18 years of age	75
At 19 years of age	85
At 20 years of age	95

Thereafter the adult rate

(5) Arbitrated Safety Net Adjustments

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(6) Translation arrangements and Savings provision

(a) Savings

No employee shall suffer a reduction in wages and/or allowances as a result of the insertion of the new classification structure into this award on 23 March 2006.

(b) Commencement

Subject to Principle 12 of the Commission's *Statement of Principles*, the provisions of this clause and the provisions of Schedule C, the rates of pay set out in this award will apply from the first full pay period to commence on or after 23 March 2006.

(c) Translation

(i) An employee whose duties fall within the classification structure set out in this award should confer with his or her employer and seek to reach agreement on the translation of the employee to the terms of this award.

(ii) Employees will translate to the new classification structure on the basis of the following principles:

- Except where otherwise provided in this clause, where an existing employee is appointed to a higher classification than they currently enjoy, they will translate to the "on commencement" rate for that classification;
- Where an existing employee retains their existing classification, they will retain their current incremental position in that classification based on their years of experience in the industry;
- New employees, or current employees who are subsequently reclassified to a higher grade, will be paid at the "on commencement" rate for the classification to which they are appointed and will progress through the scale according to the factors listed in subclause (3) of this clause.

- (iii) Despite subclause (6)(c)(ii) of this clause:
- Existing Child Care Giver employees will be classified according to their duties and their years of experience in the industry. Thus an existing Child Care Giver employee with more than two years experience will be classified at the new CSE Level 2.3. A Child Care Giver employee with more than one year but less than two years experience will be classified at the new CSE Level 2.2.
 - Existing Child Care Giver employees will be classified as either CSE Level 2 or CSE Level 3 employees depending on their qualifications and/or duties and their experience in the industry. A Child Care Giver Employee without Certificate III will normally be classified at CSE Level 2, unless they have been previously recognised by the employer as having the knowledge or experience to perform CSE Level 3 duties, in which case they will be classified as CSE Level 3. Both will be entitled to immediate recognition of their years of experience in the industry (ie. a Certificate III employee with more than two years of experience will be classified at the new CSE Level 3.3).
 - Existing E Worker employees will be classified at the new CSE Level 3.5.
 - Existing Qualified Child Care Giver employees will, depending on their qualifications and/or duties and their experience in the industry, be classified as either CSE Level 4.1, 4.2 or 4.3. Each will be entitled to immediate recognition of their years of experience in the industry at this level.
 - Existing Assistant Director employees will, depending on their qualifications and/or experience in the industry, be classified as either Assistant Director pay level 5.1, 5.2, 5.3 or 5.4. Each will be entitled to immediate recognition of their years of experience in the industry
 - Existing Director employees will, depending on the number of children the service is licensed for be classified as either Director Grade 1, Director Grade 2 or Director Grade 3. Each will be entitled to immediate recognition of their years of experience in the industry. No director shall suffer a loss of pay as a result of the transition to the new classification structure. Any employee who would suffer a loss of pay as a result of the transition to the new classification structure shall maintain their rate of pay as immediately prior to 23 March 2006.
- (d) Where the employee's current rate of pay is below the rate of pay specified in this Award for the classification appropriate to the employee, the following provisions will apply:
- (i) From the first full pay period to commence on or after 23 March 2006, the employee must be paid (in addition to the employee's current rate of pay) \$20 per week extra or the appropriate classification rate for the employee ("the first instalment", which incorporates the *State Wage Case – 4 July 2005* decision adjustment).
 - (ii) From the first full pay period to commence on or after 23 September 2006, the employee must be paid (in addition to the employee's current rate of pay), a further \$20 a week extra or the appropriate classification rate for the employee ("the second instalment).
 - (iii) From the first full pay period to commence on or after 23 March 2007, the employee must be paid a further \$20 a week extra or the appropriate classification rate for the employee ("the third instalment").
 - (iv) From the first full pay period to commence on or after 23 September 2007, the employee must be paid the balance of any increase required to achieve the appropriate classification rate ("the final instalment").
- (e) The employer and employee can agree to earlier implementation dates for wage increases than those set out in subclause (6)(d) of this clause.
- (f) In the event that the employer and the employee cannot reach agreement as envisaged by subclause (6)(c) of this clause, or in the event that a dispute arises as to the transitional arrangements referred to in this clause, the procedures specified in Appendix – Resolution of Disputes Requirement, must be followed.
- (g) Despite subclause (6)(f) of this clause and Appendix – Resolution of Disputes Requirement of this award:
- (i) An award respondent or group of respondents may apply to the Commission pursuant to Principle 12 of the Commission's *Statement of Principles* to seek variation to the phase-in period for the new minimum rates of pay provided for in this award;
 - (ii) A Board of Reference shall be established from time to time for the purpose of resolving any dispute or difficulty or likely dispute or difficulty in the application of subclause (6)(c)(ii) of this clause. The Board shall be constituted by a Chairperson who shall be a member of the Western Australian Industrial Relations Commission and at least two other members, one of whom is nominated by the Liquor, Hospitality and Miscellaneous Union and the other nominated by the employer respondent to the award affected by the dispute or difficulty or likely dispute or difficulty. Before proceedings commence, the Chairperson shall seek undertakings from the parties appearing before the Board that any decision, subject to the terms of the Act, shall be final. Any decisions of a Board of Reference made pursuant to this clause shall be reduced to writing and published by the Chairperson.
- (h) A translation table appears as Schedule C to this award.
- 5. Clause 24 – Classifications Definitions and Skill Descriptors. Delete this clause and insert the following in lieu thereof:**

All employees shall be classified by the employer into one of the levels contained in this clause in accordance with the employee's skills, responsibilities, qualifications and duties. Where an employee believes they have been wrongly classified the matter shall be dealt with in accordance with the dispute settling procedure set out in Appendix – Resolution of Disputes Requirement of this award (or subclause (6)(g) of Clause 22. – Wages of this award as appropriate).

- (1) Children's Services Employee Level 1
 - (a) Grade one
 - (i) Definition

An untrained ancillary employee employed to clean or work as a kitchen hand.

- (ii) Skill descriptors
- Such an employee:
 - Is responsible for the quality of the employee's own work subject to direct supervision;
 - Works under direct supervision either individually or in a team environment; and
 - Exercises discretion within the level of the employee's skills in the performance of tasks.

(b) Grade two

- (i) Definition
- An untrained ancillary employee who is employed to undertake cooking or gardening duties.
- (ii) Skill descriptors
- Such an employee:
 - Works under routine supervision either individually or in a team environment;
 - Is responsible for assuring the quality of the employee's own work subject to routine supervision;
 - Is required to exercise discretion during the course of his/her own work.

(2) Children's Services Employee Level 2

- (a) This is an employee working under routine supervision, engaged to assist in the supervision and care of children and generally to assist in the functioning of the centre.
- (b) This is also an employee who is appointed as an E Worker that does not meet the requirements of subclause (3)(a)(i) and subclause (3)(a)(ii) of this clause.
- (c) Responsibilities of an employee at this level may include the following:
- Maintain a clean, hygienic environment;
 - Maintain and attend to personal hygiene of children;
 - Maintain and attend to own personal hygiene;
 - Attend to nutritional needs of children;
 - Respond to child's apparent ill-health;
 - Respond to accident, emergency or threat;
 - Implement routines which enhance well being;
 - Interact positively and appropriately with children;
 - Participate in the planning and preparation of programmes;
 - Assist to prepare an environment based on programme requirements;
 - Assist in the implementation of programmes;
 - Contribute to team approach;
 - Seek to further professional development;
 - Liaise effectively with parents;
 - Uphold the Centre's philosophy;
 - Participate in appropriate administrative processes;
 - Contribute to maintenance and care of buildings and equipment; and
 - Implement Centre policies and procedures.
- (d) Additional duties of an employee at this level with more than 2 years experience in the industry may include the following:
- Assist in the facilitation of programmes suited to the needs of individual children and groups;
 - Provide input to trained staff by observations of individual children and groups;
 - Work under direction with individual children with special needs.
- (e) An E Worker at this level will take on the same duties and perform the same tasks as a CSE Level 2 and:
- Is able to display various methods and techniques of child management;
 - Is able to direct other staff members when exercising responsibility in their allocated area;
 - Possesses observational skills in excess of CSE;
 - Participates in a team approach to the delivery of care.
- (f) Subject to this Award, an employee at this Level is entitled to incremental progression to pay level 2.3. However, an employee at this level who is an E Worker must be paid no less than the rate prescribed for pay Level 2.5, and may progress to level 2.6.

(3) Children's Services Employee Level 3

- (a) This is an employee who:
- (i) has completed AQF Certificate III in Children's Services or an equivalent qualification; or
- (ii) possesses, in the opinion of the employer, sufficient knowledge or experience to perform the duties at this level.

- (b) This is also an employee who is appointed as an E Worker that meets the requirements of subclause (3)(a)(i) or subclause (3)(a)(ii) of this clause.
- (c) An employee appointed at this level will undertake the same duties and perform the same tasks as a CSE Level 2 employee, and will undertake the following additional indicative duties:
- Assist in the preparation, implementation and evaluation of developmentally appropriate programs for individual children or groups;
 - Responsible for recording observations of individual children or groups for program planning purposes for qualified staff
 - Under direction, work with individual children with particular needs.
 - Assist in the direction of untrained staff
 - Undertake and implement the requirements of quality assurance.
 - Work in accordance with food safety regulations
- (d) An E Worker will take on the same duties and perform the same tasks as a CSE Level 3 and:
- Is able to display various methods and techniques of child management;
 - Is able to direct other staff members when exercising responsibility in their allocated area;
 - Possesses observational skills in excess of CSE;
 - Participates in a team approach to the delivery of care.
- (e) Subject to this Award, an employee at this Level is entitled to incremental progression to pay level 3.3. However:
- An employee at this level who holds a relevant AQF Certificate IV or equivalent and who exercises skills and competencies beyond those required for AQF Certificate III in the ongoing performance of their work must be paid no less than the rate prescribed for pay Level 3.4.
 - An employee at this level who has completed an AQF Diploma in Children's Services or equivalent, and who applies skills and knowledge acquired beyond the competencies required for AQF Certificate III in the on-going performance of their work, must be paid no less than the rate prescribed for pay Level 3.5.
 - An employee at this level who is an E Worker must be paid no less than the rate prescribed for pay Level 3.5.
 - Any dispute concerning an employee's entitlement to be paid at pay Level 3.5 may be referred to a Board of Reference appointed under Clause 22. – Wages subclause (6)(g)(ii) of this award. A Board of Reference may require an employee to demonstrate to its satisfaction that the employee utilises skills and knowledge above those prescribed for Level 3 but below those prescribed for Level 4.
- (4) Children's Services Employee Level 4
- (a) This is an employee who has completed a Diploma in Children's Services or equivalent as recognised by licensing authorities and is appointed as the person in charge of a group of children in the age range from birth to 6 years. It shall also include persons employed as supplementary service grants (SUPS) employees and persons who do not hold approved qualifications but who have obtained an exemption from the Child Care Licensing Unit to work at this level and who are so appointed.
- (b) An employee appointed at this level will take on the same duties and perform the same tasks as a CSE Level 3 and undertake the following additional indicative duties:
- Responsible, in consultation with the Assistant Director/Director for the preparation, implementation and evaluation of a developmentally appropriate program for individual children or groups of children in care.
 - Responsible for the direction and general supervision of other employees up to CSE Level 3.
 - Responsible to the Assistant Director/Director for the supervision of students on placement.
 - Ensure a safe environment is maintained for both staff and children.
 - Ensure that records are maintained accurately for each child in their care.
 - Develop, implement and evaluate daily care routines.
 - Ensure the centre or service's policies and procedures are adhered to.
 - Liaise with families.
- (5) Children's Services Employee Level 5
- (a) This is an employee who has completed a [AQF 5] Diploma in Children's Services or equivalent, and/or is appointed as either an Assistant Director of a service, or a Children's Services Coordinator:
- (b) An Assistant Director appointed at this level will take on the same duties and perform the same tasks as a CSE Level 4 and be responsible for the following additional indicative duties:
- Coordinate and direct the activities of employees engaged in the implementation and evaluation of developmentally appropriate programs;
 - Contribute, through the Director, to the development of the centre or service's policies;
 - Coordinate centre operations including Occupational Health and Safety, program planning, staff training;
 - Take responsibility for the day-to-day management of the centre or service in the temporary absence of the Director and for management and compliance with licensing and all statutory and quality assurance issues; and
 - Generally supervise all employees within the service.
- (c) A Children's Services Coordinator undertakes additional responsibilities including coordinating the activities of more than one group, supervising staff, trainees and students on placement, and assisting in administrative functions.
- (d) An Assistant Director who holds an Advanced Diploma (AQF 6) must be paid no less than CSE Level 5.4. Pay Level 5.4 has a 145% relativity to the Pay level 3.1 [C10] rate.

- (e) Qualification Allowance: An Assistant Director who holds a graduate qualification in child care management or other relevant qualification is entitled to an all purpose allowance equivalent to 5 per cent of the rate of pay for specified for Level 5.3 (see Note 3 after subclause (1)(f) of Clause 22. - Wages of this award).
- (6) Children's Services Employee Level 6 - Director
- (a) A Director is an employee:
- (i) who holds:
- a relevant Degree, or
 - an AQF Advanced Diploma, or
 - a Diploma in Children's Services, or
 - a Diploma in Out of Hours Care, or
 - is a person possessing such experience, or holding such qualifications deemed by the employer to be appropriate to the position, and
- (ii) is appointed as the Director of a Service and is responsible for the overall management and administration of the service with the following additional indicative duties:
- supervise the implementation of developmentally appropriate programs for children;
 - recruit staff in accordance with relevant regulations;
 - maintain day-to-day accounts and handle all administrative matters;
 - ensure that the centre or service adheres to all relevant regulations and statutory requirements;
 - ensure that the centre or service meets or exceeds quality assurance requirements;
 - liaise with families and outside agencies;
 - formulate and evaluate annual budgets;
 - liaise with management committees or proprietors as appropriate;
 - provide professional leadership and development to staff;
 - develop and maintain policies and practices for the centre or service, or
- (iii) is appointed to act as the Supervising Officer pursuant to the Community Services (Child Care) Regulations 1988 as amended.
- (b) Director Level 1
A Director Level 1 is an employee appointed as the Director of a service licensed for up to 39 children and paid at the Level 6.1 to 6.3 salary range.
- (c) Director Level 2
A Director Level 2 is an employee appointed as the Director of a service licensed for between 40 and 59 children and is paid at the Level 6.4 to 6.6 salary range.
- (d) Director Level 3
A Director Level 3 is an employee appointed as the Director of a service licensed for 60 or more children and paid at the Level 6.7 to 6.9 salary range
- (e) Qualification Allowance: A Director who holds a graduate qualification in child care management or other relevant qualification is entitled to an all-purpose allowance equivalent to 5 per cent of the rate of pay for specified for Level 5.3 (see Note 3 after subclause (1)(f) of Clause 22. - Wages of this award).
- (7) Pre-School Teachers
- (a) Definition
- (i) Three year trained teacher holding a Diploma of Teaching, or equivalent, or a teacher holding a University degree (other than a Bachelor of Education) and paid at the Pre-School Teacher Level 7.1 to 7.7 range.
- (ii) Teacher holding: University degree and Diploma of Education, or University degree and Teacher's certificate, or a Bachelor of Education Degree and paid at the Pre-School Teacher Level 7.3 to 7.11 range.
- (iii) Teacher holding the qualifications outlined in 7.1.2 plus a second degree or higher degree such as a graduate diploma or a degree at honours level and paid at the Pre-School Teacher Level 7.4 to 7.11 range.
- (8) Preparation Time
A qualified full-time employee at Level 4 or above who is appointed by the employer to be responsible for the planning and implementation of the planned programme for the children in the Centre shall be entitled to two hours per week preparation time. Such time shall be taken at a time agreed by the employer and shall be free from other duties.
- (9) Examination Leave
Employees shall be granted leave with full pay in order to travel to and attend childcare examinations relevant to this Schedule and approved by the education institution. Provided that when an afternoon examination is scheduled an employee shall be allowed the morning for study if so required by the employee.
6. **Schedule A – Parties to the Award. Delete this schedule and insert the following in lieu thereof.**
The following organisation is a party to this award:
The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.
7. **Schedule B – Respondents: Immediately following this schedule insert a new title and schedule as per the following:**

SCHEDULE C. - TRANSLATION TO NEW WAGES AND CLASSIFICATION STRUCTURE

Current Award Level	Current rate	New level	Total New end rate	Total Increase	Rate at 23/03/06	Rate at 23/09/06	Rate at 23/03/07	Rate at 23/09/07
Child Care Support Employee – Grade One								
Cleaner	523.60	1.1	523.60	0.00	523.60			
Kitchen Hand	530.30	1.2	530.30	0.00	530.30			
Child Care Support Employee – Grade Two								
Step I	534.50	1.3	534.50	0.00	534.50			
Step II	542.80	1.4	542.80	0.00	542.80			
Child Care Giver								
Step I	523.60	2.1	523.60	0.00	523.60			
Step II	533.00	2.2	533.00	0.00	533.00			
Step III	542.50	2.3	542.50	0.00	542.50			
Step IV	552.00	2.4	552.00	0.00	552.00			
E Worker (Not Cert III)								
Step I	568.20	2.5	568.20	0.00	568.20			
Step II	576.20	2.6	576.20	0.00	576.20			
E Worker (Cert III)								
Step I	568.20	3.5	662.05	93.85	588.20	608.20	628.20	662.05
Step II	576.20	3.5	662.05	85.85	596.20	616.20	636.20	662.05
Child Care Giver (Cert III)								
Step I	523.60	3.1	578.20	54.60	543.60	563.60	578.20	
Step II	533.00	3.2	601.20	68.20	553.00	573.00	593.00	601.20
Step III	542.50	3.3	622.70	80.20	562.50	582.50	602.50	622.70
Step IV	552.00	3.3	622.70	70.70	572.00	592.00	612.00	622.70
Child Care Giver (Cert IV)								
Step I	523.60	3.4	640.80	117.20	543.60	563.60	583.60	640.80
Step II	533.00	3.4	640.80	107.80	553.00	573.00	593.00	640.80
Step III	542.50	3.4	640.80	98.30	562.50	582.50	602.50	640.80
Step IV	552.00	3.4	640.80	88.80	572.00	592.00	612.00	640.80
Child Care Giver (Diploma)								
Step I	523.60	3.5	662.05	138.05	543.60	563.60	583.60	662.05
Step II	533.00	3.5	662.05	129.05	553.00	573.00	593.00	662.05
Step III	542.50	3.5	662.05	119.55	562.50	582.50	602.50	662.05
Step IV	552.00	3.5	662.05	110.05	572.00	592.00	612.00	662.05
Qualified Child Care Giver								
Step IA	601.00	4.1	701.40	100.40	621.00	641.00	661.00	701.40
Step IB	619.00	4.2	713.20	94.20	639.00	659.00	679.00	713.20
Step II	631.40	4.3	724.90	93.50	651.40	671.40	691.40	724.90
Step III	645.60	4.3	724.90	79.30	665.60	685.60	705.60	724.90
Step IV	660.10	4.3	724.90	64.80	680.10	700.10	720.10	724.90
Assistant Director – Grade One								
Step I	667.90	5.1	737.30	69.40	687.90	707.90	727.90	737.30
Step II	673.40	5.2	749.10	75.70	693.40	713.40	733.40	749.10
Step III	683.00	5.3	760.80	77.80	703.00	723.00	743.00	760.80
Assistant Director – Grade Two								
Step I	673.40	5.1	737.30	63.90	693.40	713.40	733.40	737.30
Step II	683.00	5.2	749.10	66.10	703.00	723.00	743.00	749.10
Step III	690.50	5.3	760.80	70.30	710.50	730.50	750.50	760.80
Assistant Director – Grade Three								
Step I	683.00	5.1	737.30	54.30	703.00	723.00	737.30	
Step II	690.50	5.2	749.10	58.60	710.50	730.50	749.10	
Step III	704.50	5.3	760.80	56.30	724.50	744.50	760.80	

Current Award Level— <i>continued</i>	Current rate	New level	Total New end rate	Total Increase	Rate at 23/03/06	Rate at 23/09/06	Rate at 23/03/07	Rate at 23/09/07
Director								
Step I	704.50	6.1	867.70	163.20	724.50	744.50	764.50	867.70
Step II	732.50	6.2	879.45	146.95	752.50	772.50	792.50	879.45
Step III	755.10	6.3	891.20	136.10	775.10	795.10	815.10	891.20
Step IV	783.60	6.4	927.10	143.50	803.60	823.60	843.60	927.10
Step V	815.00	6.5	936.50	121.50	835.00	855.00	875.00	936.50
Step VI	840.50	6.6	948.30	107.80	860.50	880.50	900.50	948.30
Step VII	855.30	6.7	960.60	105.30	875.30	895.30	915.30	960.60
Step VIII	893.60	6.8	972.40	78.80	913.60	933.60	953.60	972.40
Step IX	922.00	6.9	984.20	62.20	942.00	962.00	982.00	984.20
Pre-School Teachers								
Step I	630.60	7.1	669.50	38.90	650.60	669.50		
Step II	660.10	7.2	701.40	41.30	680.10	700.10	701.40	
Step III	687.60	7.3	733.20	45.60	707.60	727.60	733.20	
Step IV	711.10	7.4	758.60	47.50	731.10	751.10	758.60	
Step V	734.70	7.5	782.20	47.50	754.70	774.70	782.20	
Step VI	764.20	7.6	814.10	49.90	784.20	804.20	814.10	
Step VII	794.60	7.7	849.20	54.60	814.60	834.60	849.20	
Step VIII	821.10	7.8	877.80	56.70	841.10	861.10	877.80	
Step IX	842.70	7.9	903.40	60.70	862.70	882.70	902.70	903.40
Step X	872.20	7.10	935.30	63.10	892.20	912.20	932.20	935.30
Step XI	901.60	7.11	967.10	65.50	921.60	941.60	961.60	967.10

NOTE: New Rates to be phased-in commencing 23 March 2006:

- 23 March 2006 – up to \$20.00 per week
 23 September 2006 – up to a further \$20.00 per week
 23 March 2007 – up to a further \$20.00 per week
 23 September 2007 – the full balance of any increase to achieve the total rate

2006 WAIRC 04048

CLEANERS AND CARETAKERS (CAR AND CARAVAN PARKS) AWARD 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION OF
WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

WILSON PARKING AND OTHERS

RESPONDENTS

CORAM

COMMISSIONER J H SMITH

DATE

THURSDAY, 23 MARCH 2006

FILE NO/S

APPL 421 OF 2004

CITATION NO.

2006 WAIRC 04048

Result

Award varied

Representation

Applicant

Ms S Northcott

Respondents

Mr M O'Connor (as agent on behalf of the Respondents for whom warrants have been filed)

No appearance by or on behalf of any other Respondents

Order

Having heard Ms Northcott on behalf of the Applicant, Mr O'Connor as agent on behalf of the Respondents for whom warrants have been filed and no appearance by or on behalf of any other Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Cleaners and Caretakers (Car and Caravan Parks) Award 1975 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on and from 24 March 2006

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

 SCHEDULE
1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof:2. - ARRANGEMENT

1. Title
 - 1B Minimum Adult Award Wage
 2. Arrangement
 3. Area and Scope
 4. Term
 5. Definitions
 6. Contract of Service
 7. Hours
 8. Rosters
 9. Shift and Weekend Work
 10. Overtime
 11. Higher Duties
 12. Fares and Travelling Time
 13. Special Rates and Provisions
 14. Public Holidays
 15. Annual Leave
 16. Sick Leave
 17. Long Service Leave
 18. Bereavement Leave
 19. Employment Records
 20. Parental Leave
 21. Introduction of Change and Redundancy
 22. Location Allowances
 23. Types of Employment
 24. Wages
 25. Payment of Wages
 26. No Reduction
 27. Resolution of Disputes Requirements
 28. Effect of 38-Hour Week
 29. Superannuation
 30. Right of Entry
 31. Supported Wage System for Employees with Disabilities
 32. Other Laws Affecting Employment
 33. Where to go to for Further Information
- Schedule A - Parties to the Award
Schedule B - Respondents

2. Clause 3. – Area and Scope: Delete this clause and insert the following in lieu thereof:3. - AREA AND SCOPE

This award shall apply throughout the State of Western Australia to employees classified in clause 24 - Wages of this award in the industries carried on by the respondents to this award.

3. Clause 5. – Definitions: Delete this clause and insert the following in lieu thereof:5. – DEFINITIONS

- (1) "Caretaker" shall mean an employee required to reside on or in the vicinity of the premises of the employer, and who is responsible to the employer for the supervision and/or the general maintenance of such premises, and for the safety of the employer's grounds, buildings and appurtenances, but shall not mean an employee who is employed to manage such premises.
- (2) "Watchperson" shall mean an employee who is required to watch and/or guard and/or patrol grounds and/or buildings.
- (3) "Cleaner" shall mean an employee substantially employed in performing cleaning work.
- (4) "Parking Attendant" shall mean an employee employed in car parks, either indoor or outdoor. Duties shall include the directing of clients' vehicles in such places and where applicable the collection of admission fees to such places.
- (5) "Accrued Day(s) Off" means the paid day(s) off accruing to an employee resulting from an entitlement to the 38 hour week as prescribed in Clause 7 - Hours of this Award.

4. Clause 6. – Contract of Service: Delete subclauses (1), (2), (3) and (6) of this clause and insert the following in lieu of subclause (1) thereof, and renumber accordingly:

- (1) Notice of Termination by Employer

- (a) The employment of any employee (other than a casual employee, who shall be engaged by the hour) may be terminated by the following notice period, provided that an employee who has been dismissed on the grounds of serious misconduct shall only be paid up to the time of dismissal.

PERIOD OF CONTINUOUS SERVICE	PERIOD OF NOTICE
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 has completed two years' continuous service with the employer, shall be entitled to one week's additional notice.
- (c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause shall be made if the appropriate notice period is not given. The 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 shall pay the employee the ordinary wages for the period of notice had the employment not been terminated.
- (e) 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 the Long Service Leave Standard Provisions published in each January in the Western Australian Gazette, and as amended from time to time, shall constitute continuous service for the purpose of this clause.
- (f) Notice of Termination by Employee
One weeks' notice shall be necessary for an employee to terminate their engagement or the forfeiture or payment of one week's pay by the employee to the employer in lieu or notice.
- (g) Termination, Redundancy and Introduction of Change
In circumstances of termination, redundancy or introduction of change, employees are entitled to a statement of employment, job search leave, consultation, redundancy pay and other matters as provided in the General Order 2005 WAIRC 01715 (85(WAIG)1667), as amended, varied or replaced from time to time.

5. Clause 7. – Hours: Delete subclause (1) of this clause and insert the following in lieu thereof:

- (1) The ordinary hours of duty shall be an average of 38 per week with the hours actually worked being 40 per week or 80 per fortnight to be worked eight hours per day on any five days of the week or ten days of the fortnight.
Except where provided elsewhere, the ordinary hours shall be worked with two hours of each week's work accruing as an entitlement to a maximum of 12 Accrued Day(s) Off in each 12 month period. The Accrued Day(s) Off shall be taken at a time mutually acceptable to the employer and the worker, except that the employer may require that they be taken within 12 months of the worker becoming entitled to the Accrued Day(s) Off.

6. Clause 10. – Overtime: Delete subclause (2) of this clause and insert the following in lieu thereof:

- (2) Time worked by a continuous shift employee in excess of the ordinary hours shall be paid for at ordinary rates:
- if it is due to private arrangements between the workers themselves; or
 - if it does not exceed two hours and is due to a relieving person not coming on duty at the proper time; or
 - if it is for the purpose of affecting the customary rotation of shifts.

7. Clause 10. – Overtime: Delete subclause (3) of this clause and insert the following in lieu thereof:

- (3) All work performed by shift employees on any day on which they are rostered off duty or days worked in excess of those provided in clause 7 - Hours or clause 23 – Types of Employment - shall be paid for at the rate of double time.

8. Clause 10. – Overtime: After subclause (6) of this clause insert a new subclause (7):

- (7) Reasonable Overtime
- An employer may require an employee to work reasonable overtime at overtime rates.
 - An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
 - any risk to employee health and safety;
 - the employee's personal circumstances including any family responsibilities;
 - the needs of the workplace or enterprise;
 - the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and
 - any other relevant matter.

9. Clause 12. – Fares and Travelling Time: Delete this clause and insert the following in lieu thereof:

- (1) Where an employee is required during normal working hours, by the employer, to work outside their usual place of employment, the employer shall pay the employee any reasonable travelling expenses incurred except where an allowance is paid in accordance with subclause (2) of this clause.
- (2) (a) Where an employee is required and authorised to use their own motor vehicle in the course of their duties they shall be paid an allowance not less than that provided for in the schedules set out hereunder. Notwithstanding anything contained in this subclause the employer and the employee may make any other arrangements as to car allowance not less favourable to the employee.
- (b) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.
Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
	Rate per kilometre (Cents)		
Metropolitan Area	75.3	65.5	57.9
South West Land Division	77.4	67.2	59.7
North of 23.5° South Latitude	84.9	74.0	66.0
Rest of the State	79.9	69.4	61.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate¢/km
All areas of the State	26.0

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

10. Clause 13. – Special Rates and Provisions: Delete the following subclauses (5), (7), (9), (10), (13) & (14) of this clause and insert the following in lieu thereof:

- (5) Outside Cleaning:
No employee, other than a properly equipped window cleaner, shall be required to clean the outside of windows except when standing on the ground, or balcony, or verandah.
No employee shall be required to clean the outside of windows in a dangerous situation after sunset.
- (7) Protective Clothing:
Where an employee is required by the employer to work in the rain, suitable protective clothing shall be provided free of charge by the employer.
Where an employee during the course of their duty may become wet, they shall be supplied free with protective footwear, which shall remain the property of the employer.
In the event of a dispute arising the matter shall be resolved in accordance with the dispute resolution procedures.
- (9) Height Money:
(a) Where it is necessary to go wholly outside a building to clean windows, an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of \$2.35 per day.
(b) Where an employee is required to clean windows from a swinging scaffold or similar device he/she shall be paid 31 cents per hour extra for every hour or part thereof so worked.
- (10) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than three hours an allowance of \$2.65 per day shall be paid.
- (13) Cash Handling Allowance:
An employee who is required by the employer to collect money from the customers of that employer shall be paid an allowance of \$6.40 per week.
- (14) All employees called upon to clean closets connected with septic tanks and sewerage shall receive an allowance as follows:

	Per Week\$
(a) five closets or greater but less than ten closets per day	3.75
(b) ten closets or greater but less than 30 closets per day	11.10
(c) 30 closets or greater but less than 50 closets per day	22.05
(d) 50 closets or greater per day	27.75

For the purpose of this clause, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

11. Clause 14. – Public Holidays: Delete this clause and insert the following in lieu thereof:

14. - PUBLIC HOLIDAYS

- (1) The following days or the days observed in lieu shall subject to subclause (3) hereof, be allowed as holidays without deduction of pay namely: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, State Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day.
- (2) (a) When any of the days mentioned in subclause (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.
(b) When any of the days observed as a holiday under this clause falls on a day when an employee is rostered off duty and he/she has not been required to work on that day he/she shall be paid as if the day was an ordinary working day, or, if he/she agrees, be allowed a day's leave with pay in lieu of the holiday at a time mutually acceptable to the employer and the employee.
- (3) An employee, who on a day observed as a holiday under this clause is required to work during his/her ordinary hours of work shall be paid for the time worked at the rate of double time and one-half or, if he/she agrees, be paid for the time worked at the rate of time and one-half and in addition be allowed to take a day's leave with pay on a day mutually acceptable to the employer and the employee.

- (4) The provisions of this clause shall not apply to casual employees.
- (5) Where –
- (a) A day is proclaimed as a public holiday or as a public half-holiday under Section 7 of the Public and Bank Holidays Act, 1972; and
- (b) That proclamation does not apply throughout the State or to the metropolitan area of the State,
That day shall be a whole holiday or, as the case may be, a half-holiday for the purposes of this award within the district or locality specified in the proclamation.
- (6) When any of the days observed as a holiday prescribed in this clause fall on a day when an employee is on an Accrued Day Off the employee shall be allowed to take a day's holiday in lieu of the holiday on a day immediately following the employee's annual leave or at a time mutually acceptable to the employer and the employee.
- (7) An employee, whilst on a public holiday prescribed by this clause shall continue to accrue an entitlement to an Accrued Day Off as prescribed in subclauses (1) and (2) of Clause 7. - Hours of this award.
- (8) Where an employee has additional leave granted pursuant to subclause (2) of this clause, the employer may require such leave to be taken within 12 months of falling due.

12. Clause 15. – Annual Leave: Delete this clause and insert the following in lieu thereof:

15. - ANNUAL LEAVE

- (1) An employee is entitled to a period of four (4) consecutive weeks' annual leave with payment at the employee's ordinary rate of wage for each twelve (12) months' continuous service with the employer. Entitlements to annual leave accrue pro rata on a weekly basis.
- (2) An employee before going on leave shall be paid the wages they would have received in respect of the ordinary time they would have worked had they not been on leave during the relevant period.
- (3) In addition to their payment for annual leave an employee shall be paid a loading of 17.5 percent calculated on their ordinary rate of wage. Provided that where the employee would have received any additional rates for the work performed in ordinary hours, as prescribed by this award, had they not been on leave during the relevant period and such additional rates would have entitled them to a greater amount than the loading of 17.5 percent, then such additional rates shall be added to their ordinary rate of wage in lieu of the 17.5 percent loading. Provided further that if the additional rates would have entitled them to a lesser amount than the loading of 17.5 percent, then such loading of 17.5 percent shall be added to their ordinary rate of wage in lieu of the additional rates.
- (4) The loading prescribed by subclause (3) shall not apply to proportionate leave on termination.
- (5) (a) An employee whose employment terminates after they have completed a 12 month period and who has not been allowed the leave prescribed under this clause in respect of that period, shall be given payment as prescribed in subclauses (1) (2) and (3) of this clause in lieu of so much of that leave as has not been allowed unless -
- (i) they have been justifiably dismissed for misconduct, and
- (ii) the misconduct for which they have been dismissed occurred prior to the completion of that 12 month period.
- (b) If after one week's continuous service in any 12 monthly period an employee lawfully leaves their employment or their employment is terminated by the employer through no fault of the employee, the employee shall be paid 2.923 hours pay at the ordinary rate of wage in respect of each completed week of continuous service.
- (6) If any award holiday falls within a employee's 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.
- (7) Employees continue to accrue annual leave while:
- On annual leave;
- On long service leave;
- Observing a public holiday prescribed by this award;
- On sick leave;
- On bereavement leave;
- On carer's leave.
- (8) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.
- (9) No employee shall be required to take annual leave unless two weeks' prior notice is given.
- (10) Where an employer and employee have not agreed when the employee is to take their annual leave, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave which accrued more than 12 months' before that time; provided the employee provides at least two weeks notice.
- (11) The provisions of this clause shall apply to part time employees on a pro-rata basis in the same proportion as the average number of hours worked each week in the 12 month period bear to 38.
- (12) The provisions of this clause do not apply to casual employees.

13. Clause 16. – Sick Leave: Delete this clause and insert the following in lieu thereof:

- (1) (a) An employee who is unable to attend or remain at his or her place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.
- (b) Entitlement to payment shall accrue at the rate of 1/26th of a week for each completed week of service with that employer.
- (c) If in the first or successive years of service with the employer an employee is absent on the ground of personal ill health or injury for a period longer than their entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service.

- (2) The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this clause may be claimed by the employee if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during the year at the time of the absence. Provided that an employee shall not be entitled to claim payment for any period exceeding ten weeks in any one year of service.
- (3) (a) The employee shall as soon as reasonably practicable advise the employer of his or her inability to attend for work, the nature of the illness or injury and the estimated duration of absence, Provided that such advice, other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.
- (b) An employee claiming entitlement under this clause is to provide the employer evidence that would satisfy a reasonable person of the entitlement.
- (4) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when they are absent on annual leave and an employee may apply for and the employer shall grant, paid sick leave in place of paid annual leave.
- (b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to their place of residence or a hospital as a result of their personal ill health or injury for a period of seven consecutive days or more and he or she produces a certificate from a registered medical practitioner that they were so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if they are unable to attend for work on the working day next following their annual leave.
- (c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day.
- (d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of clause 15. - Annual Leave.
- (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 15. - Annual Leave shall not be paid if the employee had already received payment with respect to the replaced annual leave.
- (5) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and Injury Management Act 1981 nor to employees whose injury or illness is the result of the employee's own misconduct.
- (6) The provisions of this clause do not apply to casual employees.
- (7) (a) An employee who works 40 actual hours each week during a particular work cycle shall be paid the wages they would have received had they not proceeded on sick leave and shall have the accrued entitlement to paid sick leave reduced by the time the employee is absent from work on account of paid sick leave.
- (b) An employee who works 38 ordinary hours each week during a particular work cycle shall be paid in respect of any absence the normal pay the employee would have received had such employee been at work during the absence.
- (c) An employee shall not be entitled to claim payment for non-attendance on the ground of personal ill-health or injury nor will the employee's sick leave entitlements be reduced if such personal ill-health or injury occurs on a day when an employee is absent on an Accrued Day Off in accordance with the provisions of Clause 7 - Hours of this award unless such illness is for a period of seven consecutive days or more and in all other respects complies with the requirements of subclause (4) hereof.
- (8) An employee whilst on paid sick leave shall continue to accrue an entitlement to an Accrued Day Off as prescribed in Clause 7 - Hours of this award.
- (9) Carer's Leave
An employee is entitled to use, each year, up to five (5) days of the employee's entitlement to sick leave, to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of immediate care and attention.
- (a) A member of the employee's family mentioned within this clause means any of the following -
- (i) the employee's partner or de facto partner;
 - (ii) a child of whom the employee has parental responsibility as defined by the Family Court Act 1997;
 - (iii) an adult child of the employee;
 - (iv) a parent, sibling or grandparent of the employee;
 - (v) any other person who lives with the employee as a member of the employee's family.
- (b) By mutual agreement between the employer and employee an employee may be granted further sick leave credits for carer's leave.
- (c) An employee may take unpaid carer's leave by agreement with the employer.
- 14. Clause 17. - Long Service Leave: Delete subclause (1) of this clause and insert the following in lieu thereof:**
- (1) The Long Service Leave Standard Provisions as published each January in the Western Australian Industrial Gazette as varied from time to time, are hereby incorporated in and shall be deemed to be part of this award.
- 15. Clause 18. - Compassionate Leave: Delete this clause and insert the following in lieu thereof:**
- 18. - BEREAVEMENT LEAVE**
- (1) (a) Subject to subclause (2) of this clause, on the death of -

- (i) the partner or de facto partner of an employee;
- (ii) the child or step-child of an employee;
- (iii) the brother or sister of an employee;
- (iv) the parent, step-parent or grandparent of an employee; or
- (v) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,

an employee (including a casual employee) is entitled to paid bereavement leave of up to 2 days.

- (b) The 2 days need not be consecutive.
- (c) Bereavement leave is not to be taken during a period of any other kind of leave.

(2) Proof in support of claim for leave

An employee who claims to be entitled to paid leave in accordance with subclause (1) hereof is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to -

- (a) the death that is the subject of the leave sought; and
- (b) the relationship of the employee to the deceased person.

16. Clause 19. – Time and Wages Record: Delete this clause and insert the following in lieu thereof:

19. – EMPLOYMENT RECORDS

(1) A record shall be kept in the premises occupied by the employer wherein shall be recorded for each employee:

- (a) On a daily basis:
 - (i) start/finish time and daily hours including overtime;
 - (ii) paid time; and
 - (iii) breaks.
- (b) For each pay period:
 - (i) designation;
 - (ii) gross and net pay; and
 - (iii) deductions, including reasons for these deductions.
- (c) The following records must also be kept:
 - (i) employee's name
 - (ii) date of birth if under 21 years of age;
 - (iii) start date;
 - (iv) nature of work performed and classification;
 - (v) all leave paid, partly paid or unpaid;
 - (vi) relevant information for Long Service Leave calculations;
 - (vii) any industrial instrument including awards, orders or agreements that apply;
 - (viii) any additional information required by the industrial instrument; and
 - (ix) any other information necessary to show remuneration and benefits comply with the award.

(2) The employer shall on the written request by a relevant person:

- (a) produce to the person the employment records relating to the employee;
- (b) let the person inspect the employment records;
- (c) let the relevant person enter the premises of the employer for the purpose of inspecting the records; and
- (d) let the relevant person take copies of or extracts from the records.

(3) A 'relevant person' means:

- (a) the employee concerned;
- (b) if the employee is a represented person, his or her representative;
- (c) a person authorised in writing by the employee; and
- (d) an officer referred to in section 93 of the Industrial Relations Act (1979) (as amended) authorised in writing by the Registrar.

(4) An employer shall comply with a written request not later than:

- (a) at the end of the next pay period after the request is received; or
- (b) the seventh day after the day on which the request was made to the employer.

(5) The records are to be kept in the manner prescribed by the Industrial Relations (General) Regulations 1997.

17. Clause 20. - Maternity Leave: Delete this clause and insert the following in lieu thereof:

20. – PARENTAL LEAVE

(1) Subject to the terms of this clause employees are entitled to parental leave.

(2) For the purposes of this clause "continuous service" is work for an employer on a regular and systematic basis (including any period of authorised leave or absence).

(3) Definitions:

In this clause -

"adoption", in relation to a child, is a reference to a child who -

- (i) is not the child or the step-child of the employee or the employee's partner;
- (ii) is less than 5 years of age; and
- (iii) has not lived continuously with the employee for 6 months or longer;

"continuous service" means service under an unbroken contract of employment and includes -

- (i) any period of parental leave; and
- (ii) any period of leave or absence authorised by the employer;

"expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;

"parental leave" means leave provided for by subclause (6)(a);

"partner" means a spouse or *de facto* partner.

(4) Entitlement to Parental Leave

- (a) Subject to subclauses (6), (7)(a) and (8)(a), an employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of -
 - (i) the birth of a child to the employee or the employee's partner; or
 - (ii) the placement of a child with the employee with a view to the adoption of the child by the employee.
- (b) An employee is not entitled to take parental leave unless the employee -
 - (i) has, before the expected date of birth or placement, completed at least 12 months' continuous service with the employer; and
 - (ii) has given the employer at least 10 weeks written notice of the employee's intention to take the leave.
- (c) An employee is not entitled to take parental leave at the same time as the employee's partner but this paragraph does not apply to one week's parental leave -
 - (i) taken by the employee and the employee's partner immediately after the birth of the child; or
 - (ii) taken by the employee and the employee's partner immediately after a child has been placed with them with a view to their adoption of the child.
- (d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except the period of one week's leave referred to in paragraph (c).

(5) Maternity leave to start 6 weeks before birth

A female employee who is pregnant and who has given notice of her intention to take parental leave is to start the leave 6 weeks before the expected date of birth, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.

(6) Medical certificate

An employee who has given notice of the employee's intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's partner, as the case may be, is pregnant and the expected date of birth.

(7) Notice of partner's parental leave

- (a) An employee who has given notice of the employee's intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.
- (b) Any notice given under paragraph (a) is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.

(8) Notice of parental leave details

- (a) An employee who has given notice of the employee's intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave no less than four weeks before the proposed commencement date.
- (b) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.
- (c) The starting and finishing dates of a period of parental leave are to be agreed between the employee and employer.

(9) Return to work after parental leave

- (a) An employee shall confirm the employee's intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of the period of parental leave.
- (b) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.
- (c) If the position referred to in paragraph (a) is not available, the employee is entitled to an available position -
 - (i) for which the employee is qualified; and
 - (ii) that the employee is capable of performing, most comparable in status and pay to that of the employee's former position.

- (d) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of the position referred to in paragraph (b), that paragraph applies only in respect of the position held by the employee immediately before taking the acting or temporary position.
- (e) Notwithstanding paragraphs (b) and (c) of this clause, an employer and an employee may agree to an alternative return to work such as part-time employment, having regard to
- (i) applicable discrimination legislation,
 - (ii) the requirements of the employee,
 - (iii) the operational needs of the employer, and
 - (iv) any other relevant matter.
- (10) Effect of parental leave on employment
Absence on parental leave -
- (a) does not break the continuity of service of an employee; and
 - (b) is not to be taken into account when calculating the period of service for the purpose of this Award.
- (11) Sick Leave
Where an employee not then on maternity leave suffers an 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 duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed 52 weeks.
- (12) Transfer to a Safe-Job
Where in the opinion of a duly qualified 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 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 maternity leave for the purposes of this clause.
- (13) Variation of Period of Parental Leave
- (a) Provided the addition does not extend the parental leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be lengthened.
 - (b) The period of 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.
- (14) Cancellation of Parental Leave
- (a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee or the employee's partner, as the case may be, terminates other than by the birth of a living child.
 - (b) Where the pregnancy of an employee or an employee's partner, as the case may be, then on parental leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that the employee desires to resume work.
- (15) Special Maternity Leave
- (a) Where the pregnancy of a female employee not then on parental leave terminates after 28 weeks other than by the birth of a living child then:
 - (i) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work; or
 - (ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a duly qualified medical practitioner certifies as necessary before her return to work.
 - (b) For the purposes of subclauses (10), (16) and (17) hereof, maternity leave shall include special maternity leave.
 - (c) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.
Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which the employee 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.
- (16) Parental Leave and Other Leave Entitlements
Provided the aggregate of leave including leave taken pursuant to subclauses (12) and (15) hereof does not exceed 52 weeks:
- (a) 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 the employee is then entitled.
 - (b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during absence on parental leave.
- (17) Termination of Employment
- (a) An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.

- (b) An employer shall not terminate the employment of an employee on the ground of the employee's absence on maternity leave or, in the case of a female employee, her pregnancy, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.
- (18) **Replacement Employees**
- (a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave.
- (b) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
- (c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
- (d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.
- (e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employee's employment continues beyond the 12 months qualifying period.

18. Clause 21. – Board of Reference: Delete this clause and insert the following in lieu thereof:

21. – INTRODUCTION OF CHANGE AND REDUNDANCY

The Termination of Employment, Introduction of Change and Redundancy General Order (85 WAIG 1667) as published in the Western Australian Industrial Gazette as varied from time to time, is hereby incorporated in and shall be deemed to be part of this award.

19. Clause 23. – Part-Time Workers: Delete this clause and insert the following in lieu thereof:

23. – TYPES OF EMPLOYMENT

Employees under this award must be engaged as full-time, part-time or casual employees. At the time of engagement, an employer will inform each employee of the terms of their engagement, and in particular stipulate whether they are full-time, part-time or casual. This advice must be confirmed in writing within two weeks of commencement of employment.

- (1) **Full-time employees**
- (a) Full-time employees will be engaged for an average of thirty-eight hours per week in accordance with clause 7 – Hours.
- (2) **Part-time employees**
- (a) An employer may employ part-time employees in any classification in this award.
- (b) A part-time employee is an employee who:
- (i) works less than full-time hours of 38 per week; and
 - (ii) has reasonably predictable hours of work; and
 - (iii) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
- (c) At the time of engagement the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.
- (d) Any agreed variation to the regular pattern of work will be recorded in writing.
- (e) An employer is required to roster a part-time employee for a minimum of three (3) consecutive hours on any shift.
- (f) All time worked in excess of the hours as mutually arranged will be overtime and paid for at the rates prescribed in clause 10 - Overtime, of this award.
- (g) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.
- (3) **Casual Employees**
- (a) A casual employee is to be one engaged and paid as such.
- (b) Before engaging a person for casual employment, the employer must inform the person
- (i) that the employment is casual
 - (ii) that there will be no entitlement to paid leave, other than bereavement leave
- (c) An employer shall state by whom the employee is employed, the job to be performed, the classification level, the actual or likely number of hours required, the relevant rate of pay and that they accrue no entitlements to paid leave with exception of bereavement leave.
- (d) A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty-eighth of the weekly award wage prescribed in clause 24 - Wages for the work being performed plus a casual loading of 20 per cent.
- (e) A casual employee shall be employed for a minimum of three (3) consecutive hours on each occasion.

20. Clause 25. – Payment of Wages: Delete subclause (2) of this clause and insert the following in lieu thereof:

- (2) The provisions of subclause (1) of this clause may be altered by agreement between the employer, the union and the employee or employees concerned. If no agreement can be reached under this subclause the dispute will be resolved through the Dispute Settlement Procedure.

21. Clause 27. – Liberty to Apply. Delete this clause and insert the following in lieu thereof:

27. – RESOLUTIONS OF DISPUTES REQUIREMENTS

1. Subject to the provisions of the Industrial Relations Act 1979 (WA) (as amended) in the event of any dispute or matter arising under this award the following procedure shall apply:

- (a) Step 1
As soon as practicable after the matter has arisen, it shall be considered jointly by the appropriate supervisor and the employee or employees concerned and, where requested, employer/employee representatives.
- (b) Step 2
If the dispute is not resolved it shall be considered jointly by the employer, the employee or employees concerned and, where requested, employer/employee representatives.
- (c) Step 3
The employer and employee(s) concerned (and their representatives where requested) will attempt to resolve the matter prior to it being referred to the Commission however, if the matter is not resolved, it may then be referred to the Western Australian Industrial Relations Commission for assistance in its resolution.

2. At all times whilst a dispute or matter is being resolved in accordance with this clause, normal work will continue unless an employee has a reasonable concern about their health and safety.

22. Clause 29. – Superannuation: Delete this clause and insert the following in lieu thereof.

29. – SUPERANNUATION

- (1) Superannuation Legislation
 - (a) The Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993 legislation as varied from time to time governs the superannuation rights and obligations of employees and employers bound by the award..
 - (b) Notwithstanding (1)(a) above the following provisions apply.
- (2) Contributions
 - (a) The employer shall contribute a minimum of 9% of ordinary time earnings per employee in accordance with subclause (3) hereof.
 - (b) Employees' Additional Voluntary Contributions:
Where the rules of the fund allow an employee to make additional contributions to the fund the employer shall, where an election is made, upon the direction of the employee deduct contributions for the employee's wages and pay them to the fund in accordance with the direction of the employee and the rules of the fund.
- (3) Compliance, Nomination and Transition
 - (a) For the purposes of this clause -
 - (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. If the employee does not nominate a fund or scheme, or until such time as an employee nominates a fund or scheme, superannuation contribution shall be paid into the default fund;
 - (c) The default fund shall be Westscheme Super Fund;
 - (d) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme within fourteen (14) days;
 - (e) Each employee shall be eligible to receive contributions from the date of eligibility, notwithstanding the date the membership application was forwarded to the Fund;
 - (f) A nomination or notification of the type referred to in paragraphs (b) and (d) hereof 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;
 - (g) 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;
 - (h) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee;
 - (i) In the event that an employee has not, after 28 days of commencing employment, nominated a complying fund into which contributions may be made, the employer will forward contributions and employee details to the default scheme, Westscheme Super Fund;
 - (j) Except where the Trust Deed provides otherwise employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer;
 - (k) All contributions into the nominated fund or scheme shall be paid on a quarterly or monthly basis and within thirty (30) days of the end of each month;
 - (l) For the purpose of this clause the employee's ordinary time earnings are as defined in the *Superannuation Guarantee (Administration) Act 1992* and shall include the base classification rate, shift penalties together with any other all purpose allowance or penalty payment for work in ordinary time and shall include in respect of casual employees' the casual loading prescribed by this award, but shall exclude any payment for overtime worked, vehicle allowances, fares or travelling time allowances (excluding travelling related to distant work) commission or bonus as well as –
 - (i) periods of unpaid leave or unauthorized absences; or
 - (ii) annual leave or any other payments paid out on termination.

- (m) The employer shall continue to contribute to the nominated fund or scheme on behalf of an employee in receipt of payments under the Workers' Compensation and Injury Management Act 1981 for not more than 52 weeks.

23. Clause 30. – Award Modernisation and Enterprise Consultation: Delete this clause and insert the following in lieu thereof:

30. – RIGHT OF ENTRY

An authorized representative of the union shall be entitled to exercise right of entry in accordance with the provisions of the Industrial Relations Act 1979 or any other legislation that makes provision for right of entry.

24. Clause 31. – Supported Wage System for Employees with Disabilities: Insert new clause as follows:

31. – SUPPORTED WAGE SYSTEM FOR EMPLOYEES WITH DISABILITES

(1) Employees eligible for a supported wage

This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:

- (a) Supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability, as documented in Supported Wage System: Guidelines and Assessment Process.
- (b) Accredited assessor means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
- (c) Disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme.
- (d) Assessment instrument means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

(2) Eligibility criteria

- (a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.
- (b) The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment.
- (c) The Award does not apply to employers in respect of their facility, programme, undertaking service or the like which receives funding under the *Disability Services Act 1986* and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s.10 or s.12A of the *Disability Services Act 1986*, or if a part only has received recognition, that part.

(3) Supported wage rates

- (a) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:

Assessed capacity	% of prescribed award rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

- (b) Provided that the minimum amount payable shall be not less than as provided by the National Supported Wage System.

- (c) Where a person's assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.

(4) Assessment of capacity

For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

- (a) the employer and a union party to the Award, in consultation with the employee or, if desired by any of these;
- (b) the employer and an Accredited Assessor from a panel agreed by the parties to the Award and the employee.

(5) Lodgement of assessment instrument

- (a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Commission.

- (b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.
- (6) **Review of assessment**
The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.
- (7) **Other terms and conditions of employment**
Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this Award paid on a pro rata basis.
- (8) **Workplace adjustment**
An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the areas.
- (9) **Trial period**
- (a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except in some cases additional work adjustment time (not exceeding four weeks) may be needed.
 - (b) During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
 - (c) The minimum amount payable to the employee during the trial period shall be no less than as provided by the National Supported Wage System.
 - (d) Work trials should include induction or training as appropriate to the job being trialled.
 - (e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause 4 of this clause.

25. Clause 32. – Other Laws Affecting Employment. Insert new clause as follows.

32. – OTHER LAWS AFFECTING EMPLOYMENT

- (1) INDUSTRIAL RELATIONS ACT 1979
www.wairc.wa.gov.au
- (2) MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993
www.slp.wa.gov.au
- (3) WORKPLACE RELATIONS ACT 1996
www.airc.gov.au
or link to
<http://www.airc.gov.au/procedures/wra/wra.html>
- (4) SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992
www.austlii.edu.au/au/legis/cth/consol_act/sga1992430/
- (5) OCCUPATIONAL SAFETY AND HEALTH ACT 1984
www.safetyline.wa.gov.au
- (6) EQUAL OPPORTUNITY ACT 1984
www.oceo.wa.gov.au
- (7) TERMINATION, REDUNDANCY AND INTRODUCTION OF CHANGE GENERAL ORDER
www.wairc.wa.gov.au (under General Orders)
2005 WAIRC 01715
Western Australian Industrial Gazette vol. 85, p. 1667.
- (8) LONG SERVICE LEAVE STANDARD PROVISIONS
www.wairc.wa.gov.au (under General Orders)

26. Clause 33 – Where to go for Further Information. Insert new clause as follows

33. – WHERE TO GO FOR FURTHER INFORMATION

- (1) Liquor, Hospitality and Miscellaneous Union
Western Australian Branch
Telephone: 08 9388 5400
Facsimile: 08 9382 3986
Email: lhmuwa@lhmu.org.au

- (2) Chamber of Commerce and Industry of Western Australia
180 Hay Street
EAST PERTH WA 6004
Telephone: 08 9365 7555.
Facsimile: 08 9365 7550
- (3) Western Australian Industrial Relations Commission
Level 16, 111 St Georges Terrace
PERTH WA 6000
Telephone: 08 9420 4444
Facsimile: 08 9420 4500
Email: webmaster@wairc.wa.gov.au
Web: www.wairc.wa.gov.au
Toll Free: 1800 624 263
- (4) Department of Consumer & Employment Protection, Labour Relations
3rd Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005
Telephone: 08 9222 7700
Facsimile: 08 9222 7777
Email: labourrelations@docep.wa.gov.au
Wageline: 1300 655 266

27. Appendix – Resolution of Disputes Requirement: Delete this appendix in its entirety.

28. Appendix - S.49B – Inspection Of Records Requirements: Delete this appendix in its entirety.

29. Schedule B – Respondents: Delete this schedule and insert the following in lieu thereof:

SCHEDULE B. - RESPONDENTS

SECURE PARKING

Level 4 / 517-533 Hay St Perth 6805

WILSON PARKING

Perth Level 8, 191 St Georges Terrace 6000

KINGS COMPLEX PARKING

17 Hay St Perth 6000

AIRPORT SECURITY PARKING

Perth Airport Domestic 6105

CAVES CARAVAN PARK YALLINGUP

Yallingup Beach Rd Yallingup 6282

ACACIA CARAVAN PARK

603 Bussell Hwy Busselton 6280

GORGES CARAVAN PARK PTY LTD

45 Brown Ave Dalkeith 6009

CENTRAL CARAVAN PARK

34 Central Ave Redcliffe 6104

KENLORN CARAVAN PARK

224 Treasure Rd Queens Park 6107

GREENHEAD CARAVAN PARK

9 Greenhead Rd Greenhead 6514

2006 WAIRC 04046

DRY CLEANING AND LAUNDRY AWARD 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESAUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION OF
WESTERN AUSTRALIAN BRANCH**APPLICANT****-v-**

ERIC DRY CLEANERS AND OTHERS

RESPONDENTS**CORAM**

COMMISSIONER J H SMITH

DATE

THURSDAY, 23 MARCH 2006

FILE NO/S

APPL 400 OF 2004

CITATION NO.

2006 WAIRC 04046

Result Award varied**Representation****Applicant** Ms S Northcott**Respondents** No appearance*Order*

Having heard Ms Northcott on behalf of the Applicant and no appearance on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Dry Cleaning and Laundry Award 1979 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on and from 24 March 2006.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

SCHEDULE
1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof:

1. Title
- 1B Minimum Adult Award Wage
2. Arrangement
3. Scope
4. Area
5. Term
6. Definitions
7. Contract of Service
8. Types of Employment
9. Hours of Work
10. Meal Intervals and Rest Periods
11. Meal Money
12. Overtime
13. Public Holidays
14. Annual Leave
15. Sick Leave
16. Bereavement Leave
17. Long Service Leave
18. Special Rates
19. Mixed Functions
20. Travelling Time & Motor Vehicle Allowance
21. General Conditions & Protective Equipment
22. Location Allowances
23. Employment Records
24. Right of Entry
25. Dispute Resolution Procedure

- 26. Deleted
 - 27. Notice Boards
 - 28. Deleted
 - 29. Deleted
 - 30. Wages
 - 31. Payment of Wages
 - 32. Parental Leave
 - 33. Shift Work
 - 34. Superannuation
 - 35. Supported Wage
 - 36. Relationship to the National Training Wage Interim Award 2000
 - 37. Other Laws Affecting Employment
 - 38. Where to go for Further Information
- Schedule A - Respondents
Schedule B - Parties to Award

2. Clause 5. – Term: Delete this clause and insert the following in lieu thereof:

The term of this award shall be for a period of six months.

3. Clause 6. – Definitions: Delete sub clause (6) of this clause and insert the following in lieu thereof:

6. - DEFINITIONS

- (6) "Union" for the purposes of this Award shall mean the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.

4. Clause 6. – Definitions: Delete sub clause (7) and (8) of this clause:

5. Clause 6. – Definitions: Immediately following subclause (12) of this clause insert new subclause (13) as follows:

- (13) Laundry Industry: means any business or operation which performs laundry work and includes a "laundrette" and the industries carried out by the Respondents set out in the schedule to this award. Laundry work shall be deemed to include the laundering of overalls, coats, towels, nappies and sheets which are laundered by the proprietor and hired out for fee or reward.

6. Clause 7. – Contract of Service: Delete this clause and insert the following in lieu thereof:

7. - CONTRACT OF SERVICE

- (1) The employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training.

(2) Notice of Termination by Employer

- (a) The employment of any employee (other than a casual employee, who shall be engaged by the hour) may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of serious misconduct in which case shall only be paid up to the time of dismissal.

<u>PERIOD OF CONTINUOUS SERVICE</u>	<u>PERIOD OF NOTICE</u>
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 has completed two years' continuous service, shall be entitled to one week's additional notice.
- (c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause shall be made if the appropriate notice period is not given or required to be worked. The 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 shall pay the employee the ordinary wages for the period of notice had the employment not been terminated or payment in lieu of notice shall be calculated using the employee's weekly ordinary time earnings.
- (3) Notice of Termination by Employee
- One weeks notice shall be necessary for an employee to terminate his or her engagement or the forfeiture or payment of one week's pay by the employee to the employer in lieu of notice.
- (4) Termination, Redundancy or Introduction of Change

In circumstances of termination, redundancy or introduction of change, employees are entitled to a statement of employment, job search leave, consultation, redundancy pay and other matters as provided in the General Order 2005 WAIRC 01715 (85(WAIG)1667), as amended, varied or replaced from time to time.

7. Clause 8 – Insert a new clause as follows:**8. - TYPES OF EMPLOYMENT**

Employees under this award must be engaged as full-time, part-time or casual officers. At the time of engagement, an employer will inform each employee of the terms of their engagement, and in particular stipulate whether they are full-time, part-time or casual. This advice must be confirmed in writing within two weeks of commencement of employment.

- (1) Full-time employees
 - (a) Full-time employees will be engaged for an average of thirty-eight hours per week.
- (2) Part-time employees
 - (a) An employer may employ part-time employees in any classification in this award.
 - (b) A part-time employee is an employee who:
 - (i) works less than full-time hours of 38 per week; and
 - (ii) has reasonably predictable hours of work; and
 - (iii) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
 - (c) At the time of engagement the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.
 - (d) Any agreed variation to the regular pattern of work will be recorded in writing.
 - (e) An employer is required to roster a part-time employee for a minimum of three (3) consecutive hours on any shift.
 - (f) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with sub clause 3.
 - (g) All time worked in excess of the hours as mutually arranged will be overtime and paid for at the rates prescribed in clause 12 - Overtime, of this award.
 - (h) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.
- (3) Casual Employees
 - (a) A casual employee is to be one engaged and paid as such. A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty-eighth of the weekly award wage prescribed in clause 30 for the work being performed plus a casual loading of 20 per cent in lieu of sick leave, annual leave and public holidays.
 - (b) A casual employee shall be employed for a minimum of three (3) consecutive hours on each occasion.
 - (c) A casual employee shall not be engaged for periods totalling in excess of eight weeks in any 12 month period without the approval of the Union.
 - (d) The provisions of paragraph (c) of this subclause shall not apply to employees engaged for a specific period of time to replace a designated person where the period of that replacement work does not exceed 13 weeks. The period of time for which the replacement employee is engaged together with any other special conditions of employment shall be confirmed in writing at the time of appointment.

8. Clause 9. – Hours of Work: Delete subclause (2)(f) of this clause and insert the following in lieu thereof:

- (2) (f) Any other starting or finishing times may be agreed upon by the employer and employee concerned and assented to by the union in writing.

9. Clause 11. – Meal Money: Delete subclause (3) of this clause and insert the following in lieu thereof:

- (3) Any dispute under this clause as to the suitability of a canteen meal supplied may be resolved through the Dispute Resolution Procedure.

10. Clause 12. – Overtime: Delete subclause (2) of this clause and insert the following in lieu thereof:

- (2) (a) An employer may require any employee to work reasonable overtime at overtime rates.
- (b) The organization party to 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 overtime in accordance with the requirements of this subclause.
- (c) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
 - (i) any risk to employee health and safety;
 - (ii) the employee's personal circumstances including any family responsibilities;
 - (iii) the needs of the workplace or enterprise;
 - (iv) the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and
 - (vii) any other relevant matter.

11. Clause 13. – Holidays: Delete the title of this clause and insert the following in lieu thereof:**13. – PUBLIC HOLIDAYS**

12. Clause 14. – Annual Leave: Delete this clause and insert the following in lieu thereof:14. – ANNUAL LEAVE

- (1) Annual Leave
- (a) An employee is entitled to a period of four (4) consecutive weeks' annual leave with payment at the employee's ordinary rate of wage for each twelve (12) months continuous service with the employer. Entitlements to annual leave accrue pro rata on a weekly basis.
- (b) Before going on leave the employee shall be paid the ordinary wages as prescribed by Clause 30 - Wages of this award they would have received in respect of the ordinary time they would have worked had they not been on leave during the relevant period.
- (2) (a) During a period of annual leave an employee shall receive in addition to their payment for annual leave a loading of 17.5% calculated on the employee's ordinary wage as prescribed in Clause 30 – Wages for that period of leave.
- (b) Provided that where the employee would have received any additional rates for the work performed in ordinary hours as prescribed by this award, had they not been on leave during the relevant period and such additional rates would have entitled him them to a greater amount than the loading of 17.5 percent, then such additional rates shall be added to his ordinary rate of wage in lieu of the 17.5 percent loading.
- Provided further, that if the additional rates would have entitled him to a lesser amount than the loading of 17.5 percent, then such loading of 17.5 percent shall be added to their ordinary rate of wage in lieu of the additional rates.
- (c) The loading prescribed by this clause shall not apply to proportionate leave on termination.
- (3) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, that day shall be added to the employees annual leave entitlement.
- (4) (a) An employee whose employment lawfully terminates and who has not taken the leave prescribed under this clause to which they have become entitled shall be given payment in lieu of that leave at the rate of one thirteenth of a week's pay (2.923 hours pay for each completed week of service) at their ordinary rate of wage for each completed week of service.
- (b) Annual leave loading shall be payable in addition to any payment to which the employee may be entitled to under paragraph (a) hereof.
- (c) An employee whose employment terminates before the employee has completed a twelve month qualifying period and has not been allowed leave prescribed under this Award in respect of that qualifying period shall be given payment in lieu of that leave. Or, in a case where the employee has taken part of the leave in lieu of so much of that leave as has not been taken) unless-
- (i) the employee has been justifiably dismissed for misconduct; and
- (ii) the misconduct for which the employee has been dismissed occurred prior to the completion of that qualifying period.
- (5) Employees continue to accrue annual leave while on paid leave including:
- (a) annual leave
- (b) long service leave
- (c) observing a public holiday prescribed by this award
- (d) sick leave
- (e) bereavement leave
- (6) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee. Provided further that the maximum number of single day absences allowable during any twelve-month accrual period shall be five.
- No employee shall be required to take annual leave unless two weeks' prior notice is given.
- (7) Where an employer and employee have not agreed when the employee is to take their annual leave, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave which accrued more than 12 months before that time; provided the employee provides at least two weeks notice.
- (8) (a) Notwithstanding anything else herein contained, an employer who observes a Christmas close-down for the purpose of granting annual leave may require an employee to take their annual leave accrued in the 12 month period up to their anniversary.
- (b) An employer who requires employees to take their annual leave over a Christmas close-down must provide at least 14 days notice to the employees required to take such leave.
- (c) In the event of an employee being employed by an employer for a portion only of a year they shall only be entitled subject to subclause (5) of this clause, to such leave on full pay as is proportionate to their length of service during that period with such employer. If such leave is not equal to the leave given to the other employees, the employee shall not be entitled to work or pay whilst the other employees are on leave on full pay.
- (9) (a) At the request of an employee, and with the consent of the employer, annual leave prescribed by this clause may be given and taken in advance of being accrued by the employee in accordance with subclause (1).
- (b) If the service of an employee terminates and the employee has taken a period of leave in accordance with this subclause and if the period of leave so taken exceeds that which would become due pursuant to subclause (4) of this clause, the employee shall be liable to pay the amount representing the difference between the amount received by him for the period of leave taken in accordance with this subclause and the amount which would have accrued in accordance with subclause (4) of this clause. The employer may deduct this amount from monies due to the employee by reason of the other provisions of this Award at the time of termination.
- (c) The annual leave loading provided by subclause (2)(a) of this clause, shall not be payable when annual leave is taken in advance pursuant to the provisions of this subclause. The loading not paid, for the period of leave

taken in advance, shall be payable to the employee at the end of the first pay period following the employee accruing the leave taken in advance.

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

13. Clause 15. – Absence Through Sickness: Change the title of this clause and delete subclause (1)(b) of this clause and insert the following in lieu thereof:

15. – SICK LEAVE

(1) (b) Entitlement to payment shall accrue at the rate of one twenty sixth of a week for each completed week of service with the employer.

14. Clause 15. – Sick Leave: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) (a) The employee shall as soon as reasonably practicable advise the employer of his or her inability to attend for work, the nature of the illness or injury and the estimated duration of absence, Provided that such advice, other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.

(b) An employee claiming entitlement under this clause is to provide the employer evidence that would satisfy a reasonable person of the entitlement.

15. Clause 15. – Sick Leave: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when they are absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.

(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to their place of residence or a hospital as a result of their personal ill health or injury for a period of seven consecutive days or more and produces a certificate from a registered medical practitioner that they were so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if they are unable to attend for work on the working day next following their annual leave.

(c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day.

(d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 14 - Annual Leave.

16. Clause 15. – Sick Leave: Delete subclauses (6) and (7) of this clause and insert the following in lieu thereof:

(6) Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (3) of Clause 2 of the Long Service Leave provisions published in Volume 59 of the Western Australian Industrial Gazette at pages 1-6, as varied from time to time, the paid sick leave standing to the credit of the employee at the date of transmission from service with the transmitter shall stand to the credit of the employee at the commencement of service with the transferee and may be claimed in accordance with the provisions of this clause.

(7) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and Injury Management Act 1981 nor to employees whose injury or illness is the result of the employees own misconduct.

17. Clause 15. – Sick Leave: Renumber subclauses (8) and (9) of this clause as (7) and (8). Then immediately following the new subclause (8) of this clause insert the following new subclauses:

(9) An employee is entitled to use, each year, up to five (5) days of the employees entitlement to sick leave, to be primary care giver of a member of the employee's family or household who is ill or injured and in need of the immediate care and attention.

(10) A member of the employee's family mentioned within subclause (1) means any of the following

- (a) the employee's partner or de facto partner;
- (b) a child of whom the employee has parental responsibility as defined by the Family Court Act 1997;
- (c) an adult child of the employee;
- (d) a parent, sibling or grandparent of the employee;
- (e) any other person who lives with the employee as a member of the employee's family.

(11) By mutual agreement between the employer and employee an employee may be granted further sick leave credits for carer's leave.

(12) An employee may take unpaid carer's leave by agreement with the employer.

18. Clause 16. – Bereavement Leave: Delete this clause and insert the following in lieu thereof:

16. - BEREAVEMENT LEAVE

(1) (a) Subject to subclause (2) of this clause, on the death of -

- (i) the spouse or *de facto* partner of an employee;
- (ii) the child or step-child of an employee;
- (iii) the brother or sister, of an employee;
- (iv) the parent step-parent or grandparent of an employee; or
- (v) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,

an employee (including a casual employee) is entitled to paid bereavement leave of up to 2 days.

- (b) The 2 days need not be consecutive.
- (c) Bereavement leave is not to be taken during a period of any other kind of leave.
- (2) Proof in support of claim for leave
An employee who claims to be entitled to paid leave in accordance with subclause (1) hereof is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to -
- (a) the death that is the subject of the leave sought; and
- (b) the relationship of the employee to the deceased person.

19. Clause 17. – Long Service Leave: Delete this clause and insert the following in lieu thereof:

17. - LONG SERVICE LEAVE

The long service leave provisions applicable to the private sector published in the Western Australian Industrial Gazette as varied from time to time are hereby incorporated in and shall be deemed to be part of this award.

20. Clause 18. – Special Rates: Delete this clause and insert the following in lieu thereof:

18. – SPECIAL RATES

Where an employee is required to sort foul linen an extra allowance of 36 cents per hour will be paid whilst so employed on this type of work.

21. Clause 20. – Travelling Time and Motor Vehicle Allowance: Delete this clause and insert the following in lieu thereof:

20. - TRAVELLING TIME AND MOTOR VEHICLE ALLOWANCE

- (1) Where an employee is sent to work from an employer's recognised place of business the employer shall pay all travelling time from such place of business to the job and if the employee is required to return the same day to the employer's place of business, the employer shall pay travelling to the place of business. An employee sent for duty to a place other than his/her regular place of duty shall be paid travelling expenses.
- (2) (a) Where an employee is required and authorised to use his/her own motor vehicle in the course of his/her duties he/she shall be paid an allowance not less than that provided for in the schedules set out hereunder. Notwithstanding anything contained in this subclause, the employer and the employee may make any other arrangements as to car allowance no less favourable to the employee.
- (b) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.
- (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-& 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	75.3	65.5	57.9
South West Land Division	77.4	67.2	59.7
North of 23.5 ⁰ South Latitude	84.9	74.0	66.0
Rest of the State	79.9	69.4	61.6

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	26.0

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

22. Clause 21. – Casual Worker/Permanent Part Time Worker: Delete this clause and insert the following in lieu thereof:

21. - GENERAL CONDITIONS & PROTECTIVE EQUIPMENT

- (1) Uniforms:
Where an employer requires an employee to wear a uniform they shall pay for its provision and cleaning.
- (2) Tools of Trade:
The employer shall provide all necessary tools for employees in each workshop or factory.
Any tools lost due to serious neglect on the part of the employee shall be replaced by or paid for by the employee concerned.
- (3) Where any person is required to work under wet or dirty conditions, suitable protective clothing including footwear, shall be supplied free of charge by the employer to the employee concerned.
Any dispute as to the necessity or suitability of such clothing shall be resolved through the Dispute Resolution Procedure.

23. Clause 23. – Time and Wages Record: Delete this clause and insert the following in lieu thereof:**23. - EMPLOYMENT RECORDS**

- (1) A record shall be kept in the premises occupied by the employer wherein shall be recorded for each employee:
- (a) On a daily basis:
 - (i) start/finish time and daily hours including overtime;
 - (ii) paid time; and
 - (iii) breaks.
 - (b) For each pay period:
 - (i) designation;
 - (ii) gross and net pay; and
 - (iii) deductions, including reasons for these deductions.
 - (c) The following records must also be kept:
 - (i) employee's name
 - (ii) date of birth if under 21 years of age;
 - (iii) start date;
 - (iv) nature of work performed and classification;
 - (v) all leave paid, partly paid or unpaid;
 - (vi) relevant information for Long Service Leave calculations;
 - (vii) any industrial instrument including awards, orders or agreements that apply;
 - (viii) any additional information required by the industrial instrument; and
 - (ix) any other information necessary to show remuneration and benefits comply with the award.
- (2) The employer shall on the written request by a relevant person:
- (a) produce to the person the employment records relating to the employee;
 - (b) let the person inspect the employment records;
 - (c) let the relevant person enter the premises of the employer for the purpose of inspecting the records;
 - (d) let the relevant person take copies of or extracts from the records.
- (3) A 'relevant person' means:
- (a) the employee concerned;
 - (b) if the employee is a represented person, his or her representative;
 - (c) a person authorised in writing by the employee;
 - (d) an officer referred to in section 93 of the *Industrial Relations Act (1979)* (as amended) authorised in writing by the Registrar.
- (4) An employer shall comply with a written request not later than:
- (a) at the end of the next pay period after the request is received; or
 - (b) the seventh day after the day on which the request was made to the employer.

24. Clause 24. – Right of Entry: Delete this clause and insert the following in lieu thereof:**24. – RIGHT OF ENTRY**

An authorized representative of the union shall be entitled to exercise right of entry in accordance with the provisions of the Industrial Relations Act 1979 or any other legislation that makes provision for right of entry.

25. Clause 25. – General Conditions: Delete this clause and insert the following in lieu thereof:**25. – DISPUTE RESOLUTION PROCEDURE**

- (1) Subject to the provisions of the *Industrial Relations Act 1979 (WA)* (as amended) in the event of any dispute or matter arising under this award, the following procedure shall apply.
- (a) Step 1
As soon as practicable after the dispute has arisen, it shall be considered jointly by the appropriate supervisor and the employee or employees concerned and, where requested, by representatives of the employer or employee(s).
 - (b) Step 2
If the dispute is not resolved it shall be considered jointly by the employer, the employee or employees concerned and, where requested, by representatives of the employer or employee(s).
 - (c) Step 3
The employer and the employee(s) concerned (and their representatives where requested) will attempt to resolve the dispute prior to it being referred to the Commission however, if the dispute is not resolved, it may then be referred to the Western Australian Industrial Relations Commission for assistance in its resolution.
- (2) At all times whilst a dispute or matter is being resolved in accordance with this clause, normal work will continue.
- 26. Clause 26. – Protective Equipment: Delete this clause**
- 27. Clause 28. – Board of Reference: Delete this clause**
- 28. Clause 29. – Liberty to Apply: Delete this clause in its entirety.**

29. Clause 30. – Wages: Delete this clause and insert the following in lieu as follows:

30. - WAGES

(1) The minimum weekly rate of wage payable to an adult employee covered by this award shall include the base rate plus the arbitrated safety net adjustment expressed hereunder:

(a) Group Classification

	Minimum Rate \$	STRUCTURAL EFFICIENCY ADJUSTMENT \$
A Tradesperson Dry Cleaner/ in charge of machinery maintenance and/or boiler	578.20	15.00
B "Invisible" Mender Tailor or Tailoress	544.50	15.00
C Presser Receiver and Despatcher in Charge (namely a person in charge of a depot and responsible for the keeping of records and responsible for cash)	509.40	12.50
D Cleaner (Operating Dry Cleaning Machine) Repairer (other than Tailor or Tailoress) Spotter Presser (Off-set Press) Hand Ironer Receiver and/or Despatcher	509.40	12.50
E Wet Cleaner Steam Air Finisher Examiner of Garments Assembler of Garments Sorter of Garments	501.10	12.50
F All other Adult Employees	484.40	10.00

Provided that a person employed in any area of operation of this Award who is required to be solely accountable for all aspects of a self-contained dry cleaning establishment including the receiving of garments and articles, the cleaning, spotting, pressing, packaging and despatch of garments and articles, the handling of moneys, the keeping of records and the maintenance of the establishment shall be paid at a rate of not less than the rate prescribed in this table for the Tradesperson Dry Cleaner. Provided that in such a case all receivers and despatchers in that establishment shall be paid in accordance with the rates prescribed for Group D of such table.

(b) Laundering Industry:

Classification	Minimum Rate Per Week \$
Laundry Employee - Grade 1	492.75
Laundry Employee - Grade 2	499.45
Laundry Employee - Grade 3	526.00
Laundry Employee - Grade 4	534.30

(c) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(2) Junior Employees:

(a) Dry Cleaning and Dyeing Industry

(i) Wages: The minimum rates of wages to be paid to junior employees shall be as follows:

Percentage of Minimum Rate for Classification E - Sorter of Garments

Under 16 years of age	50
16 years and under 17 years	55
17 years and under 18 years	65
18 years and under 19 years	75
19 years and under 20 years	85
20 years and under 21 years	93

- (ii) Proportion of Juniors:
 - (aa) Juniors may be employed in the following proportion of not more than two for every employee receiving the adult rate.
 - (bb) Calculation of Proportion: In the calculation of the proportion of the number of employees receiving the adult rate for the purposes of this clause, working proprietors shall be included, but each working proprietor shall be counted only once.
- (iii) No person under 18 years shall be employed on a manually operated steam press (other than an off-set silk press) or a manually operated dry cleaning machine.
- (iv) Junior employed in a Receiving Depot: Notwithstanding anything hereinbefore contained any junior working alone and responsible for cash transactions and/or in charge of depot shall be paid not less than the rate prescribed for a junior '19 years and under 20 years' plus an amount of \$5.93 per week.

(b) Laundering Industry:

- (i) Wages: The minimum rates of wages to be paid to junior employees shall be as follows:

Percentage of Minimum Rate for the Classification in which they are Employed

Under 16 years of age	55
16 to 17 years of age	65
17 to 18 years of age	75
18 to 19 years of age	85
19 to 20 years of age	90
20 to 21 years of age	95

(3) Structural Efficiency:

- (a) Arising out of the decision of the 1989 State Wage Case Decision (69 WAIG 2913) and in consideration of the wage increases resulting from the first structural efficiency adjustment payable from the first pay week commencing on or after 29 March 1990, employees are to perform a wider range of duties including work which is incidental to or peripheral to their main tasks or functions.
- (b) Any changes to the classification system in the award will be based on the results of federal skill audit and trialing. The Union is prepared for the purposes of the second phase and in good faith, to duly consider any specific concerns identified by respondents to the Award and any proposals for trialing specific arrangements aimed at achieving greater flexibility for WA employers.
- (c) In accordance with the Structural Efficiency Principle the parties are prepared to commit themselves to the:
 - (i) acceptance of classification change and new job specifications;
 - (ii) acceptance in principle that with due consultation between the relevant parties there will be no barriers to opportunity for advancement of employees within the award structure or through access to training;
 - (iii) co-operation in the transition from the old structure to the new structure in an orderly manner.
- (d) In addition the Union gives the following commitments:
 - (i) preparedness of employees to undertake training associated with wider range of duties;
 - (ii) acceptance by the Union of the broad award framework and relationships established.

- (4) (a) The structural efficiency increases specified in (1)(a) and below shall be added to existing actual rate of pay/base rates of pay for time employees/payment by results employees respectively and shall not be absorbed into any over award bonus payment.

GROUP	STRUCTURAL EFFICIENCY ADJUSTMENT
	\$
F (all others)	10.00
E (rest of Group E)	12.50
D	12.50
C	12.50
B	15.00
A	15.00

30 Clause 32. - Maternity Leave: Delete this clause and insert the following in lieu thereof:**32. – PARENTAL LEAVE**

- (1) Subject to the terms of this clause employees are entitled to parental leave.
- (2) For the purposes of this clause “continuous service” is work for an employer on a regular and systematic basis (including any period of authorised leave or absence).
- (3) Definitions:
In this clause -
"adoption", in relation to a child, is a reference to a child who -
 (i) is not the child or the step-child of the employee or the employee's partner;
 (ii) is less than 5 years of age; and
 (iii) has not lived continuously with the employee for 6 months or longer;
 "continuous service" means service under an unbroken contract of employment and includes -
 (i) any period of parental leave; and
 (ii) any period of leave or absence authorised by the employer;
 "expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;
 "parental leave" means leave provided for by subclause (6)(a);
 "partner" means a spouse or *de facto* partner.
- (4) Entitlement to Parental Leave
 (a) Subject to subclauses (6), (7)(a) and (8)(a), an employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of -
 (i) the birth of a child to the employee or the employee's partner; or
 (ii) the placement of a child with the employee with a view to the adoption of the child by the employee.
 (b) An employee is not entitled to take parental leave unless the employee -
 (i) has, before the expected date of birth or placement, completed at least 12 months' continuous service with the employer; and
 (ii) has given the employer at least 10 weeks written notice of the employee's intention to take the leave.
 (c) An employee is not entitled to take parental leave at the same time as the employee's partner but this paragraph does not apply to one week's parental leave -
 (i) taken by the employee and the employee's partner immediately after the birth of the child; or
 (ii) taken by the employee and the employee's partner immediately after a child has been placed with them with a view to their adoption of the child.
 (d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except the period of one week's leave referred to in paragraph (c).
- (5) Maternity leave to start 6 weeks before birth
 A female employee who is pregnant and who has given notice of her intention to take parental leave is to start the leave 6 weeks before the expected date of birth, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.
- (6) Medical certificate
 An employee who has given notice of the employee's intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's partner, as the case may be, is pregnant and the expected date of birth.
- (7) Notice of partner's parental leave
 (a) An employee who has given notice of the employee's intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.
 (b) Any notice given under paragraph (a) is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.
- (8) Notice of parental leave details
 (a) An employee who has given notice of the employee's intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave no less than four weeks before the proposed commencement date.
 (b) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.
 (c) The starting and finishing dates of a period of parental leave are to be agreed between the employee and employer.
- (9) Return to work after parental leave
 (a) An employee shall confirm the employee's intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of the period of parental leave.

- (b) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.
- (c) If the position referred to in paragraph (a) is not available, the employee is entitled to an available position –
- (i) for which the employee is qualified; and
 - (ii) that the employee is capable of performing, most comparable in status and pay to that of the employee's former position.
- (d) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of the position referred to in paragraph (b), that paragraph applies only in respect of the position held by the employee immediately before taking the acting or temporary position.
- (e) Notwithstanding paragraphs (b) and (c) of this clause, an employer and an employee may agree to an alternative return to work such as part-time employment, having regard to
- (i) applicable discrimination legislation,
 - (ii) the requirements of the employee,
 - (iii) the operational needs of the employer, and
 - (iv) any other relevant matter.
- (10) Effect of parental leave on employment
- Absence on parental leave -
- (a) does not break the continuity of service of an employee; and
 - (b) is not to be taken into account when calculating the period of service for the purpose of this Award.
- (11) Sick Leave
- Where an employee not then on maternity leave suffers an 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 duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed 52 weeks.
- (12) Transfer to a Safe-Job
- Where in the opinion of a duly qualified 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 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 maternity leave for the purposes of this clause.
- (13) Variation of Period of Parental Leave
- (a) Provided the addition does not extend the parental leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be lengthened.
 - (b) The period of 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.
- (14) Cancellation of Parental Leave
- (a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee or the employee's partner, as the case may be, terminates other than by the birth of a living child.
 - (b) Where the pregnancy of an employee or an employee's partner, as the case may be, then on parental leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that the employee desires to resume work.
- (15) Special Maternity Leave
- (a) Where the pregnancy of a female employee not then on parental leave terminates after 28 weeks other than by the birth of a living child then:
 - (i) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work; or
 - (ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a duly qualified medical practitioner certifies as necessary before her return to work.
 - (b) For the purposes of subclauses (10), (16) and (17) hereof, maternity leave shall include special maternity leave.
 - (c) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which the employee 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.
- (16) Parental Leave and Other Leave Entitlements
- Provided the aggregate of leave including leave taken pursuant to subclauses (12) and (15) hereof does not exceed 52 weeks:
- (a) 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 the employee is then entitled.

- (b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during absence on parental leave.
- (17) Termination of Employment
- (a) An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.
- (b) An employer shall not terminate the employment of an employee on the ground of the employee's absence on maternity leave or, in the case of a female employee, her pregnancy, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.
- (18) Replacement Employees
- (a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave.
- (b) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
- (c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
- (d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.
- (e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employee's employment continues beyond the 12 months qualifying period.

31. Clause 34. - Superannuation: Delete this clause and insert the following in lieu thereof:

34. – SUPERANNUATION

- (1) Superannuation Legislation
- (a) The Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993 legislation as varied from time to time governs the superannuation rights and obligations of the parties.
- (b) Notwithstanding (1)(a) above the following provisions apply.
- (2) (a) Contributions
- The employer shall contribute a minimum of 9% of ordinary time earnings per employee in accordance with subclause 3 of this clause.
- (b) Employees' Additional Voluntary Contributions:
- Where the rules of the fund allow an employee to make additional contributions to the fund the employer shall, where an election is made, upon the direction of the employee deduct contributions for the employee's wages and pay them to the fund in accordance with the direction of the employee and the rules of the fund.
- (3) Compliance, Nomination and Transition
- (a) For the purposes of this clause -
- (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. If the employee does not nominate a fund or scheme, or until such time as an employee nominates a fund or scheme, superannuation contribution shall be paid into the default fund.;
- (c) The default fund shall be Westscheme Super Fund.
- (d) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme within fourteen (14) days;
- (e) Each employee shall be eligible to receive contributions from the date of eligibility, notwithstanding the date the membership application was forwarded to the Fund.
- (f) A nomination or notification of the type referred to in paragraphs (b) and (c) of subclause (3) 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;
- (g) 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;
- (h) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee;
- (i) In the event that an employee has not, after 28 days of commencing employment, nominated a complying fund into which contributions may be made, the employer will forward contributions and employee details to the default scheme, Westscheme Super Fund.
- (j) Except where the Trust Deed provides otherwise employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer.
- (k) All contributions into the nominated Fund or scheme shall be paid on a quarterly basis and within thirty (30) days of the end of each month.
- (l) For the purpose of this clause the employee's ordinary time earnings are as defined in the *Superannuation Guarantee (Administration) Act 1992* shall include base classification rate, shift penalties together with any other all purpose allowance or penalty payment for work in ordinary time and shall include in respect of casual employee's the casual loading prescribed by this Award, but shall exclude any payment for overtime worked, vehicle allowances, fares or travelling time allowances (excluding travelling related to distant work) commission or bonus as well as –

- (i) periods of unpaid leave or unauthorized absences; or
- (ii) annual leave or any other payments paid out on termination.
- (m) The employer shall continue to contribute to the nominated fund or scheme on behalf of an employee in receipt of payments under the Workers' Compensation and Injury Management Act 1981 for not more than 52 weeks.

34. Clause 35. - Award Modernisation and Enterprise Consultation: Delete this clause and insert the following in lieu thereof:

**35. - SUPPORTED WAGE SYSTEM FOR EMPLOYEES
WITH DISABILITIES**

(1) Employees eligible for a supported wage

This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:

- (a) Supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability, as documented in Supported Wage System: Guidelines and Assessment Process.
- (b) Accredited assessor means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
- (c) Disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme.
- (d) Assessment instrument means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

(2) Eligibility criteria

- (a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.
- (b) The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment.
- (c) The Award does not apply to employers in respect of their facility, programme, undertaking service or the like which receives funding under the *Disability Services Act 1986* and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s.10 or s.12A of the *Disability Services Act 1986*, or if a part only has received recognition, that part.

(3) Supported wage rates

- (a) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:

Assessed capacity	% of prescribed award rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

- (b) Provided that the minimum amount payable shall be not less than as provided by the National Supported Wage System.
- (c) Where a person's assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.

(4) Assessment of capacity

For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

- (a) the employer and a union party to the Award, in consultation with the employee or, if desired by any of these;
- (b) the employer and an Accredited Assessor from a panel agreed by the parties to the Award and the employee.

- (5) Lodgement of assessment instrument
- (a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Industrial Relations Commission.
- (b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.
- (6) Review of assessment
- The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.
- (7) Other terms and conditions of employment
- Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this Award paid on a pro rata basis.
- (8) Workplace adjustment
- An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the areas.
- (9) Trial period
- (a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except in some cases additional work adjustment time (not exceeding four weeks) may be needed.
- (b) During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
- (c) The minimum amount payable to the employee during the trial period shall be no less than as provided by the National Supported Wage System.
- (d) Work trials should include induction or training as appropriate to the job being trialled.
- (e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (4) of this clause.

33. Clause 36. - Relationship to the National Training Wage Award 1994: Delete this clause and insert the following in lieu thereof:

36. - RELATIONSHIP TO THE NATIONAL TRAINING WAGE AWARD 2000

A party to this award shall comply with the terms of the National Training Wage Award 2000 [AW790899 - PR904174 (No. 277)] and as varied from time to time as though it was a party bound by Clause 3. - Parties Bound of that award.

34. Clause 36. - Immediately following this clause insert new clauses as follows:

37. - OTHER LAWS AFFECTING EMPLOYMENT

- (1) INDUSTRIAL RELATIONS ACT 1979
www.wairc.wa.gov.au
- (2) MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993
www.slp.wa.gov.au
- (3) WORKPLACE RELATIONS ACT 1996
www.airc.gov.au or link to <http://www.airc.gov.au/procedures/wra/wra.html>
- (4) SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992
www.austlii.edu.au/au/legis/cth/consol_act/sga1992430/
- (5) OCCUPATIONAL SAFETY AND HEALTH ACT 1984
www.safetyline.wa.gov.au
- (6) EQUAL OPPORTUNITY ACT 1984
www.oceo.wa.gov.au
- (7) TERMINATION, REDUNDANCY AND INTRODUCTION OF CHANGE GENERAL ORDER
www.wairc.wa.gov.au (under General Orders)
2005 WAIRC 01715
Western Australian Industrial Gazette vol. 85, p. 1667.
- (8) LONG SERVICE LEAVE STANDARD PROVISIONS
www.wairc.wa.gov.au (under General Orders)

38. - WHERE TO GO FOR FURTHER INFORMATION

- (1) Liquor, Hospitality and Miscellaneous Union
Western Australian Branch
Telephone: 08 9388 5400
Facsimile: 08 9382 3986
Email: lhmuwa@lhmu.org.au

- (2) Chamber of Commerce and Industry of Western Australia
180 Hay Street
EAST PERTH WA 6004
Telephone: 08 9365 7555.
Facsimile: 08 9365 7550
- (3) Western Australian Industrial Relations Commission
Level 16, 111 St Georges Terrace
PERTH WA 6000
Telephone: 08 9420 4444
Facsimile: 08 9420 4500
Email: webmaster@wairc.wa.gov.au
Web: www.wairc.wa.gov.au
Toll Free: 1800 624 263
- (4) Department of Consumer & Employment Protection, Labour Relations
3rd Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005
Telephone: 08 9222 7700
Facsimile: 08 9222 7777
Email: labourrelations@docep.wa.gov.au
Wageline: 1300 655 266

35 Appendix: Resolution of Disputes Requirement: Delete this clause

36. Schedule A. – Respondents: Delete this schedule and insert the following in lieu thereof:

SCHEDULE A. – RESPONDENTS

Quality Drycleaning & Laundry Services
Clarkson Ocean Keys Shopping Centre Shop 33
Ocean Keys Blv
CLARKSON WA 6030

Quality Dry Cleaning & Laundry Services
Shop 16b Currambine Marketplace
Cnr Shenton Avenue
CURRAMBINE WA 6028

Quality Drycleaning & Laundry Services
Shop 64 Karrinyup Shopping Centre
Karrinyup Road
KARRINYUP WA 6018

Quality Drycleaning & Laundry Services
25 Sheppard Way (cnr Whiley Rd)
MARMION WA 6020

Superclean Steam Laundry & Drycleaners
2 Hehir St
BELMONT WA 6104

Bentley Dry Cleaning & Laundromat
49a Bentley Shopping Centre
BENTLEY WA 6102

Stannard's Dry Cleaning
173 Hay St
SUBIACO WA 6008

Eric Dry Cleaners
Burt Street
BOULDER WA 6432

Valiant Dry Cleaners
 Frederick Street
 ALBANY WA 6330

North Star Steam Laundry
 and Dry Cleaners
 Edgar Street
 PORT HEDLAND WA 6721

Busselton Dry Cleaners
 43 Nuove Street
 BUSSELTON WA 6280

Four Seasons Dry Cleaners
 KATANNING WA 6317

Elimes Dry Cleaners and Laundry
 Norseman Road
 ESPERANCE WA 6450

2006 WAIRC 04022

GAOL OFFICERS' AWARD 1998 NO 12 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

PARTIES**APPLICANT**

-v-

THE MINISTER FOR JUSTICE

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
DATE FRIDAY, 24 MARCH 2006
FILE NO/S APPL 316 OF 2004
CITATION NO. 2006 WAIRC 04022

Result Award varied
Representation
Applicant Mr. D. Seal and Mr. J. Welch
Respondent Mr. N. Cinquina and Mr. P. Budd

Order

HAVING HEARD Mr D. Seal on behalf of the applicant and Mr N. Cinquina 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 Gaol Officers' Award 1998 No. 12 of 1968 be varied in accordance with the following schedule and that such variation shall have effect on and from the 20th March 2006.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.**SCHEDULE**

A. Clause 32. - TRANSFERS: Delete this clause and insert in lieu:

32. – TRANSFERS

The following principles and objectives are the basis for transfer arrangements:

Principles

Transfers are to be effected through an agreed process and applied in a manner able to withstand open scrutiny with fair and equitable treatment of all officers subject to transfer.

Objectives

To facilitate the identification and filling of vacancies in a timely manner.

To ensure that agreed establishment levels are maintained at all prisons.

To ensure that agreed staffing numbers of male and female officers are maintained in all prisons.

To provide stability in prison staffing.

To provide a degree of predictability and certainty so that officers can plan for the future.

To provide a system that is easy to work and easy to understand.

To provide officers with an opportunity to gain broad based experience.

To provide consistency in the decision making process.

(1) Definitions

For the purposes of this clause the following expressions shall have the following meanings:

“Agreed Establishment Levels” means the number of officers required to fill all the permanent substantive positions within a prison.

“Compassionate Transfer” means a transfer effected outside the normal Transfer Lists in response to personal circumstances that warrant relocation of an officer.

“Gender Numbers” means the agreed number of female and male officers required to operate the prison.

“Mutual Swap” is a voluntary exchange of positions between officers of the same rank at different locations.

“Local Recruit” means an officer who is specifically recruited for a position in an identified prison or region and who resides in that location or region.

“Permanent Posting” means the placement of an officer to a permanent position at a prison, on the completion of the trainee Prison Officers course.

“Prison” - means any gazetted prison, work camp or other work location where the department requires prison officers to be posted.

“Redeployed Prison Officer” means an officer who, as a result of a prison closure or abolition of their substantive position as a result of a restructure, does not have a permanent substantive position at any prison.

“Temporary Posting” means the agreed temporary placement of an officer to a prison on the completion of the trainee prison officer course, pending a permanent posting.

“Transfer” is the movement of an employee from one location to another location at the same, or lesser rank. There are three main categories of transfer, these being:

- (a) Voluntary: A transfer initiated by an officer and effected through the transfer lists, mutual swap or a compassionate transfer.
- (b) Management Initiated: A Department directive to an officer to relocate from one location to another to meet its operational needs.
- (c) Disciplinary: A Departmental directive to an officer to relocate from one prison to another in accordance with the disciplinary procedures of the Prisons Act and Regulations or this Award.

“Transfer List” is the list of officers who have expressed an interest for a transfer to another prison or branch.

(2) Transfer Committee

- (a) All proposals and requests for transfer between prisons shall be forwarded to the Transfer Committee for consideration.
- (b) The Transfer Committee shall be comprised of:
 - One or more of either the General Manager Adult Custodial, the Director Regional and Rural Prisons and the Director Women’s Custodial Services;
 - A representative from the Human Resources (Prisons) Branch; and
 - At least one representative of the Western Australian Prison Officers Union.
- (c) The Director Health Services may participate in the deliberations of the Transfer Committee where it is necessary to make an assessment of medical information provided by an officer.

(3) Special Conditions

- (a) A transfer that is to be implemented in accordance with the Department’s obligations under the Regional Incentives arrangements negotiated between the parties shall take precedence over all proposals and requests for transfers and filling of positions.
- (b) The determination of the Transfer Committee in considering a Departmental proposals or an officer’s request for transfer out of the ESG shall be made in accordance with arrangements that may be agreed between the parties.
- (c) As close as possible to half of all Senior Officer and First Class Prison Officer positions that become vacant within each prison each year may be advertised by the Department for promotion before being offered on a transfer basis. All other positions will be filled on a transfer basis and will only be offered for promotion if no person is registered on the transfer list as wishing to transfer into the position
- (d) Officers wishing to obtain an employee-initiated transfer will be required to serve a minimum of twelve months at their initial posting from the trainee prison officer course.
- (e) Officers having received a promotion will be required to serve a minimum of twelve months in the promoted position before being eligible for employee-initiated transfer.
- (f) An officer who receives a transfer, whether it be through the Transfer Lists, mutual swap or a compassionate transfer, will be ineligible to be considered for a transfer within two years of their last transfer, unless they are granted a further compassionate transfer.
- (g) Probationary Prison Officers will take up vacancies after transfers based on the transfer list have been effected except where the position is filled by a local recruit.

- (h) Officers who accept a transfer to another prison to fill a vacancy at a lower rank than their current rank will revert substantively to the rank of the position they are to fill.
 - (i) Where a vacancy is unable to be filled through the normal transfer process the time limits specified in paragraphs (d), (e) and (f) of this subclause may be waived by the Department after consultation with WAPOU.
 - (j) Where an officer has a documented substandard performance issue that officer cannot be transferred to another prison via an employee-initiated transfer, irrespective of his/her position on the transfer list, while that substandard performance issue remains unresolved
 - (k) Where certain skill sets are required at a prison and the Department and Union have agreed to pre-requisite training, such training must be successfully completed before a person can transfer to that prison.
 - (l) Prison Officers (Vocational and Support) who have completed the Department's Industry Standard Prison Officer Training Course or deemed equivalent shall be entitled to register on the Prison Officer (General) transfer list.
 - (m) Prison Officers (Vocational and Support) shall be entitled to register on the Prison Officer (Vocational and Support) transfer list to transfer into vacant positions within their scope of vocational skills and knowledge that may arise at other prisons.
- (4) Voluntary Transfers
- (a) Transfer lists

To enable a transfer from a Transfer List to be effective there must be an identified vacancy at a prison that resulted or will result in the staffing level being below the approved establishment level.

The Transfer List process will work as follows:

 - (i) Officers can apply to be placed on a Transfer List at any time. If there is nobody on the Transfer List an officer may submit an expression of interest for transfer to a like for like position at the time a position becomes vacant.
 - (ii) Officers are entitled to seek to transfer to another prison through application to be placed on a transfer list. Separate Transfer lists will be maintained for:
 - Prison Officers (General);
 - First Class Prison Officers;
 - Senior Officers;
 - Hospital Officers;
 - Prison Officers (Vocational and Support);
 - Work Camp Officers; and
 - Canine Handlers.
 - (iii) Prison Officers (General), First Class Prison Officers, and Senior Officers can express an interest for transfer to a maximum of three prisons.
 - (iv) Officers accepting a transfer will be removed from all other transfer lists and will be ineligible to be placed on any transfer list for two years from the time of transferring to the new prison.
 - (v) To ensure compliance with the provisions of the Equal Opportunity Act, 1984 relating to discrimination on the basis of marital status, where two officers are married or are in a defacto or other relationship they will be treated as independent officers unless both officers advise that they want to be both transferred to the same locality. An Officer, who wishes to transfer with a partner, will take a position on the Transfer List equivalent to the position of the partner placed lower on the Transfer List.
 - (vi) In deciding whether to offer a transfer to an officer on a transfer list the department will take into account the following factors:
 - The obligations set down in subclause 3 of this Clause - Special Conditions;
 - Whether there are officers subject to redeployment who have nominated that prison;
 - The availability of accommodation at Broome, Eastern Goldfields and Roebourne.
 - Gender numbers that may be agreed between the parties.
 - (b) Applications for placement on the transfer lists can be lodged at any time in writing to the Human Resources (Prisons) Branch.
 - (c) Officers will be placed on the transfer list in the order they are received at the Human Resources (Prisons) Branch.
 - (d) Transfer lists will be published by the Department on a regular basis of at least once annually
- (5) Compassionate Transfers
- (a) An officer may seek a transfer outside the normal Transfer List process on compassionate grounds based on personal circumstances which warrant the relocation of an officer.
 - (b) Applications from officers seeking compassionate transfers shall be considered on a case by case basis.
 - (c) The officer will meet costs associated with a compassionate transfer and is not eligible for property, removal or transfer allowances provided by this Award unless otherwise approved.
 - (d) The Department, for the purpose of effecting a compassionate transfer, is not obligated to consider the effects on the approved establishment levels of the particular prison.
 - (e) Compassionate transfers will be considered by the Department. The grounds, without being limited, will include:
 - Medical reasons,

- Personal/Family reasons, or
 - Work related conflict.
- (f) Officers seeking a compassionate transfer on one of the above grounds should make application to the General Manager Adult Custodial stating the reason and where possible provide supporting evidence, for example, supporting evidence from a doctor if the transfer is sought for medical reasons.
- (6) Mutual Swap Transfers
- (a) Officers may obtain a transfer outside the normal Transfer List process through a voluntary exchange of positions with an officer of the same rank at a different location.
 - (b) Applications from officers seeking mutual swap transfers shall be considered on a case by case basis.
 - (c) A mutual swap transfer will not impact on the approved establishment level of any prison.
 - (d) In instances where a mutual swap transfer is approved the officers concerned will be responsible for all costs associated with the transfer and they are not eligible for property, removal or transfer allowances provided by this Award.
 - (e) The following process shall be followed by officers seeking a mutual swap employee initiated transfer:
 - Find someone on the transfer list who is prepared to undertake a mutual swap
 - If no one is available on the transfer list, contact the prison to which he/she wants to transfer and arrange advertising.
 - Once an officer to swap with has been identified each officer submits an application through his/her Superintendent to the Workforce Planner, Human Resources (Prisons) Branch, who joins the applications and submits the joint submission to the Transfer Committee.
 - (f) Officers will be required to return to their original substantive positions held prior to the swap in the event of one of the parties involved in the swap not fulfilling their obligations of the mutual swap transfer.
- (7) Management Initiated Transfers
- (a) Where the Department is contemplating the transfer of an officer from one prison to another the Department will advise the officer in writing and request that the officer submit in writing by a specified date any personal issues he/she wants considered by the Department in deciding whether the officer is to be transferred.
 - (b) The Department will genuinely consider all issues raised by the officer prior to making a final decision about the transfer.
 - (c) If the Department decides the officer is to be transferred the officer will be advised in writing of the date he/she will commence duty at the new prison.
 - (d) Transfer of one or more officers because of the need to adjust staffing levels within prisons will occur in accordance with the following:
 - (i) Where there is a need to transfer one or more officers from one prison to another to meet operational needs the Department will first check the transfer list to see if there are officers registered as seeking a transfer from their current prison.
 - (ii) If there are insufficient officers seeking transfer the Department will advertise for volunteers to transfer.
 - (iii) If insufficient volunteers are received the Department will write to all officers of the appropriate rank in the prison and advise that they are being considered for transfer, what the potential transfer locations are, and requesting that each officer submit in writing by a specified date any personal issues he/she wants considered by the Department in deciding who shall be transferred.
 - (v) The Transfer Committee will undertake a comparative assessment of all officers and the required number of officers will be chosen for transfer.
 - (vi) Officers selected for transfer will be advised in writing of the date they will commence duty at the new prison.
 - (e) For the purpose of these procedures Casuarina, Hakea, Boronia and Bandyup Prisons, the Training and Development Branch and the Specialist Services Branch are all deemed to be located in the metropolitan area and are in the same locality.
 - (f) Officers subject to compulsory transfer will be given at least six (6) weeks' notice of the date they are required to commence duty at the prison to which they are transferring unless otherwise agreed between the parties.
 - (g) Officers subjected to a compulsory transfer from a prison to adjust staffing levels shall be given the first right of return to the prison when a vacancy arises or staffing levels are increased; that is they will be placed at the top of the transfer list. Where more than one officer has been so transferred, the officers will be given right of return in the order in which they are transferred out of the prison.
 - (h) The Department will pay the costs and allowances provided by this award associated with compulsory transfers.
 - (i) On application from the officer concerned, an officer may be excluded from being chosen for a compulsory transfer to another prison. Each application will be considered on its merits. Grounds upon which an exemption may be granted include but are not limited to:
 - the transfer is to a regional prison and the officer has previously served in a regional prison for a period of two years or more;
 - the transfer is from one locality to another and the officer has dependant children living with him/her who are attending years 11 or 12 at high school;
 - the officer is working in a prison to which he/she was recruited locally and there are officers not recruited locally who can be transferred.
- (8) Transfer of Redeployees
- (a) Redeployed officers who have been substantively placed through this means will not be subject to the two-year rule.

- (b) Officers subjected to a transfer by way of redeployment from a prison shall be given the first right of return to the prison after those wishing to invoke their right under subclause 6(g) when a vacancy arises or staffing levels are increased, that is they will be placed at the top of the transfer list. Where more than one officer has been so transferred, the officers will be given right of return in the order in which they were redeployed out of the prison.
 - (c) The Department will pay the costs and allowances associated with transfer of redeployees.
 - (d) Officers who have been identified for redeployment will be given the opportunity to nominate one or more prisons where they wish to gain a permanent position.
 - (e) At the first opportunity the officer will be placed at the preferred prison in a substantive position.
 - (f) Should a substantive position not be available the officer may be placed at the preferred prison or another prison as agreed pending the availability of a substantive position.
- (9) Allowances
Subject to the provisions of subclauses 5 and 6 of this clause officers who are transferred are entitled to District, Property, Removal and Transfer Allowances as provided in this Award.

B. Schedules B and C – Memorandum of Agreement: delete these Schedules and insert in lieu the following new Schedule B.

SCHEDULE B – MEMORANDUM OF AGREEMENT

The Minister for Justice (“the Employer”) for Western Australia and the Western Australian Prison Officers’ Union of Workers (“the Union”) agree that the following provisions shall apply to all officers covered by the Goal Officers Award 1968.

The provisions of this Memorandum shall be read and interpreted wholly in conjunction with the Award. Where there is any inconsistency between this Memorandum and the Award, the provisions of this Memorandum shall prevail to the extent of any inconsistency.

Where an informal or unregistered agreement comes to the notice of either party after the registration of this Schedule B - Memorandum of Agreement that party shall bring that agreement to the notice of the other party in writing within one month of becoming aware of the agreement. Where the parties agree to that agreement being added into this Schedule it shall be so added.

Section 1 – SALARY

Incremental placement – Promotion or transfer of Prison Officers (Vocational and Support)

- a) A Prison Officer (Vocational and Support) who is transferred or promoted to a Prison Officer General position shall be paid at the relevant year of service for the range of the Monday to Friday or Shift depending upon the position to which the officer is transferred or promoted. There will be no salary maintenance should the transfer or promotion resulting in a lesser salary than that which the officer received as a Prison Officer (Vocational and Support).
- b) A Prison Officer (Vocational and Support) who is transferred or promoted to a Prison Officer General position will not automatically progress to First Class or Senior Officer due to the equivalent remuneration per years of service the officer acquired as a Prison Officer (Vocational and Support).

Increments – Higher Duties

Where an officer is directed to act in a higher position(s) that has an incremental range of salaries such officer shall be entitled to receive an increase in the higher duties allowance equivalent to the increment the officer would have received had the officer been appointed to such position(s); provided that acting service with allowances for acting in positions of the same or higher classification than the position during the eighteen (18) months preceding the commencement of acting shall aggregate as qualifying service towards such an increase in the allowance.

Higher Duties – Salary on Annual Leave

Where a prison officer acting in Senior Officer position proceeds on a period of normal annual leave the officer shall be paid the salary of the higher position for the period of the leave if the officer has been in receipt of a higher duties allowance for the greater proportion of the calendar month prior to taking the leave.

Salary – Appointment and Acting

The following arrangements apply in respect of substantive and acting appointments to Level 4 and 5 Prison Officer (Vocational and Support) positions.

- a) Appointment to Level 4 or 5 from outside the Service is to be at the minimum point of the range.
- b) Salary on promotion from Level 3 to Level 4 of an officer in the service will be at the same point in the range and the officer shall retain the Level 3 anniversary date.
- c) Salary on promotion from Level 4 to Level 5 of an officer in the service would be at the same point in the range and of the officer shall retain the Level 4 anniversary date.
- d) When acting in a Level 4 position a Level 3 officer in the service will be paid at the at the same point in the Level 4 range as enjoyed within the Level 3 range with retention of the Level 3 anniversary date.
- e) When acting in a Level 5 position a Level 3 officer in the service will be paid at the at the same point in the Level 5 range as enjoyed within the Level 3 range with retention of the Level 3 anniversary date.
- f) When acting in a Level 5 position a Level 4 officer in the service will be paid at the at the same point in the Level 5 range as enjoyed within the Level 4 range with retention of the Level 4 anniversary date.

Section 2 – HOURS OF DUTY

Filling of Rosters

The following process shall be followed in the development of rosters.

- a) All positions required at both Senior Officer and Prison Officer classification to fulfil the operational requirements of the prison on a daily basis shall be identified.
- b) An agreed roster shall be prepared to cover all these positions

- c) The first priority in preparing the roster shall be to fill all lines or part thereof.
- d) The second priority will be to cover all absences due to long-term sickness and worker's compensation.
- e) All officers attached to the prison whether on duty or absent due to sickness, workers compensation, or secondment should be listed on the roster.
- f) In the preparation of the roster the only time there will not be an officer's name against a roster line will be where there is an actual vacant position at that prison.
- g) When preparing the roster and prior to posting any excess staff on a particular day should be allocated to offset any shortfalls.

Agreed Rosters

Prison rosters will only be posted following agreement between the local branch of the Union and the administration of the prison.

Roster Cycles

- a) Each roster period will run for six weeks and will be made up of two or three week roster cycles.
- b) A roster will initially be posted with another roster in advance providing rosters to cover a total of twelve weeks containing six or four roster cycles.
- c) A roster will be posted at the completion of a roster and at all times on the completion of one roster period another roster shall be posted. At any one point in time there will be posted a maximum of two rosters covering twelve weeks and a minimum of one roster covering six weeks.
- d) Roster cycles will run independently of each other.
- e) The non-leave period will be made up of three weeks, three weeks, and six weeks in any order over a three year period.
- f) Shift swaps shall not be approved between roster periods.
- g) Shift swaps can occur between roster cycles that make up the same roster period.

Shift Swaps

- a) An officer must have at least one full day break after any period of seven (7) consecutive twelve-hour shifts including approved employee or management initiated shift swaps and out of hours work.
- b) Shift swaps must be approved prior to the first of the shifts swapped being worked. Shift swaps will not be approved retrospectively except where an urgent pressing need was notified prior to the scheduled commencement of the first of the shifts being swapped.
- c) Any proposed shift swap must adhere to the requirements of the 12-hour shift arrangements regarding the break between finishing time of a day shift and commencement of a following night shift.
- d) Shift swaps will not be approved where it will result in an officer working more than two consecutive night shifts. When working day shifts on the posted roster no more than two (2) night shifts can be swapped into in any seven (7) consecutive days.
- e) Shift swaps will not be approved where it will result in an officer working more than an additional two consecutive nights following or before night shifts on the posted roster. When working night shifts on the posted roster no more than two (2) additional night shifts can be swapped in any consecutive days.
- f) Shift swaps must be completed within the same roster period.
- g) Where possible shift swaps should be with an officer of the same unit to ensure continuity for case management purposes.
- h) Shift swaps will not be approved where it appears, from a trend of previous shift swaps, that officers are avoiding certain duties that will result in an atrophying of skills in any area of prison officer work (e.g. officers changing shifts and not having prisoner contact).

Commencement of duty

- a) A Prison Officer's hours of duty commence and cease when the officer reports to the front gate at their prison.
- b) 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 payment in addition to the Officer's annualised salary.

Section 3 – LEAVE

Single Days Annual Leave

The following conditions provide clarification of the entitlement to take up to five single days of Annual Leave as provided by Clause 16 (7) of the Award.

- a) Prison Officers shall be entitled to take up to five days of the normal annual leave as single days leave subject to the approval of the Superintendent or Officer in Charge.
- b) Any shortfall on the roster created by approval of single days of annual leave shall be covered by:
 1. An officer utilised from the normal roster staffing levels identified by local agreement between the prison administration and branch of the Union; or
 2. An officer surplus or additional to that day's normal roster staffing level requirement; or
 3. Payment of overtime.

If the Superintendent is unable to obtain an officer to undertake the overtime required or redeploy staff as provided in 1 and 2 above then approval of the application for a single day's annual leave may be withheld. Once staff are redeployed in accordance with 1 and 2 above to cover an absence caused by granting a single day's annual leave they cannot be reassigned.

- c) The officer shall complete shifts equivalent to single annual leave days taken before commencement of their normal annual leave.
- d) The officer's leave will be delayed for one working shift for each single day's leave taken. The Officer will be required to work on each of these days. In cases where an officer has taken 4 or 5 days single days leave the first three days shall be cleared by attending work on the first three days of the nominated leave period with one day break before attending work to clear the remaining work obligation. If the officer is on days off immediately prior to the nominated day for the commencement of leave then the four or five days work obligation may be satisfied by working those shifts on consecutive days.
- e) The officer and the Superintendent may agree an administrative swap that provides for the time to be worked at a time other than outlined in the previous paragraph but no later than the date upon which the officer's annual leave is scheduled.

Sick leave credits

- a) All Officers who prior to 1 July 1994 received a total sick leave entitlement of three months with payment of ordinary wages and three months with payment of half ordinary wages in each period in three years will receive a credit of 528 hours in addition to their entitlements under Clause 20 (1)(a).
- b) All Officers with more than 10 years' continuous service as at 1 July 1994 who had accrued more than 528 hours' sick leave will be entitled to receive those days in addition to their entitlements under Clause 20 (1)(a).

Sick leave - Anniversary date

The anniversary date for the determination of a prison officer's sick leave entitlements shall be as follows:

- a) 19 July for officers who chose to transfer from the triennial scheme to new arrangements introduced as from 28 July 1990;
- b) 1 July with the introduction of the "Package" for officers employed on 1 July 1994 and still on the triennial system who were transferred to the present sick leave entitlements of the Award; and
- c) Officers employed since 1 July 1994 who have an anniversary date linked to commencement date.

Reconciliation of sick leave

- a) The following subclause shall complement the provisions of Clause 20(1)(b) of the Award.
- b) Payment for sick leave may be adjusted at the end of each accruing year or at the time the officer leaves the service of the employer in the event of the officer being entitled by service subsequent to sickness in that year to a greater entitlement than that existing at the time the sickness occurred.

Sick leave on annual leave

Where an officer is ill during a period of annual leave for a period of at least seven consecutive days and produces at the time or as soon as possible thereafter medical evidence that the officer is or was as a result of the illness confined to the officer's place of residence or hospital the officer who claims reinstatement of annual leave will have sick leave credits debited on the basis of eight hours a day (forty hours a week) and annual leave credited on the basis of eight hours a day (forty hours a week).

Annual leave loading

- a) Subject to the provisions of subclauses (b), (c), (d) and (h) of this clause, a loading equivalent to 17.5% of annualised salary is payable to officers proceeding on annual leave, including accumulated annual leave.
- b) Officers whose annualised salary includes a component for shift penalties that exceeds 17.5% of the Monday to Friday plus public holidays rate for their classification and are granted an additional week's pay shall not be entitled to annual leave loading.
- c) Officers whose annualised salary includes a component for shift penalties that is less than 17.5% of the Monday to Friday plus public holidays rate for their classification and are granted an additional week's pay shall be paid an allowance equal to the difference between a loading equivalent to 17.5% of normal salary and the shift work component for five weeks' leave.
- d) Subject to the provisions of subclause (f) of this clause the loading is paid on a maximum of four weeks' annual leave, or five weeks in the case of shift workers who are granted an additional week's penalty leave. Payment of the loading is not made on additional leave granted for any other purpose (e.g. to officers whose headquarters are located North of the 26° South Latitude). The maximum payment shall not exceed the Average Weekly Total Earnings of all Males in Western Australia, as published by the Australian Bureau of Statistics, for the September quarter of the year immediately preceding that in which the leave commences. The maximum payment of the loading including the shift work component of the annualised salary to officers granted in accordance with subclause (c) shall not exceed 5/4th of the Average Weekly Total Earnings of all Males in Western Australia, as published by the Australian Bureau of Statistics, for the September quarter of the year immediately preceding that in which the leave commences.
- e) Annual leave commencing in any year and extending without a break into the following year attracts the loading calculated on the salary applicable on the day the leave commenced.
- f) The loading payable on approved accumulated annual leave shall be at the rate applicable at the date the leave is commenced. Under these circumstances an officer can receive up to the maximum loading for the approved accumulated annual leave in addition to the loading for the current year's entitlement.
- g) A pro rata loading is payable on periods of approved annual leave less than four weeks.
- h) The loading is calculated on the rate of the normal fortnightly salary including any allowances that are paid as a regular fortnightly or annual amount but excluding any shift allowances. Any allowance paid to an officer for undertaking additional or higher-level duties is only included if the allowance is payable during that period of normal annual leave.

- i) Where payment in lieu of accrued or pro rata annual leave is made on the death or retirement of an officer, a loading calculated in accordance with the terms of this clause is to be paid on accrued and pro rata annual leave.
- j) When an officer resigns, or ceases employment, or where an officer is dismissed under Part X of the Prisons Act, an annual leave loading shall be paid as follows:
 - (i) Accrued entitlements to annual leave - a loading calculated in accordance with the terms of this clause for accrued annual leave is to be paid.
 - (ii) Pro rata annual leave - no loading is to be paid.
- k) Part-time officers shall be paid a proportion of the annual leave loading at the salary rate applicable, provided that the maximum loading payable shall be calculated in accordance with the following:

$$\frac{\text{Hours of work per fortnight}}{80} \times \frac{\text{Maximum loading in accordance with subparagraph (d) of this clause}}{1}$$

- l) An officer who has been permitted to proceed on annual leave and who ceases duty other than by resignation or dismissal under Part X of the Prisons Act before completing the required continuous service to accrue the leave must refund the value of the unearned pro rata portion of Leave Loading but no refund is required in the event of the death of an officer.
- m) An officer who has been permitted to proceed on annual leave and who resigns or is dismissed under Part X of the Prisons Act must refund the value of the loading paid for leave other than accrued leave.

Recall to duty during leave:

Officers who are recalled to duty from annual or long service leave other than for training or to give evidence in an official capacity as provided under provisions for witness service shall be paid as follows:

- a) For a period less than one day payment at overtime rates for all time worked with a minimum payment for three hours. No adjustment will be made to the officer's pay or leave credits.
- b) An officer's leave shall be reinstated for periods in excess of one day with payment at overtime rates for all hours worked in excess of eight hours on any one day.

Long Service Leave – Pro Rata Entitlements

On application to the Department a lump sum payment for the money equivalent of any:

- a) Long service leave entitlement for seven years' continuous service shall be made to any prison officer who resigns, retires, is retired, is dismissed, or in respect of a prison officer who dies;
- b) Pro rata long service leave entitlement based on continuous service of less than seven years shall be made to any prison officer who:
 - (i) retires at or over the age of 55 years or who is retired on grounds of ill health if the prison officer has completed not less than twelve months' continuous service before retirement;
 - (ii) not having resigned is retired by the Department for any other cause if the prison officer has completed not less than three years' continuous service before the date of retirement;
 - (iii) in respect of a prison officer who dies, if the officer has completed not less than twelve months' continuous service before the date of death.
- c) In the case of a deceased prison officer, payment shall be made to the estate of the prison officer unless the officer is survived by a legal dependent approved by the Department, in which case the payment shall be made to the legal dependent.

Long Service Leave – Portability

Prison Officers are entitled to portability in respect of Long Service Leave entitlements for prior service with State bodies and statutory authorities set down in Administrative Instruction 611 of 13 December 1989 under the same conditions as officers of the Public Service.

Witness Service

- a) A prison officer subpoenaed or called as a witness to give evidence in any proceeding will as soon as practicable notify their Superintendent.
- b) Where a prison officer is subpoenaed or called as a witness to give evidence in an official capacity including occasions where the officer is to give evidence at a Coronial Inquiry or other court proceedings relating to the conduct of a prisoner in prison, that officer will be granted by the employer leave of absence with pay, but only for such period as required to enable the officer to carry out duties related to being a witness. If the officer is on any form of paid leave, the leave involved will be reinstated.
- c) A prison officer subpoenaed or called as a witness to give evidence in an official capacity is not entitled to any witness fee and will pay any fees received including travel expenses into the Consolidated Revenue Fund and forward the receipt for such payment to the employer.
- d) A prison officer subpoenaed or called as a witness to give evidence on behalf of the Crown but not in an official capacity will be granted leave with full pay entitlements. If the officer is on any form of paid leave, this leave will be not be reinstated as such witness service is deemed to be part of the officer's civic duty.
- e) A prison officer subpoenaed or called as a witness to give evidence on behalf of the Crown but not in an official capacity granted paid leave is not entitled to retain any witness fee and will pay any fees received including travel expenses into the Consolidated Revenue Fund and forward the receipt for such payment to the employer.
- f) A prison officer subpoenaed or called as a witness under circumstances other than those specified in subclauses (b) and (d) will be granted leave of absence without pay except where the officer makes an application to clear accrued leave in accordance with the Award.

Additional leave entitlement – Definition of Regular

- a) An officer's eligibility for an additional week's leave is calculated using the period between the date of the officer's appointment and its anniversary irrespective of when the officer takes the leave.
- b) An officer satisfies the definition of regular for the purposes of Clause 16 (1) (c) of the Award if the officer has worked on the approved roster eleven (11) Sundays or Public Holidays, not including overtime, in the period established under subclause (a) to calculate entitlement.

Section 4 – ALLOWANCESPager Allowance

- a) A prison officer instructed in writing to carry a pager and be available to be called to attend work outside of normal rostered hours of duty shall be paid an allowance of \$39.24 per week.
- b) Officers required to carry a pager for a period of less than a week, that is seven calendar days, shall be paid a pro-rata allowance based on the number of days required.
- c) Officers will not be required to carry a pager during period of annual or long service leave and will not be entitled to receive the allowance for that period of leave.
- d) A prison officer who is unavailable to respond to after hour calls as a result of illness is not eligible to claim the allowance for the period of that incapacity.
- e) From 18 October 1996 the allowance provided in subclause a) shall be varied annually with effect from 18 October each year to reflect movements in the Consumer Price Index over the previous twelve months.

Travel Allowances

- a) The headquarters for officers allocated to the Special Services Branch is the Hakea Complex.
- b) The headquarters for each officer attached to the Gatehouse project will be established as either Casuarina or Hakea Prison prior to the officer commencing duty on the project.
- c) Officers directed to report for duty at a location other than their nominated headquarters will be entitled to kilometrage as provided for in Schedule F of the Public Service Award 1992 where the distance travelled to and from that location is greater than the officer's normal travelling distance to their nominated headquarters.

Overtime meal allowances

- a) A Prison Officer required to work overtime of not less than two hours and who actually purchases a meal shall be reimbursed in accordance with Part 2 of Schedule H. - Overtime of the Public Service Award, in addition to any payment for overtime to which that officer is entitled.
- b) A Prison Officer working a continuous period of overtime who has already purchased one meal during a meal break, shall not be entitled to reimbursement for the purchase of any subsequent meal in accordance with Part 2 of Schedule H. - Overtime, of the Public Service Award until that officer has worked a further five hours' overtime from the time of the last meal break.
- c) If an officer, having received prior notification of a requirement to work overtime, is no longer required to work overtime, then the officer shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased.

Shift penalty rates

- a) The following formula is the basis upon which the shift component of the officer's annualised salary will be calculated.
- b) Fifteen percent (15%) for any shift commencing before 6.01am Monday to Friday inclusive.
- c) Fifteen percent (15%) for any shift commencing on or after midday Monday to Friday inclusive.
- d) Time and a half for the length of any shift worked on a Saturday.
- e) Time and three quarters for the length of any shift worked on a Sunday.

Section 5 – STAFFINGOfficer in Charge

- a) The appointment of the Officer in Charge of the prison shall be determined in accordance with the procedure outlined Department's correspondence to the Union dated 19 October 1988 and 21 November 1988.
- b) Acting Senior Officer appointments shall be determined in accordance with the procedure outlined Department's correspondence to the Union dated 15 September 1988.

Work beyond age 65

The provisions of Attachment 3 Extension of and Employment beyond age 65 contained in Circular to Departments and Authorities No 22 of 1988 shall apply to Prison Officers covered by the Gaol Officers Award.

Vacancy management and relief pools

The Department shall maintain a pool of prison officers equal in size to the full time equivalent of the annual absence of staff due to worker's compensation. Prison officers from that pool shall be used to cover staffing shortfalls caused by absence of officers on worker's compensation.

Dog Handlers

- a) An Officer seeking to leave or required to leave the Canine Squad shall be entitled to return to their previous prison or posting. The officer may apply to the Transfer Committee for an alternative placement.
- b) The Officer prior to returning to their previous posting/prison or taking up a requested alternative placement may be required to take a temporary posting within the Metropolitan Area pending a vacancy occurring at their previous or requested posting.

- c) Officers will not be required to use their vehicle to travel to and from work unless a Departmental vehicle is not available. Where no Departmental vehicle is available and the officer agrees to transport the dog in their own private vehicle, the officer shall be paid the motor vehicle rate provided by Schedule E of the Public Service Award.

Section 6 – TRAINING

Residential and Full Time Training

- a) These terms and conditions will apply to officers attending training where the course requires their attendance for a full day or more away from their normal work location.
- b) Criteria for selection of officers to attend a course will be developed before the selection process is commenced. Officers shall attend courses where directed. Training programs developed out of performance reviews or disciplinary proceedings are excluded from the scope of these arrangements. The conditions governing such programs would be developed to meet the needs of the specific program.
- c) Courses will generally be based around a nine-hour structured training day (including the paid meal break provided by the Award). Officers will be rostered for duty for the duration of the structured training day. Where a course is to be something other than a nine-hour day the Training and Development Branch will advise the prison when initially advising the prison of the course.
- d) Where a course is to be conducted the following process should be followed:
1. Training Branch will advise the prison of the upcoming course.
 2. The prison superintendent or delegate will determine whether staff can be released to attend the training, and identify officer/s to attend.
 3. The prison superintendent or delegate will negotiate with the local WAPOU branch for agreement on a training roster as an addendum to the existing agreed roster or modification to the agreed roster to release officer/s for training. No roster modification will be required if the vacancies created by the officer/s attendance at training are to be backfilled using overtime.
 4. The roster/s for the officer/s attending training must be adjusted to ensure that they work a total of 120 hours for each three-week period.
 5. In adjusting the hours, prisons must ensure that officers attending training have at least six rostered days off in each three-week period.
 6. When the addendum training or modified roster is agreed it must be posted as in the normal course of events, thereby giving officers formal notification of their attendance at training in accordance with industrial requirements.
 7. Where a roster has already been posted and a superintendent wishes an officer to vary his/her roster to attend training then the superintendent must seek agreement with the officer prior to committing that officer to the training. Superintendents should ensure officers are given as much notice as possible in these circumstances.
- e) Where there is a need to cover the attendance of an officer at training the agreed protocols applying at the prison for covering ad-hoc absences shall apply.
- f) Where a course is non-residential officers will be entitled to kilometreage as provided for in Schedule F of the Public Service Award 1992 where the distance travelled to and from the training venue is greater than the officer's normal travelling distance to work.
- g) Where courses are residential and the accommodation site is located away from the training venue, officers will be provided with transport to and from the training venue.
- h) Other than when there is a requirement for officers attending a course who are not utilising the departmental supplied accommodation to report to the accommodation site to travel to the course venue, the time spent travelling from the accommodation site to the training venue each morning and from the training venue to the accommodation site each afternoon will not form part of the nine-hour structured training day. This travel will be in the officers' own time, being analogous to that time normally spent travelling to and from work. Where officers are required to report to the accommodation the travel time from and to the accommodation site shall be rostered time worked in addition to the structured training day.
- i) Residential courses shall have no formal structured training scheduled outside of the structured training day. In accordance with common training and professional development program practices, attendees can be expected to undertake in their own time after-hours study and other activities that do not form part of the structured training schedule.
- j) Where structured extracurricular voluntary activities (such as team building activities, wellness programs) are programmed into a training period during times outside of the structured training day they are to be clearly marked as voluntary on the course outline. Officers taking part in such activities are not entitled to payment of overtime for the time spent participating in the activities. Where structured training sessions are programmed into a course during times outside of the structured training day, officers are required to attend the sessions and overtime will be paid.
- k) Travel to and from courses shall be in accordance with the Travel Plan included in the Course Joining Instruction. The Travel Plan will detail the mode of transport. Where an officer wishes to use his/her private vehicle in lieu:
- Permission may be obtained from the officer's Superintendent or the Manager, Training and Development Branch.
 - Officers may claim kilometreage as provided for at Schedule F of the Public Service Award 1992 of an amount up to that which it would have cost the department to purchase the fare for the public transport; and
 - Officers will be paid the normal salary rate for:

- the actual period of the journey; or
 - the period equal to the time it would have taken for the officer to travel by mode nominated in the Travel Plan:
- which ever is lesser.

- l) Where officers are involved in team building or other activities that require them to wear special protective clothing and footwear other than their issue of uniform, footwear and accoutrements then that special protective clothing and footwear will be provided. Any special protective clothing and footwear provided must be returned on the completion of the course. Where the course facilitators deem it prudent to wear civilian clothing or footwear officers will be advised of that in the joining instructions and will have the option of wearing civilian clothing or their uniform.
- m) Where an officer is required to attend a residential course of more than one week and is necessarily absent from his or her residence and separated from dependants, the officer shall be granted an additional day's leave for every group of three (3) consecutive weekends so absent, provided that each weekend shall be counted as a member of only one group. Provided that:
 - An additional day's leave shall not be allowed if the General Manager Adult Custodial or their representative has approved the officer's dependants accompanying the officer to the locality of the course;
 - The additional leave is commenced within one (1) month of the conclusion of the training course unless the General Manager Adult Custodial or their representative approves otherwise;
 - Annual leave loading, if payable, shall not apply to this additional leave entitlement.
- n) Where officers attend a residential course the department will not be responsible for the provision or reimbursement of cost, of transport for private purposes.
- o) Where officers attend a residential course the travelling allowances provisions contained in Clause 27 of the Award – Travelling, Relieving and Transfer Allowances shall apply.

Accredited Training

- a) The standard of training provided to prison officers shall meet the national accreditation set for Certificate III in Correctional Practice (Custodial), Certificate IV in Correctional Practice (Custodial), and the Diploma of Correctional Administration.
- b) The Department of Justice Prison Officers Training Course for Probationary Prison Officers shall be at the standard set for national accreditation for Certificate III in Correctional Practice (Custodial).
- c) The Department deems that all Prison Officers who have completed the Department of Justice Probationary Prison Officers training course hold qualification required for appointment to positions requiring the Certificate III in Correctional Practice (Custodial).

Section 7 – GENERAL

Performance Management

The parties agree to the implementation of a performance management system for the assessment of Prison Officer work performance at all ranks.

Classification Prison Officer (Vocational and Support)

- a) The Department will establish and maintain Position History files for all Prison Officer (Vocational and Support) positions. The Position History file will contain at all times a current Job Description Form detailing duties and responsibilities of the position.
- b) Subject to subclause (c) of this clause a Prison Officer (Vocational and Support) shall be entitled to seek a review of their position at any time. The review will be processed expeditiously.
- c) Where a Prison Officer (Vocational and Support) position has been reviewed in accordance with subclause (b) the occupant of the position shall not be entitled to seek a further review within twelve months of that review unless there has been a change in the duties and responsibilities of the position since the date of that review.
- d) The Prison Officer (Vocational and Support) Classification Committee, consisting of equal employer and Union representation shall examine classification claims from Prison Officer (Vocational and Support) Prison Officers. Where necessary the parties will make application to the WA Industrial Relations Commission to amend the award to reflect the outcome of the claim.
- e) Where the Prison Officer (Vocational and Support) Classification Committee is unable to agree on a classification and the occupant of the position wishes to appeal against the Department's assessment of the position, the appeal shall be processed in accordance with the Commission's correspondence to the parties pursuant to Application No 1303 of 1988.
- f) The parties will develop criteria structure for the future operations of Prison Officer (Vocational and Support) within the Prison Service. The criteria will address work requirements and reclassification procedures. The agreed reclassification procedures will replace the Industrial Officer Reclassification Committee.

Rank Structure

The existing rank structure including Prison Officer (Vocational and Support) will be investigated with a view to developing a more appropriate structure for the future operations of the Prison Service.

Health and Fitness

- a) Officers who are selected for a Senior Officers Qualification Course shall undergo a health and fitness appraisal as part of the course. The appraisal will test, amongst other things, lung function, blood pressure and aerobic fitness. The appraisal shall not be used for promotional or assessment purposes, however, participants on courses are expected to give a serious commitment to and measurably improve in fitness.

- b) Officers appointed to the Special Services Branch (formerly the Emergency Response Group) will be required to undergo a health and fitness test as part of the selection process. In addition on appointment the officers will be required to meet fitness standards determined from time to time. Officers appointed to the Special Services Branch will carry out duties as outlined in the Special Services Branch Operations Parameters document issued by the Executive Director Prison Operations.

HR and MR Class driving licence

Where the Department requires a prison officer already in the employment to obtain a "HR" or "MR" Class licence the Department shall meet the cost of licence test fees.

Subject to vehicle availability if required the Department will make available a vehicle for this purpose

Personal files and reports

- a) The Department shall keep a separate official Personal File and Record of Service for each Prison Officer employed. The File and Record shall be kept in secure custody.
- b) Access to these files and records shall only be allowed for official purposes and restricted to those persons with specific authority of the General Manager Adult Custodial.
- c) Subject to the approval of the General Manager Adult Custodial a Prison Officer may see their personal file.
- d) A Prison Officer given permission to see their personal file may copy any portion of the file and retain such copy for their own records.
- e) Where an authorised officer submits an adverse report in relation to the conduct, diligence or efficiency of a Prison Officer the following apply:
- i. Before the report is placed on the Prison Officer's personal file the report shall be brought to the notice of that officer and initialled by that officer.
 - ii. Where the Prison Officer wishes to give an explanation in respect of the report or state reasons for disagreeing with the report the officer shall provide the explanation or reasons in writing and these shall be attached to the report prior to its submission.
- C. Schedule D - Memorandum of Agreement - Prison Officer (Vocational and Support) Training: Renumber this Schedule as Schedule C - Memorandum of Agreement - Prison Officer (Vocational and Support) Training.

2006 WAIRC 04013

HOTEL AND TAVERN WORKERS' AWARD, 1978 (NO R31 OF 1977)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS) AND OTHERS

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE FRIDAY, 24 MARCH 2006
FILE NO/S APPL 19 OF 2006
CITATION NO. 2006 WAIRC 04013

Result Varied

Order

HAVING heard Ms S Northcott on behalf of the applicant, Ms A Kearney on behalf of the Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) and Ms S Thorpe as agent on behalf of a number of respondents, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Hotel and Tavern Workers' Award 1978 (No R31 of 1977) be varied in accordance with the following Schedule and that such variation shall have effect from 24 March 2006

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

SCHEDULE

- 1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof:**
1. Title
 2. Arrangement
 3. Area
 4. Scope

5.	Term
6.	Definitions
7.	Contract of Service
8.	Hours
9.	Additional Rates for Ordinary Hours
10.	Overtime
11.	Casual Employees
12.	Part-Time Employees
13.	Meal Breaks
14.	Meal Money
15.	Sick Leave
16.	Bereavement Leave
17.	Public Holidays
18.	Annual Leave
19.	Long Service Leave
20.	Payment of Wages
21.	Wages
21A	Minimum Adult Award Wage
21B	Translation of Full-Time and Part-Time Employees
22.	Junior Employees
23.	Apprentices
24.	Option for Annualised Salary
25.	Higher Duties
26.	Uniforms and Laundering
27.	Protective Clothing
28.	Employee Equipment
29.	No Reduction
30.	Board and/or Lodging
31.	Travelling Facilities
32.	Employment Record
33.	Roster
34.	Change and Rest Rooms
35.	First Aid Kit
36.	Posting of Award and Union Notices
37.	Union Delegates and Meetings
38.	Superannuation
39.	Supported Wage System for Employees with Disabilities
40.	Prohibition of Contracting Out of Award
41.	District Allowance
42.	Breakdowns
43.	Parental Leave
44.	National Training Wage
45.	Enterprise Flexibility
46.	Right of Entry
47.	Termination, Introduction Of Change And Redundancy
48.	Anti-Discrimination
49.	Resolution of Disputes
50.	Further Claims
	Schedule A - Named Parties
	Schedule B - Respondents

2. Clause 6. – Definitions:

A. Delete subclause (4) of this clause and insert the following in lieu thereof:

- (4) Food and Beverage Attendant (Tradesperson) Grade 4 means an employee who has completed the appropriate level of training or who has passed the appropriate trade test and as such carries out specialised skilled duties in a fine dining room or restaurant.

B. Immediately following subclause (31) of this clause insert a new subclause as per the following:

- (32) **Reasonable Evidence** means evidence that would satisfy a reasonable person.

3. Clause 10. – Overtime: Delete subclause (7) of this clause and insert the following in lieu thereof:

- (7) Requirement to work reasonable overtime

- (a) Subject to subclause (5)(b) of this clause an employer may require an employee to work reasonable overtime at overtime rates specified or time off arrangements provided in this clause.
- (b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
- (i) any risk to employee health and safety;
 - (ii) the employee's personal circumstances including any family responsibilities;
 - (iii) the needs of the workplace or enterprise;
 - (iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it.

4. Clause 10A. – Translation of Casual Employees: Delete this number title and clause.

5. Clause 11. - Casual Employees:

A. Delete subclause (4) of this clause and insert the following in lieu thereof:

- (4) In addition to the hourly base rate of pay prescribed in subclause (3) of this clause, a casual employee shall also be paid the following loading.

DAY	% PENALTY RATE
Monday to Friday	25
Saturday & Sunday	50
Public Holiday	125

B. Immediately following subclause (5) of this clause insert a new subclause as follows:

- (6) A casual employee is to be informed, before they are engaged, that they are employed on a casual basis and that there is no entitlement to paid sick leave or annual leave.

6. Clause 15. – Sick Leave:

A. Delete paragraph (a) and (b) of subclause (1) of this clause and insert the following in lieu thereof:

- (1) (a) A worker who is unable to attend or remain at his place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.
- (b) Entitlement to payment shall accrue at the rate of one twenty sixth of a week for each completed week of service with the employer.

B. Delete subclause (4) of this clause and insert the following in lieu thereof:

- (4) An employee claiming entitlement under this clause is to provide the employer reasonable evidence of the entitlement.

C. Delete subclauses (6) and (7) of this clause and insert the following in lieu thereof:

- (6) Where a business has been transmitted from one employer to another and the worker's service has been deemed continuous in accordance with subclause (3) of Clause 2 of the Long Service Leave provisions published in Western Australian Industrial Gazette as varied from time to time, the paid sick leave standing to the credit of the worker at the date of transmission from service with the transmitter shall stand to the credit of the worker at the commencement of service with the transferee and may be claimed in accordance with the provisions of this clause.
- (7) The provisions of this clause with respect to payment do not apply to workers who are entitled to payment under the Workers' Compensation and Injury Management Act 1981 nor to workers whose injury or illness is the result of the worker's own misconduct.

D. Immediately following subclause (8) of this clause insert new subclauses as follows:

- (9) An employee is entitled to use, each year, up to five (5) days of the employee's entitlement to sick leave, to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of the immediate care and attention. If requested, the employee must provide reasonable evidence of the entitlement to such leave.
- (10) A member of the employee's family mentioned within subclause (9) means any of the following
- (a) the employee's spouse or de facto partner;
- (b) a child of whom the employee has parental responsibility as defined by the Family Court Act 1997;
- (c) an adult child of the employee;
- (d) a parent, sibling or grandparent of the employee.
- (11) An employee may take unpaid carer's leave by agreement with the employer.

7. Clause 16. – Bereavement Leave: Delete this clause and insert the following in lieu thereof:

16. – BEREAVEMENT LEAVE

- (1) (a) Subject to subclause (2) of this clause, on the death of -
- (i) the spouse or de facto partner of an employee;
- (ii) the child or step-child of an employee;
- (iii) the brother or sister of an employee;
- (iv) the parent, step-parent, parent-in-law or grandparent of an employee; or
- (v) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,
- an employee is entitled to paid bereavement leave of up to 2 days.
- (b) The 2 days need not be consecutive.
- (c) Bereavement leave is not to be taken during a period of any other kind of leave.

(2) Proof in support of claim for leave

An employee who claims to be entitled to paid leave in accordance with subclause (1) hereof is to provide to the employer, if so requested by the employer, reasonable evidence as to -

- (a) the death that is the subject of the leave sought; and
- (b) the relationship of the employee to the deceased person.

8. Clause 17. – Holidays: Delete the title of this clause and insert the following in lieu thereof:

17. – PUBLIC HOLIDAYS

9. Clause 18. – Annual Leave:

A. Delete subclause (1) of this clause and insert the following in lieu thereof:

- (1) (a) An employee is entitled, for each year of continuous service, to a period of four (4) weeks annual leave with payment at the employee's ordinary rate of wage. Entitlements to annual leave will accrue at the rate of one-thirteenth of a week for each completed week of service.

- (b) Where pursuant to paragraph (3) of sub-clause (2) of the Long Service Leave provisions published in the Western Australian Industrial Gazette as varied from time to time, the period of continuous service which an employee has had with the transmitter (including any such service with any prior transmitter) is deemed to be service of the employee with the transferee then that period of continuous service shall be deemed to be service with the transferee for the purposes of this sub-clause.
- B. Delete subclause (4) of this clause and insert the following in lieu thereof:**
- (4) Employees continue to accrue annual leave while on paid leave including but not limited to:
- annual leave
 - long service leave
 - observing a public holiday prescribed by this award
 - sick leave
 - bereavement leave.
- C. Delete sub-paragraph (i) of paragraph (a) of subclause (5) of this clause and insert the following in lieu thereof:**
- (i) the transmission of a business where paragraph (b) of subclause (1) of this clause applies;
- D. Delete paragraph (b) of subclause (6) of this clause and insert the following in lieu thereof:**
- (b) An employee whose employment terminates and who has not taken the leave prescribed under this clause shall be given payment in lieu of that leave at the rate of one thirteenth of a week's pay (2.923 hours pay) at their ordinary rate of wage for each completed week of service, or for part-timers the entitlement accrues pro rata to this rate.
- E. Delete subclause (9) of this clause and insert the following in lieu thereof:**
- (9) (a) An employer and employee may agree, in writing, that annual leave prescribed by this clause may be given and taken before the completion of 12 months continuous service as prescribed by subclause (1) of this clause.
- (b) If the service of an employee terminates and the employee has taken a period of leave in accordance with this subclause and if the period of leave so taken exceeds that which would become due pursuant to subclause (6) of this clause the employee shall be liable to pay the amount representing the difference between the amount received by him/her for the period of leave taken in accordance with this subclause and the amount that would have accrued in accordance with subclause (6) of this clause. The employer may deduct this amount from monies due to the employee by reason of the other provisions of this award at the time of termination.
- (c) The annual leave loading provided by subclause (2) of this clause, shall not be payable when annual leave is taken in advance pursuant to the provisions of this subclause. The loading not paid, for the period of leave taken in advance, shall be payable to the employee at the end of the first pay period following the employee completing the qualifying period of continuous service provided in subclause (1) of this clause.
- 10. Clause 19. – Long Service Leave: Delete this clause and insert the following in lieu thereof:**
The Long Service Leave General Order provisions as varied from time to time published in the Western Australian Industrial Gazette, are hereby incorporated in and shall be deemed to be part of this award.
- 11. Clause 21A. – Minimum Wage – Adult Males and Females: Delete the title of this clause and insert the following in lieu thereof:**
- 21A. - MINIMUM ADULT AWARD WAGE
- 12. Clause 23. – Apprentices: Delete this clause and insert the following in lieu thereof:**
- (1) Apprentices may be taken to the trade of cooking in the ratio of one apprentice for every two or fraction of two (the fraction being not less than one) tradesperson employed and shall not be taken in excess of that ratio unless -
- the Union so agrees; or
 - the Commission so determines.
- (2) Wages (per fortnight) expressed as a percentage of the "Tradespersons's Rate":
- | | | |
|-----|--|----|
| (a) | Four Year Term - | % |
| | First year | 42 |
| | Second year | 55 |
| | Third year | 75 |
| | Fourth year | 88 |
| (b) | Three and a Half Year Term - | % |
| | First six months | 42 |
| | Next year | 55 |
| | Next following year | 75 |
| | Final year | 88 |
| (c) | Three Year Term - | |
| | First year | 55 |
| | Second year | 75 |
| | Third year | 88 |
| (d) | For the purposes of this subclause the term "Tradesperson's Rate" means the total rate payable to a "Qualified Cook", as prescribed in Clause 21. - Wages of this award. | |
- 13. Clause 26. – Uniforms and Laundering: Delete subclause (4) of this clause and insert the following in lieu thereof:**
- (4) Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 49. – Resolution of Disputes of this award.

- 14. Clause 27. – Protective Clothing: Delete subclause (5) of this clause and insert the following in lieu thereof:**
- (5) Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 49. – Resolution of Disputes of this award.
- 15. Clause 30. – Board and/or Lodging: Delete subclause (4) of this clause and insert the following in lieu thereof:**
- (4) Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 49. – Resolution of Disputes of this award.
- 16. Clause 32. – Record:**
- A. Delete the title of this clause and insert the following in lieu thereof:**
- 32 - EMPLOYMENT RECORD
- B. Delete subclause (1) of this clause and insert the following in lieu thereof:**
- (1) Each employer bound by this award shall maintain a record at each establishment in compliance with the requirements of the Industrial Relations Act 1979 or any other legislation that makes provision for employment records.
- Such record shall also contain the following information relating to each worker:
- (a) The name and address given by the worker;
- (b) The age of the worker if paid as a junior worker;
- (c) The classification of the worker and whether the worker is full-time, part-time or casual;
- (d) The commencing and finishing times of each period of work each day;
- (e) The number of ordinary hours and the number of overtime hours worked each day and the totals for each pay period; and
- (f) The wages and any allowances paid to the worker each pay period and any deductions made therefrom.
- C. Delete paragraph (c) and (d) of subclause (3) of this clause and insert the following in lieu thereof:**
- (c) In this clause “relevant person” means –
- (i) the employee concerned;
- (ii) if the employee is a represented person, his or her representative;
- (iii) a person authorised in writing by the employee; and
- (iv) an officer referred to in section 93 of the Industrial Relations Act 1979 authorised in writing by the Registrar.
- (d) Before exercising a power of inspection the relevant person shall give reasonable notice of not less than 24 hours to the employer.
- (e) Subject to this clause the record shall be available for inspection by a relevant person on the employer's premises from Monday to Friday, both inclusive, between the hours of 9.00 am to 5.00 pm (excepting the period between 12.00 noon and 2.00 pm). In the case of any establishment which is only open for business after 5.00 pm or on a Saturday or Sunday, the record shall be open for inspection during all business hours of that establishment.
- (f) The relevant person shall be permitted reasonable time to inspect the record and, if the relevant person requires, take an extract or copy of any of the information contained therein.
- D. Delete subclause (4) of this clause and insert the following in lieu thereof:**
- (4) (a) If, for any reason, the record is not available for inspection by the relevant person when the request is made, the relevant person and the employer or the employer's agent may fix a mutually convenient time for the inspection to take place.
- (b) If a mutually convenient time cannot be fixed, the relevant person may advise the employer in writing that he or she requires to inspect the record in accordance with the provisions of this award and shall specify the period contained in the record which he or she requires to inspect.
- (c) Within 10 days of receipt of such advice:
- (i) Employers who normally keep the record at a place more than 40 kilometres from the GPO, Perth shall send a copy of that part of the record specified to the office of the relevant person; and
- (ii) Employers who normally keep the record at a place less than 40 kilometres from the GPO, Perth shall make the record available to the relevant person at the time specified by the relevant person. If the record is not then made available to the relevant person the employer shall within three days send a copy of that part of the record specified to the office of the relevant person.
- (d) In the event of a demand made by the relevant person which the employer considers unreasonable the employer may apply to the Western Australian Industrial Relations Commission for direction. An application to the Western Australian Industrial Relations Commission by an employer for direction will subject to that direction, stay the requirements contained elsewhere in this subclause.
- 17. Clause 33. – Roster: Delete subclause (3) of this clause and insert the following in lieu thereof:**
- (3) The roster shall be open for inspection at such times and to such “relevant persons” as the Employment Record is open for inspection.
- 18. Clause 34. – Change and Rest Rooms: Delete this clause and insert the following in lieu thereof:**
- Each employer shall provide a change and rest room in cases where workers do not reside on the premises, which shall be adequately lighted and ventilated and be sufficiently roomy to accommodate all workers likely to use it at the one time. Such rest rooms shall be provided with a lounge, couch or bed, steel or vermin-proof lockers, suitable floor coverings, and a table or tables with adequate seating accommodation where workers may partake of meals. These workers shall have access to a bathroom with hot and cold water facilities.

Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 49- Resolution of Disputes of this award.

19. Clause 38. – Superannuation: Delete this clause and insert the following in lieu thereof:

- (1) The employer shall contribute on behalf of the employee in accordance with the requirements of the Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992 and the Superannuation (Resolution of Complaints) Act 1993 as varied from time to time.
- (2) Contributions shall be paid into one of the following funds:
 - (a) Any complying fund nominated by the employee; or
 - (b) Hostplus Super Fund, which shall become the “nominated fund” if no fund is nominated by the employee.
- (3) Contributions shall be paid into the nominated fund on a quarterly basis, within thirty (30) days of the end of each quarter.
- (4) For the purposes of this clause the employee’s ordinary time earnings shall include base classification rate, shift and weekend penalties and any other all purpose allowance or penalty payment for work in ordinary time and in respect of casual employees the casual loading.
- (5) Employee’s Options
 - (a) Within 14 days of commencing employment, the employer shall notify the employee of the employee’s entitlement to nominate a complying fund.
 - (b) Any failure by the employee to nominate a fund shall not affect the employee’s eligibility to receive contributions.
 - (c) 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.
 - (d) The employer shall not unreasonably refuse to agree to a change of complying fund requested by an employee.
 - (e) Employees' Additional Voluntary Contributions
The employer shall deduct additional contributions from an employee's wages and pay them to the fund in compliance with both of the following:
 - (i) the rules of the fund; and
 - (ii) the directions of the employee;
 but not otherwise.

20. Clause 39. – Over-Award Payments to Clause 52. – Further Claims inclusive: Delete these numbers, titles and clauses and insert the following in lieu thereof:

39.- SUPPORTED WAGE SYSTEM FOR EMPLOYEES WITH DISABILITIES

- (1) Workers eligible for a supported wage
This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:
 - (a) Supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability, as documented in Supported Wage System: Guidelines and Assessment Process.
 - (b) Accredited assessor means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
 - (c) Disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme.
 - (d) Assessment instrument means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.
- (2) Eligibility criteria
 - (a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.
 - (b) The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment.
 - (c) The Award does not apply to employers in respect of their facility, programme, undertaking service or the like which receives funding under the *Disability Services Act 1986* and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s.10 or s.12A of the *Disability Services Act 1986*, or if a part only has received recognition, that part.
- (3) Supported wage rates
 - (a) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:

Assessed capacity	% of prescribed award rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(b) Provided that the minimum amount payable shall be not less than as provided by the National Supported Wage System.

(c) Where a person's assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.

(4) Assessment of capacity

For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

(a) the employer and a union party to the Award, in consultation with the employee or, if desired by any of these;

(b) the employer and an Accredited Assessor from a panel agreed by the parties to the Award and the employee.

(5) Lodgement of assessment instrument

(a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Industrial Relations Commission.

(b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

(6) Review of assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

(7) Other terms and conditions of employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other workers covered by this Award paid on a pro rata basis.

(8) Workplace adjustment

An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the areas.

(9) Trial period

(a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except in some cases additional work adjustment time (not exceeding four weeks) may be needed.

(b) During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

(c) The minimum amount payable to the employee during the trial period shall be no less than as provided by the National Supported Wage System.

(d) Work trials should include induction or training as appropriate to the job being trialled.

(e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (4) of this clause.

40. - PROHIBITION OF CONTRACTING OUT OF AWARD

All workers covered by the terms of this award shall be paid not less than the wages prescribed by this award and shall work in accordance with provisions not less advantageous to him than the provisions of this award, notwithstanding anything that may be determined to the contrary by the employer, or by the employer in agreement with the worker.

41. - DISTRICT ALLOWANCES

(1) Subject to the provisions of this clause, in addition to the wages prescribed in Clause 21. - Wages of this award, a married worker shall be paid the following allowances each fortnight when employed in the towns described hereunder.

TOWN	\$
Agnew	50.40
Balladonia	48.00
Barradale	67.80
Boulder	20.00
Bremer Bay	27.00
Broad Arrow	20.00
Broome	79.20
Bulla Bulling	20.00
Bullfinch	40.40
Carrabin	24.00
Cockatoo Island	87.20
Cocklebidy	50.80
Coolgardie	20.00
Cue	50.80
Dampier	68.40
Day Dawn	50.80
Denham	40.40
Derby	82.40
Esperance	15.60
Eucla	55.60
Exmouth	70.40
Fitzroy Crossing	99.20
Fimiston	20.00
Gascoyne Junction	40.40
Gibson	15.60
Goldsworthy	47.60
Grass Patch	15.60
Halls Creek	112.00
Hopetoun	27.00
Kalbarri	16.40
Kalgoorlie	20.00
Kambalda	20.00
Kookynie	27.00
Karratha	80.40
Koolan Island	87.20
Koolyanobbing	24.00
Kumarina	47.60
Kununurra	128.00
Lake Argyle	126.40
Laverton	50.40
Learmonth	70.40
Leinster	50.40
Leonora	50.40
Madura	52.00
Marble Bar	120.80
Marvel Loch	24.00
Meekatharra	43.60
Menzies	50.40
Moorine Rock	24.00
Mount Magnet	53.60
Mundrabilla	54.00
Newman	48.00
Norseman	41.20
Nullagine	120.40
Onslow	83.20
Pannawonica	64.40
Paraburdoo	63.60
Paynes Find	53.60
Port Hedland	68.00
Ravensthorpe	26.80
Roebourne	92.40
Salmon Gums	15.60
Sandstone	50.40

TOWN— <i>continued</i>	\$
Shark Bay	40.40
Shay Gap	47.20
Southern Cross	24.00
South Hedland	68.00
Telfer	113.20
Teutonic Bore	50.40
Tom Price	63.60
Wannoo	40.40
Westonia	24.00
Whim Creek	80.00
Wickham	78.40
Widgiemooltha	20.00
Wiluna	51.20
Windarra	50.40
Wittenoom	107.20
Wurarga	53.60
Wyndham	121.60
Yalgoo	53.60

- (2) A single worker shall be paid 60 per cent of the fortnightly allowances prescribed in subclause (1) of this clause.
- (3) A worker, whose spouse is employed by the same employer and who is entitled to an allowance of a similar kind to that prescribed by this clause shall be paid 50 per cent of the allowance prescribed in subclause (1) of this clause.
- (4) Junior workers, casual workers, part-time workers, apprentices receiving less than the adult rate and workers employed for less than a fortnight, shall receive that proportion of the District Allowance as equates with the proportion that their wage for ordinary hours for that fortnight is to the adult rate for the work performed.
- (5) Where a worker is on annual leave or receives payment in lieu of annual leave he shall be paid for the period of such leave the District Allowance to which he would ordinarily be entitled.
- (6) Where a worker is on long service leave, or other approved leave with pay (other than annual leave), he shall only be paid the District Allowance for the period of such leave he remains in the district in which he is employed.
- (7) For the purpose of this clause a married worker includes a person who is a sole parent with dependent children.
- (8) Nothing herein contained shall have the effect of reducing any "district allowance" currently payable to any worker subject to the provisions of this Award whilst that worker remains employed by his present employer.

42. - BREAKDOWNS

The employer shall be entitled to deduct payment for any day or portion of any day upon which the worker cannot be usefully employed because of any strike by the union or unions affiliated with it, or by any other association or union, or through the breakdown of the employer's machinery or any stoppage of work by any cause which the employer cannot reasonably prevent.

43 - PARENTAL LEAVE

- (1) Subject to the terms of this clause employees are entitled to parental leave.
- (2) For the purposes of this clause "continuous service" is work for an employer on a regular and systematic basis (including any period of authorised leave or absence).
- (3) Definitions
In this clause -
 "adoption", in relation to a child, is a reference to a child who -
 (a) is not the child or the step-child of the employee or the employee's partner;
 (b) is less than 5 years of age; and
 (c) has not lived continuously with the employee for 6 months or longer;
 "continuous service" means service under an unbroken contract of employment and includes -
 (a) any period of parental leave; and
 (b) any period of leave or absence authorised by the employer;
 "expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;
 "parental leave" means leave provided for by subclause (4)(a);
 "partner" means a spouse or *de facto* partner.
- (4) Entitlement to Parental Leave
 (a) Subject to subclauses (6), (7)(a) and (8)(a), an employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of -
 (i) the birth of a child to the employee or the employee's partner; or
 (ii) the placement of a child with the employee with a view to the adoption of the child by the employee.
 (b) An employee is not entitled to take parental leave unless the employee -
 (i) has, before the expected date of birth or placement, completed at least 12 months' continuous service with the employer; and
 (ii) has given the employer at least 10 weeks written notice of the employee's intention to take the leave.

- (c) An employee is not entitled to take parental leave at the same time as the employee's partner but this paragraph does not apply to one week's parental leave -
- (i) taken by the employee and the employee's partner immediately after the birth of the child; or
 - (ii) taken by the employee and the employee's partner immediately after a child has been placed with them with a view to their adoption of the child.
- (d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except the period of one week's leave referred to in paragraph (c) of this subclause.
- (5) Maternity leave to start 6 weeks before birth
A female employee who is pregnant and who has given notice of her intention to take parental leave is to start the leave 6 weeks before the expected date of birth, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.
- (6) Medical certificate
An employee who has given notice of the employee's intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's partner, as the case may be, is pregnant and the expected date of birth.
- (7) Notice of partner's parental leave
- (a) An employee who has given notice of the employee's intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.
 - (b) Any notice given under paragraph (a) is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.
- (8) Notice of parental leave details
- (a) An employee who has given notice of the employee's intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave no less than four weeks before the proposed commencement date.
 - (b) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.
 - (c) The starting and finishing dates of a period of parental leave are to be agreed between the employee and employer.
- (9) Return to work after parental leave
- (a) An employee shall confirm the employee's intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of the period of parental leave.
 - (b) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12) of this clause, to the position the employee held immediately before such transfer.
 - (c) If the position referred to in paragraph (b) of this subclause is not available, the employee is entitled to an available position -
 - (i) for which the employee is qualified; and
 - (ii) that the employee is capable of performing, most comparable in status and pay to that of the employee's former position.
 - (d) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of the position referred to in paragraph (b) of this subclause, that paragraph applies only in respect of the position held by the employee immediately before taking the acting or temporary position.
 - (e) Notwithstanding paragraphs (b) and (c) of this subclause, an employer and an employee may agree to an alternative return to work arrangement such as part-time employment, having regard to:
 - (i) applicable discrimination legislation;
 - (ii) the requirements of the employee;
 - (iii) the operational needs of the employer; and
 - (iv) any other relevant matter.
- (10) Effect of parental leave on employment
Absence on parental leave -
- (a) does not break the continuity of service of an employee; and
 - (b) is not to be taken into account when calculating the period of service for the purpose of this award.
- (11) Sick Leave
Where an employee not then on maternity leave suffers an 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 duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed 52 weeks.
- (12) Transfer to a Safe-Job
Where in the opinion of a duly qualified 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 employer 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 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 maternity leave for the purposes of this clause.

- (13) Variation of Period of Parental Leave
- (a) Provided the addition does not extend the parental leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be lengthened.
 - (b) The period of 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.
- (14) Cancellation of Parental Leave
- (a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee or the employee's partner, as the case may be, terminates other than by the birth of a living child.
 - (b) Where the pregnancy of an employee or an employee's partner, as the case may be, then on parental leave terminates other than by the birth of a living child, it shall be 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 the employee desires to resume work.
- (15) Special Maternity Leave
- (a) Where the pregnancy of a female employee not then on parental leave terminates after 28 weeks other than by the birth of a living child then:
 - (i) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work; or
 - (ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a duly qualified medical practitioner certifies as necessary before her return to work.
 - (b) For the purposes of subclauses (10), (16) and (17) hereof, maternity leave shall include special maternity leave.
 - (c) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.
Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which the employee 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.
- (16) Parental Leave and Other Leave Entitlements
- Provided the aggregate of leave including leave taken pursuant to subclauses (12) and (15) hereof does not exceed 52 weeks:
- (a) 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 the employee is then entitled.
 - (b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during absence on parental leave.
- (17) Termination of Employment
- (a) An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.
 - (b) An employer shall not terminate the employment of an employee on the ground of the employee's absence on maternity leave or, in the case of a female employee, her pregnancy, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.
- (18) Replacement Employees
- (a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave.
 - (b) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
 - (c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
 - (d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.
 - (e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employee's employment continues beyond the 12 months qualifying period.

44. - NATIONAL TRAINING WAGE

The terms of the federal National Training Wage Award 2000 (as subsequently amended from time to time) apply to this award provided the following clauses and Schedules are excluded –

- Clause 3. - Anti-discrimination
- Clause 4. - Parties Bound
- Clause 6. - Super-session
- Clause 7. - Period of Operation
- Schedule A
- Schedule B

45. - ENTERPRISE FLEXIBILITY

- (1) Employers and employees covered by this award may negotiate and reach agreement to apply to vary any provision of this award so as to make the enterprise or workplace operate more efficiently according to its particular needs.
- (2) Employees may seek advice from, or be represented by, the union during the negotiations for an agreement.
- (3) Where agreement is reached at an enterprise or workplace and where giving effect to such agreement requires this award, as it applies at the enterprise or workplace, to be varied, an application to vary the award shall be made to the Commission.
- (4) A copy of the agreement shall be made available in writing to all employees at the enterprise or workplace and to the union party to this award.
- (5) The union shall not unreasonably oppose the application to vary the award to give effect to the terms of the agreement.
- (6) When this award is varied to give effect to an agreement made pursuant to this clause the variation shall become a schedule to this award and the variation shall take precedence over any provision of this award to the extent of any expressly identified inconsistency.
- (7) The agreement must meet the following requirements to enable the Commission to vary this award to give effect to it:
 - (a) that the purpose of the agreement is to make the enterprise or workplace operate more efficiently according to its particular needs;
 - (b) that the majority of employees covered by the agreement genuinely agree to it;
 - (c) where the union has members at the enterprise or workplace, the union has been given reasonable advice of the intention to negotiate an agreement, provided that this paragraph shall not apply where the employer could not reasonably be expected to have known the union has members at the enterprise or workplace;
 - (d) that the award variation necessitated by the agreement does not in relation to their terms and conditions of employment, disadvantage the employees who would be affected by the variation.
- (8) For the purposes of subclause (7) hereof, an agreement is taken to disadvantage employees in relation to their terms and conditions of employment only if:
 - (a) it would result in the reduction of any entitlements or protection of those employees under:
 - (i) the award; or
 - (ii) any other law of the Commonwealth or State that the Commission thinks relevant; and
 - (b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest.
- (9) Nothing in this clause shall be taken as limiting the right of any party to apply to give effect to an enterprise agreement under any other provisions of the Industrial Relations Act, 1979.

46 - RIGHT OF ENTRY

An authorised representative of the union shall be entitled to exercise right of entry in accordance with the provisions of the Industrial Relations Act 1979 or any other legislation that makes provision for right of entry.

47. - TERMINATION, INTRODUCTION OF CHANGE AND REDUNDANCY

- (1) **Statement of Employment**
An employer shall, in the event of termination of employment, provide upon request to the employee who has been terminated a written statement specifying the period of employment and the classification or type of work and duties performed by the employee.
- (2) **Job Search entitlement**
 - (a) 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. The time off shall be taken at times that are convenient to the employee after consultation with the employer.
 - (b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, 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.
- (3) **Introduction of Change - Employer's Duty to Notify**
 - (a) Where an employer decides to introduce changes in production, program, organisation, structure or technology, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and, if an employee nominates a union to represent him or her, the union nominated by the employee.
 - (b) "Significant effects" includes termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of a job opportunity, a promotion opportunity or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.
- (4) **Employer's Duty to Consult over Change**
 - (a) The employer shall consult the employees affected and, if an employee nominates a union to represent him or her, the union nominated by the employee, about the introduction of the changes, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals), and the ways to avoid or minimise the effects of the changes (e.g. by finding alternate employment).
 - (b) The consultation shall commence as soon as practicable after making the decision referred to in the "Employer's Duty to Notify" clause.
 - (c) For the purpose of such consultation the employer shall provide in writing to the employees concerned and, if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees, and any other matters likely to affect employees, provided that any employer shall not be

required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

(5) Redundancy

(a) Definitions

Business includes trade, process, business or occupation and includes part of any such business.

Redundancy occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.

Transmission includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

Weeks' pay means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:

- (i) overtime;
- (ii) penalty rates;
- (iii) disability allowances;
- (iv) shift allowances;
- (v) special rates;
- (vi) fares and travelling time allowances;
- (vii) bonuses; and
- (viii) any other ancillary payments of a like nature.

(b) Consultation Before Terminations

- (i) Where an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer shall consult the employee directly affected and if an employee nominates a union to represent him or her, the union nominated by the employee.
- (ii) The consultation shall take place as soon as is practicable after the employer has made a decision to which subclause (5)(b)(i) applies and shall cover the reasons for the proposed terminations, measures to avoid or minimise the terminations and/or their adverse affects on the employees concerned.
- (iii) For the purpose of the consultation the employer shall, as soon as practicable, provide in writing to the employees concerned and if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that an employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

(c) Transfer to lower paid duties

- (i) Where an employee is transferred to lower paid duties by reason of redundancy the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if the employee's employment had been terminated.
- (ii) The employer may, at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.
- (iii) The amounts must be worked out on the basis of:
 - (aa) the ordinary working hours to be worked by the employee; and
 - (bb) the amounts payable to the employee for the hours including for example, allowances, loading and penalties; and
 - (cc) any other amounts payable under the employee's contract of employment.

(d) Severance Pay

- (i) In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service: Provided that the entitlement of any employee whose employment terminates on or before 1 February 2006 shall not exceed 8 weeks' pay.

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

- (ii) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.
- (iii) For the purpose of this clause continuity of service shall not be broken on account of -
 - (aa) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding the obligations of this clause in respect of leave of absence;
 - (bb) any absence from work on account of leave granted by the employer; or
 - (cc) any absence with reasonable cause, proof whereof shall be upon the employee;

Provided that in the calculation of continuous service any time in respect of which any employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.

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) or (4) of the Long Service Leave Provisions published in Part 1 (January) of each volume of the Western Australian Industrial Gazette shall also constitute continuous service for the purpose of this clause.

(e) Employee leaving during notice period

An employee whose employment is terminated by reason of redundancy may terminate his/her employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.

(f) Alternative employment

- (i) An employer, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied if the employer obtains acceptable alternative employment for an employee.
- (ii) This subclause does not apply in circumstances involving transmission of business as set out in subclause (5)(g).

(g) Transmission of business

- (i) The provisions of subclause (5) are not applicable where a business is before or after the date of this order, transmitted from an employer (in this subclause called "the transmitter") to another employer (in this subclause called "the transferee"), in any of the following circumstances:
 - (aa) Where the employee accepts employment with the transferee which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service of the employee with the transferee; or
 - (bb) Where the employee rejects an offer of employment with the transferee:
 - (A) in which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmitter; and
 - (B) which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service with the transferee.
- (ii) The Commission may vary subclause 5(g)(i)(bb) if it is satisfied that this provision would operate unfairly in a particular case.

(h) Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in the "Consultation Before Terminations" clause, the employer shall notify Centrelink as soon as possible giving all relevant information about the proposed terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.

(i) Employees exempted

This clause does not apply:

- (i) Where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice.
- (ii) Except for subclause (5)(b), to employees with less than one year's service.
- (iii) Except for subclause (5)(b), to probationary employees.
- (iv) To apprentices.
- (v) To trainees.
- (vi) Except for subclause (5)(b), to employees engaged for a specific period of time or for a specified task or tasks; or
- (vii) To casual employees.

(j) Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, subclause (5)(d) shall not apply to employers who employ less than 15 employees.

(k) Incapacity to pay

An employer or a group of employers, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied on the basis of the employer's incapacity to pay.

48. - ANTI-DISCRIMINATION

- (1) It is the intention of the respondents to this award to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, natural extraction or social origin.
- (2) Accordingly, in fulfilling their obligations under the dispute avoidance and settling clause, the respondents must make every endeavour to ensure that neither the award provisions nor their operation are directly or indirectly discriminatory in their effects.
- (3) Nothing in this clause is taken to affect:
 - (a) any different treatment (or treatment having different effects) which is specifically exempted under the State or Commonwealth anti-discrimination legislation;
 - (b) junior rates of pay;
 - (c) an employee, employer or registered organisation, pursuing matters of discrimination in any State or federal jurisdiction, including by application to the Human Rights and Equal Opportunity Commission;
 - (d) a reason for terminating employment if the reason is based on the inherent requirements of the particular position concerned; or
 - (e) a reason for terminating a person's employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.

49 – RESOLUTION OF DISPUTES.

Subject to the *Industrial Relations Act 1979* (as amended) in the event of a problem, grievance, question, dispute, claim or difficulty that affects one or more employees, or arises from the employees work or contract of employment, the following procedure shall apply:

- (1) At first instance the matter shall be raised at site level with the foreman/supervisor/manager as appropriate.
- (2) In the event that the matter is unresolved it may be raised at the enterprise level by the individual concerned (or his/her representative), or the shop steward or union official involved.
- (3) If the matter is still not resolved it may be referred to the Western Australian Industrial Relations Commission for determination, and if necessary arbitration.
- (4) The parties will attempt to resolve the matter prior to either party referring the matter to the Western Australian Industrial Relations Commission.
- (5) Nothing in this clause shall be read so as to exclude an organisation party to or bound by the award/industrial agreement from representing its members.

50. - FURTHER CLAIMS

- (1) The consent variations made to the award in matters 378 of 1995 and 579 of 1994 do not prejudice either party in respect of any further claim made after 1 July 2003 in relation to the following matters or matters that reasonably relate to those matters –
penalty rates for ordinary hours for casuals on week-ends or public holidays; and
'additional rates' for ordinary hours for casuals.
- (2) The parties will not seek to rely on the consent variations as a basis for any future claims of the above matters and any such claim must be established on its merits.
- (3) Further, the parties agree that in any future arbitration of the above matters the onus lies with the party then seeking the variation.

21. Appendix -Resolution of Disputes Requirement: Delete this title and appendix.

22. Schedule A – Named Union Party: Delete this title and schedule and insert the following in lieu thereof:

SCHEDULE A - NAMED PARTIES

The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch

Western Australian Hotels and Hospitality Association Incorporated (Union of Employers)

23. Schedule C – Letter to Employees: Delete this title and schedule.

24. Appendix – S.49B – Inspection of Records Requirements: Delete this title and appendix.

2006 WAIRC 04042

LAUNDRY WORKERS' AWARD, 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESAUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION OF
WESTERN AUSTRALIAN BRANCH**APPLICANT**

-v-

FREMANTLE STEAM LAUNDRY CO PTY LTD & OTHERS

RESPONDENTS**CORAM**

COMMISSIONER J H SMITH

DATE

THURSDAY, 23 MARCH 2006

FILE NO/S

APPL 398 OF 2004

CITATION NO.

2006 WAIRC 04042

Result

Award varied

Representation**Applicant**

Ms S Northcott

RespondentsMr M O'Connor (as agent on behalf of Respondents for whom warrants have been filed)
No appearance by or on behalf of any other Respondents*Order*

Having heard Ms Northcott on behalf of the Applicant, Mr O'Connor as agent on behalf of the Respondents for whom warrants have been filed and no appearance by or on behalf of any other Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Laundry Workers' Award, 1981 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on and from 24 March 2006.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof:

1. Title
- 1B Minimum Adult Award Wage
2. Arrangement
3. Scope
4. Term
5. Area
6. Definitions
7. Wages
8. Hours of Work
9. Overtime
10. Contract of Service
11. Public Holidays
12. Annual Leave
13. Sick Leave
14. Payment of Wages
15. Employment Records
16. Proportion of Juniors
17. Breakdowns
18. No Reduction
19. Meal Times
20. Meal Money
21. Supported Wage System for Employees with Disabilities
22. Allowances
23. General Conditions
24. Types of Employment
25. Long Service Leave
26. Parental Leave
27. Shift Work
28. First Aid
29. Bereavement Leave
30. Posting of Awards and Union Notices
31. Right of Entry
32. Dispute Settlement Procedure
33. Superannuation
34. National Training Wage

- 35. Other Laws Affecting Employment
- 36. Where to go for Further Information

Schedule A - Parties to the Award

Schedule B - Respondents

- 2. **Clause 2B. – Award Modernisation and Enterprise Consultation: Delete this clause in its entirety.**
- 3. **Clause 3. – Scope: Delete this clause and insert the following in lieu thereof:**

3. – SCOPE

This award shall apply to all employees employed in a calling or callings set out in Clause 7. - Wages in the Laundry Industry.

- 4. **Clause 6. – Definitions: Delete subclause (5) of this clause and insert the following in lieu thereof:**

(5) Laundry Industry: means any business or operation which performs laundry work and including a "laundrette" and the industries carried out by the Respondents set out in the schedule to this award. Laundry work shall include but not be limited to the laundering of overalls, coats, towels, nappies, Manchester and sheets which are laundered by the proprietor and hired out for fee or reward.

- 5. **Clause 7. – Wages: Delete this clause and insert the following in lieu thereof:**

7. - WAGES

(1) The minimum weekly rate of wage payable to an employee covered by this award shall include the base rate plus the Arbitrated Safety Net Adjustment expressed hereunder:

(a) Adult Employees

	Minimum Rate \$
Laundry Employee - Grade 1	492.75
Laundry Employee - Grade 2	513.60
Laundry Employee - Grade 3	538.65
Laundry Employee - Grade 4	555.35

(b) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(2) Junior Employees:

Junior employees shall receive the prescribed percentage of the adult rate for the class of work on which they are engaged.

	%
Under 16 years of age	55
16 to 17 years of age	65
17 to 18 years of age	75
18 to 19 years of age	85
19 to 20 years of age	90
20 to 21 years of age	Adult Rates

- 6. **Clause 8. – Hours of Work: Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:**

(5) Nothing in this clause shall be construed to prevent the employer and the majority of employees affected in a workplace or part thereof reaching an agreement to operate any method of working a 38 hour week provided that agreement is reached in accordance with the following procedure:

- (a) the Union will be notified in writing of the proposed variations prior to any change taking place;
- (b) the proposed variations for each workplace or part thereof shall be explained to the employees concerned and written notification of proposals will be placed on the notice board at the worksite;
- (c) the parties will then consult with each other on the changes with a view to reaching agreement;
- (d) where the majority of Union members do not support the agreement then the issues will be referred to the Western Australian Industrial Relations Commission for conciliation and, if necessary, arbitration.

While the dispute is being determined by the Commission, the status quo shall remain.

- 7. **Clause 8. – Hours of Work: Renumber subclause (7) of this clause as subclause (6) and delete the following words from that subclause:**

"subclause (3) of"

8. Clause 9. – Overtime: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Notwithstanding anything contained in the award:

- (a) An employer may require an employee to work reasonable overtime at overtime rates.
- (b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
 - (i) any risk to employee health and safety;
 - (ii) the employee's personal circumstances including any family responsibilities;
 - (iii) the needs of the workplace or enterprise;
 - (iv) the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and
 - (v) any other relevant matter.
- (c) Subject to this clause, no organization, party to this award or employee covered by this award, shall in any way, whether directly or indirectly, be party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of this subclause.

9. Clause 10. – Contract of Service: Delete this clause and insert the following in lieu thereof:10. – CONTRACT OF SERVICE

(1) The employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training.

(2) Notice of Termination by Employer

- (a) The employment of any employee (other than a casual employee, who shall be engaged by the hour) may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of serious misconduct in which case shall only be paid up to the time of dismissal.

<u>PERIOD OF CONTINUOUS SERVICE</u>	<u>PERIOD OF NOTICE</u>
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 has completed two years' continuous service, shall be entitled to one week's additional notice.
 - (c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause shall be made if the appropriate notice period is not given or required to be worked. The 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 shall pay the employee the ordinary wages for the period of notice had the employment not been terminated or payment in lieu of notice shall be calculated using the employee's weekly ordinary time earnings.
- (3) Notice of Termination by Employee
One weeks notice shall be necessary for an employee to terminate his or her engagement or the forfeiture or payment of one week's pay by the employee to the employer in lieu of notice.

(4) Termination, Redundancy or Introduction of Change

In circumstances of termination, redundancy or introduction of change, employees are entitled to a statement of employment, job search leave, consultation, redundancy pay and other matters as provided in the General Order 2005 WAIRC 01715 (85 WAIG 1667), as amended, varied or replaced from time to time.

10. Clause 11. – Holidays: Delete subclause (4) of this clause and amend the title of this clause as follows:11. – PUBLIC HOLIDAYS**11. Clause 12. – Annual Leave: Delete this clause and insert the following in lieu thereof:**12. – ANNUAL LEAVE

- (1) (a) An employee is entitled to a period of four (4) consecutive weeks annual leave with payment at the employee's ordinary rate of wage for each twelve (12) months continuous service with the employer. Entitlements to annual leave accrue pro rata on a weekly basis.
- (b) Before going on leave the employee shall be paid the ordinary wages as prescribed by Clause 7.- Wages of this award they would have received in respect of the ordinary time they would have worked had they not been on leave during the relevant period.
- (2) (a) In addition to their payment for annual leave an employee shall receive a loading of 17.5% calculated on the employee's ordinary wage for that period of leave.
- (b) Provided that where the employee would have received any additional rates for the work performed in ordinary hours as prescribed by this award, had they not been on leave during the relevant period and such additional rates would have entitled them to a greater amount than the loading of 17.5 percent, then such additional rates shall be added to their ordinary rate of wage in lieu of the 17.5 percent loading.
Provided further, that if the additional rates would have entitled them to a lesser amount than the loading of 17.5 percent, then such loading of 17.5 percent shall be added to their ordinary rate of wage in lieu of the additional rates.

- (c) The loading prescribed by this clause shall not apply to proportionate leave on termination.
- (3) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, that day shall be added to the employees annual leave entitlement.
- (4) (a) An employee whose employment terminates and who has not taken the leave prescribed under this clause shall be given payment in lieu of that leave at the rate of one thirteenth of a week's pay (2.923 hours pay for each completed week of service) at their ordinary rate of wage for each completed week of service.
- (b) An employee whose employment terminates before the employee has completed a twelve month qualifying period and has not been allowed leave prescribed under this Award in respect of that qualifying period, shall be given payment in lieu of that leave (or, in a case where the employee has taken part of the leave, in lieu of so much of that leave as has not been taken) unless-
- (i) the employee has been justifiably dismissed for misconduct; and
- (ii) the misconduct for which the employee has been dismissed occurred prior to the completion of that qualifying period.
- (5) Employees continue to accrue annual leave while on paid leave including but not limited to:
- (a) annual leave
- (b) long service leave
- (c) observing a public holiday prescribed by this award
- (d) sick leave
- (e) carer's leave
- (f) bereavement leave
- (6) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee. Provided further that the maximum number of single day absences allowable during any twelve month accrual period shall be five.
- No employee shall be required to take annual leave unless two weeks' prior notice is given.
- (7) Where an employer and employee have not agreed when the employee is to take their annual leave, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave which accrued more than 12 months before that time; provided the employee provides at least two weeks notice.
- (8) (a) Notwithstanding anything else herein contained, an employer who observes a Christmas close-down for the purpose of granting annual leave may require an employee to take the annual leave accrued in the 12 month period up to their anniversary.
- (b) An employer who requires employees to take their annual leave over a Christmas close-down must provide at least 14 days notice to the employees required to take such leave.
- (c) In the event of an employee being employed by an employer for a portion only of a year they shall only be entitled subject to subclause (5) of this clause, to such leave on full pay as is proportionate to their length of service during that period with such employer. If such leave is not equal to the leave given to the other employees, the employee shall not be entitled to work or pay whilst the other employees are on leave on full pay.
- (9) (a) At the request of an employee, and with the consent of the employer, annual leave prescribed by this clause may be given and taken in advance of being accrued by the employee in accordance with subclause (1).
- (b) If the service of an employee terminates and the employee has taken a period of leave in accordance with this subclause and if the period of leave so taken exceeds that which would become due pursuant to subclause (4) of this clause, the employee shall be liable to pay the amount representing the difference between the amount received by them for the period of leave taken in accordance with this subclause and the amount which would have accrued in accordance with subclause (4) of this clause. The employer may deduct this amount from monies due to the employee by reason of the other provisions of this Award at the time of termination.
- (c) The annual leave loading provided by subclause (2)(a) of this clause, shall not be payable when annual leave is taken in advance pursuant to the provisions of this subclause. The loading not paid, for the period of leave taken in advance, shall be payable to the employee at the end of the first pay period following the employee accruing the leave taken in advance.
- (10) The provisions of this clause shall not apply to casual employees.
- 12. Clause 13. – Absence Through Sickness: Change the title of this clause as follows and delete paragraph (b) of subclause (1) of this clause and insert the following in lieu thereof:**
13. – SICK LEAVE
- (b) Entitlement to payment shall accrue at a rate of one twenty sixth of a week for each completed week of service with the employer.
- 13. Clause 13. – Sick Leave: Delete subclauses (3), (3) and (4) of this clause and insert the following in lieu thereof:**
- (3) (a) The employee shall as soon as reasonably practicable advise the employer of his or her inability to attend for work, the nature of the illness or injury and the estimated duration of absence.
- Provided that such advice, other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.
- (b) An employee claiming entitlement under this clause is to provide the employer evidence that would satisfy a reasonable person of the entitlement.
- 14. Clause 13. – Sick Leave: Delete subclause (5) of this clause and insert the following in lieu thereof:**
- (4) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when they are absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.

- (b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to their place of residence or a hospital as a result of their personal ill health or injury for a period of seven consecutive days or more and produces a certificate from a registered medical practitioner that they were so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if they are unable to attend for work on the working day next following their annual leave.
- (c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day.
- (d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 12. - Annual Leave.
- (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken. Provided that the annual leave loading prescribed in Clause 12. - Annual Leave shall not be paid if the employee had already received payment with respect to the replaced annual leave.
- 15. Clause 13. – Sick Leave: Delete subclauses (6) and (7) of this clause and insert the following in lieu thereof:**
- (5) Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (3) of Clause 2 of the Long Service Leave provisions published in Volume 59 of the Western Australian Industrial Gazette at pages 1-6, as varied from time to time, the paid sick leave standing to the credit of the employee at the date of transmission from service with the transmitter shall stand to the credit of the employee at the commencement of service with the transferee and may be claimed in accordance with the provisions of this clause.
- (6) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and Injury Management Act 1981 nor to employees whose injury or illness is the result of the employee's own misconduct.
- 16. Clause 13. – Sick Leave: Renumber subclauses (8) and (9) of this clause as (7) and (8). Then immediately following the new subclause (8) of this clause insert the following new subclauses:**
- (9) An employee is entitled to use, each year, up to five (5) days of the employee's entitlement to sick leave, to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of the immediate care and attention.
- (10) A member of the employee's family mentioned within subclause (1) means any of the following
- (a) the employee's partner or de facto partner;
- (b) a child of whom the employee has parental responsibility as defined by the Family Court Act 1997;
- (c) an adult child of the employee;
- (d) a parent, sibling or grandparent of the employee;
- (e) any other person who lives with the employee as a member of the employee's family.
- (11) By mutual agreement between the employer and employee an employee may be granted further sick leave credits for carer's leave.
- (12) An employee may take unpaid carer's leave by agreement with the employer.
- 17. Clause 15. – Time and Wages Record: Delete this clause and insert the following in lieu thereof:**
- 15. - EMPLOYMENT RECORDS**
- (1) A record shall be kept in the premises occupied by the employer wherein shall be recorded for each employee:
- (a) On a daily basis:
- (i) start/finish time and daily hours including overtime;
- (ii) paid time; and
- (iii) breaks.
- (b) For each pay period:
- (i) designation;
- (ii) gross and net pay; and
- (iii) deductions, and the reasons for these deductions.
- (c) The following records must also be kept:
- (i) employee's name
- (ii) date of birth if under 21 years of age;
- (iii) start date;
- (iv) nature of work performed and classification;
- (v) all leave whether paid, partly paid or unpaid;
- (vi) relevant information for LSL calculations;
- (vii) any industrial instrument that applies including awards, orders or agreements;
- (viii) any additional information required by the industrial instrument; and
- (ix) any other information necessary to show remuneration and benefits comply with the award.

- (2) The employer shall on the written request by a relevant person:
- (a) produce to the person the employment records relating to the employee;
 - (b) let the person inspect the employment records;
 - (c) let the relevant person enter the premises of the employer for the purpose of inspecting the records;
 - (d) let the relevant person take copies of or extracts from the records.
- (3) A 'relevant person' means:
- (a) the employee concerned;
 - (b) if the employee is a represented person, his or her representative;
 - (c) a person authorised in writing by the employee;
 - (d) an officer referred to in section 93 of the Industrial Relations Act (1979) (as amended) authorised in writing by the Registrar.
- (4) An employer shall comply with a written request not later than:
- (a) at the end of the next pay period after the request is received; or
 - (b) the seventh day after the day on which the request was made to the employer.

18. Clause 16. – Proportion of Juniors: Delete this clause and insert the following in lieu thereof:

16. – PROPORTION OF JUNIORS

Junior employees shall only be employed in no greater proportion than 2 juniors to 1 adult employee. Provided that, where special circumstances arise in any given business, arrangement for the employment of juniors in greater proportion may be made between the Union and the employer concerned. Provided further, that where the employer or manager is performing the duties of an employee, one junior employee may be employed.

19. Clause 17. – Breakdowns: Delete this clause and insert the following in lieu thereof:

17. – BREAKDOWNS

The employee shall not be entitled to pay in respect of any portion of a day upon which the employee cannot be usefully employed because of any strike by the union or unions affiliated with it or by any other association or union, or through the breakdown of the employer's machinery or any stoppage of work by any cause which the employer cannot reasonably prevent.

20. Clause 19. – Meal Times: Delete subclauses (1) and (2) of this award and insert the following in lieu thereof:

- (1) No employee shall work more than five hours without an unpaid meal break except that, by agreement between the employer and employee, the employee may work up to six hours without a meal break.
- (2) Meal breaks shall not be less than 30 minutes.
- (3) Time and a half rates shall be paid for all work done during meal hours and thereafter until a meal break is taken.
- (4) A morning tea break of 10 minutes duration shall be allowed to all employees. Such break shall be counted as time worked.
- (5) Where an employer proposes to work overtime at the conclusion of the normal hours of work all employees who will be involved in working overtime of more than 1.1/2 hours shall be allowed a break of 10 minutes duration. Such break shall be counted as time worked.

21. Clause 21. – Under-Rate Employees: Delete this clause and insert the following in lieu thereof:

21. - SUPPORTED WAGE SYSTEM FOR EMPLOYEES WITH DISABILITIES

- (1) Employees eligible for a supported wage
This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:
 - (a) Supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability, as documented in Supported Wage System: Guidelines and Assessment Process.
 - (b) Accredited assessor means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
 - (c) Disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.
 - (d) Assessment instrument means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.
- (2) Eligibility criteria
 - (a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.
 - (b) The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment.
 - (c) The Award does not apply to employers in respect of their facility, programme, undertaking service or the like which receives funding under the Disability Services Act 1986 and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s.10 or s.12A of the Disability Services Act 1986, or if a part only has received recognition, that part.

- (3) Supported wage rates
- (a) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:
- | Assessed capacity
(subclause 4) | % of prescribed award rate |
|------------------------------------|----------------------------|
| 10% | 10% |
| 20% | 20% |
| 30% | 30% |
| 40% | 40% |
| 50% | 50% |
| 60% | 60% |
| 70% | 70% |
| 80% | 80% |
| 90% | 90% |
- (b) Provided that the minimum amount payable shall be not less than as provided by the National Supported Wage System.
- (c) Where a person's assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.
- (4) Assessment of capacity
- For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:
- (a) the employer and a union party to the Award, in consultation with the employee or, if desired by any of these;
- (b) the employer and an Accredited Assessor from a panel agreed by the parties to the Award and the employee.
- (5) Lodgement of assessment instrument
- (a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Industrial Relations Commission.
- (b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.
- (6) Review of assessment
- The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.
- (7) Other terms and conditions of employment
- Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this Award paid on a pro rata basis.
- (8) Workplace adjustment
- An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the areas.
- (9) Trial period
- (a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except in some cases additional work adjustment time (not exceeding four weeks) may be needed.
- (b) During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
- (c) The minimum amount payable to the employee during the trial period shall be no less than as provided by the National Supported Wage System.
- (d) Work trials should include induction or training as appropriate to the job being trialled.
- (e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause 4 of this clause.

22. Clause 22. – Allowances: Delete this clause and insert the following in lieu thereof;

22. - ALLOWANCES

- (1) Where an employee is required to sort foul linen an extra allowance of 39 cents per hour will be paid whilst so employed on this type of work.

(2) Travelling Time and Expenses

- (a) Where an employee is sent to work from an employer's recognised place of business the employer shall pay all travelling time from such place of business to the job and if the employee is required to return the same day to the employer's place of business, the employer shall pay travelling to the place of business. An employee sent for duty to a place other than his/her regular place of duty shall be paid travelling expenses.
- (b)
 - (i) Where an employee is required and authorised to use his/her own motor vehicle in the course of his/her duties he/she shall be paid an allowance not less than that provided for in the schedules set out hereunder. Notwithstanding anything contained in this subclause, the employer and the employee may make any other arrangements as to car allowance no less favourable to the employee.
 - (ii) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.
 - (iii) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.
- (c) Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-& 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	75.3	65.5	57.9
South West Land Division	77.4	67.2	59.7
North of 23.5° South Latitude	84.9	74.0	66.0
Rest of the State	79.9	69.4	61.6

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	26.0

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

23. Clause 23. – General Conditions: Delete subclause (4) of this clause and insert the following in lieu thereof:

- (4) No employee shall be required to lift or handle weights in excess of 4.5 kilograms from a seated position, or weights in excess of 16 kilograms from any other position, without a risk assessment being conducted for that employee. Nothing in this subclause shall act to reduce the obligations imposed by the Occupational Safety and Health Act 1984.

24. Clause 24. – Part-Time Employees: Delete this clause and insert the following in lieu thereof:

24. – TYPES OF EMPLOYMENT

- (1) Prior to engagement, an employer will inform each employee of the terms of their engagement, and in particular stipulate whether they are full-time, part-time or casual. This advice must be confirmed in writing within two weeks of commencement of employment.
- (2) Full-time employees will be engaged for an average of thirty-eight hours per week in accordance with clause 8. – Hours of Work.
- (3) Part-Time Employment
 - (a) An employer may employ part-time employees in any classification in this award.
 - (b) A part-time employee is an employee who:
 - (i) works less than full-time hours of 38 per week; and
 - (ii) has reasonably predictable hours of work; and
 - (iii) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
 - (c) At the time of engagement the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.
 - (d) Any agreed variation to the regular pattern of work will be recorded in writing.
 - (e) An employer is required to roster a part-time employee for a minimum of three (3) consecutive hours on any shift.
 - (f) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with subclause (4) of this clause.
 - (g) All time worked in excess of the hours as mutually arranged will be overtime and paid for at the rates prescribed in clause 9 - Overtime, of this award.
 - (h) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.

- (4) Casual Employees
- (a) A casual employee is to be one engaged and paid as such. A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty-eighth of the weekly award wage prescribed in clause 7. - Wages for the work being performed plus a casual loading of 20 per cent in lieu of annual leave, sick leave and public holidays.
- (b) A casual employee shall be employed for a minimum of three (3) consecutive hours on each occasion.
- (c) A casual employee is employed for a period of not more than 20 days exclusive of public holidays. An employee who is continuously employed for more than this time shall be regarded as permanent.

25. Clause 25. – Long Service Leave: Delete this clause and insert the following in lieu thereof:

25. – LONG SERVICE LEAVE

The general order long service leave provisions applicable to the private sector published in Western Australian Industrial Gazette as varied from time to time, are hereby incorporated in and shall be deemed to be part of this award.

26. Clause 26. – Maternity Leave: Delete this clause and insert the following new title and clause in lieu thereof:

26. – PARENTAL LEAVE

- (1) Subject to the terms of this clause employees are entitled to parental leave.
- (2) For the purposes of this clause "continuous service" is work for an employer on a regular and systematic basis (including any period of authorised leave or absence).
- (3) Definitions:
In this clause -
"adoption", in relation to a child, is a reference to a child who -
(i) is not the child or the step-child of the employee or the employee's partner;
(ii) is less than 5 years of age; and
(iii) has not lived continuously with the employee for 6 months or longer;
"continuous service" means service under an unbroken contract of employment and includes -
(i) any period of parental leave; and
(ii) any period of leave or absence authorised by the employer;
"expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;
"parental leave" means leave provided for by subclause (6)(a);
"partner" means a spouse or de facto partner.
- (4) Entitlement to Parental Leave
(a) Subject to subclauses (6), (7)(a) and (8)(a), an employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of -
(i) the birth of a child to the employee or the employee's partner; or
(ii) the placement of a child with the employee with a view to the adoption of the child by the employee.
(b) An employee is not entitled to take parental leave unless the employee -
(i) has, before the expected date of birth or placement, completed at least 12 months' continuous service with the employer; and
(ii) has given the employer at least 10 weeks written notice of the employee's intention to take the leave.
(c) An employee is not entitled to take parental leave at the same time as the employee's partner but this paragraph does not apply to one week's parental leave -
(i) taken by the employee and the employee's partner immediately after the birth of the child; or
(ii) taken by the employee and the employee's partner immediately after a child has been placed with them with a view to their adoption of the child.
(d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except the period of one week's leave referred to in paragraph (c).
- (5) Maternity leave to start 6 weeks before birth
A female employee who is pregnant and who has given notice of her intention to take parental leave is to start the leave 6 weeks before the expected date of birth, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.
- (6) Medical certificate
An employee who has given notice of the employee's intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's partner, as the case may be, is pregnant and the expected date of birth.
- (7) Notice of partner's parental leave
(a) An employee who has given notice of the employee's intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.
(b) Any notice given under paragraph (a) is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.
- (8) Notice of parental leave details
(a) An employee who has given notice of the employee's intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave no less than four weeks before the proposed commencement date.

- (b) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.
 - (c) The starting and finishing dates of a period of parental leave are to be agreed between the employee and employer.
- (9) Return to work after parental leave
- (a) An employee shall confirm the employee's intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of the period of parental leave.
 - (b) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.
 - (c) If the position referred to in paragraph (a) is not available, the employee is entitled to an available position –
 - (i) for which the employee is qualified; and
 - (ii) that the employee is capable of performing, most comparable in status and pay to that of the employee's former position.
 - (d) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of the position referred to in paragraph (b), that paragraph applies only in respect of the position held by the employee immediately before taking the acting or temporary position.
 - (e) Notwithstanding paragraphs (b) and (c) of this clause, an employer and an employee may agree to an alternative return to work such as part-time employment, having regard to
 - (i) applicable discrimination legislation,
 - (ii) the requirements of the employee,
 - (iii) the operational needs of the employer, and
 - (iv) any other relevant matter.
- (10) Effect of parental leave on employment
- Absence on parental leave -
- (a) does not break the continuity of service of an employee; and
 - (b) is not to be taken into account when calculating the period of service for the purpose of this Award.
- (11) Sick Leave
- Where an employee not then on maternity leave suffers an 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 duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed 52 weeks.
- (12) Transfer to a Safe-Job
- Where in the opinion of a duly qualified 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 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 maternity leave for the purposes of this clause.
- (13) Variation of Period of Parental Leave
- (a) Provided the addition does not extend the parental leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be lengthened.
 - (b) The period of 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.
- (14) Cancellation of Parental Leave
- (a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee or the employee's partner, as the case may be, terminates other than by the birth of a living child.
 - (b) Where the pregnancy of an employee or an employee's partner, as the case may be, then on parental leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that the employee desires to resume work.
- (15) Special Maternity Leave
- (a) Where the pregnancy of a female employee not then on parental leave terminates after 28 weeks other than by the birth of a living child then:
 - (i) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work; or
 - (ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a duly qualified medical practitioner certifies as necessary before her return to work.
 - (b) For the purposes of subclauses (10), (16) and (17) hereof, maternity leave shall include special maternity leave.
 - (c) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which the employee 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.

- (16) **Parental Leave and Other Leave Entitlements**
 Provided the aggregate of leave including leave taken pursuant to subclauses (12) and (15) hereof does not exceed 52 weeks:
- (a) 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 the employee is then entitled.
 - (b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during absence on parental leave.
- (17) **Termination of Employment**
- (a) An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.
 - (b) An employer shall not terminate the employment of an employee on the ground of the employee's absence on maternity leave or, in the case of a female employee, her pregnancy, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.
- (18) **Replacement Employees**
- (a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave.
 - (b) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
 - (c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
 - (d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.
 - (e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employee's employment continues beyond the 12 months qualifying period.

27. Clause 29. – Bereavement Leave: Delete this clause and insert the following in lieu thereof:

29. – BEREAVEMENT LEAVE

- (1) (a) Subject to subclause (2) of this clause, on the death of -
- (i) the spouse or de facto partner of an employee;
 - (ii) the child or step-child of an employee;
 - (iii) the brother or sister of an employee;
 - (iv) the parent or step-parent of an employee; or
 - (v) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,
- an employee (including a casual employee) is entitled to paid bereavement leave of up to 2 days.
- (b) The 2 days need not be consecutive.
 - (c) Bereavement leave is not to be taken during a period of any other kind of leave.
- (2) **Proof in support of claim for leave**
 An employee who claims to be entitled to paid leave in accordance with subclause (1) hereof is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to -
- (a) the death that is the subject of the leave sought; and
 - (b) the relationship of the employee to the deceased person.

28. Clause 31. – Right of Entry: Delete this clause and insert the following in lieu thereof:

31. – RIGHT OF ENTRY

An authorized representative of the union shall be entitled to exercise right of entry in accordance with the provisions of the Industrial Relations Act 1979 or any other legislation that makes provision for right of entry.

29. Clause 32. – Casual Employees: Delete this clause and insert the following in lieu thereof:

32. – DISPUTE RESOLUTION PROCEDURE

1. Subject to the provisions of the Industrial Relations Act 1979 (WA) (as amended) in the event of any dispute or matter arising under this award, the following procedure shall apply.
- (a) **Step 1**
 As soon as practicable after the dispute has arisen, it shall be considered jointly by the appropriate supervisor and the employee or employees concerned and, where requested, by representatives of the employer or employee(s).
 - (b) **Step 2**
 If the dispute is not resolved it shall be considered jointly by the employer, the employee or employees concerned and, where requested, by representatives of the employer or employee(s).
 - (c) **Step 3**
 The employer and the employee(s) concerned (and their representatives where requested) will attempt to resolve the dispute prior to it being referred to the Commission however, if the dispute is not resolved, it may then be referred to the Western Australian Industrial Relations Commission for assistance in its resolution.
2. At all times whilst a dispute or matter is being resolved in accordance with this clause, normal work will continue.

30. Clause 33. – Superannuation: Delete this clause and insert the following in lieu thereof:**33. - SUPERANNUATION**

Superannuation Legislation

- (1) The Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993 legislation as varied from time to time governs the superannuation rights and obligations of the parties.

Notwithstanding (1) above the following provisions apply.

- (2) Contributions.
- (a) The employer shall contribute a minimum of 9% of ordinary time earnings per employee in accordance with subclause (3) of this clause.
- (b) Employees' Additional Voluntary Contributions:
Where the rules of the fund allow an employee to make additional contributions to the fund the employer shall, where an election is made, upon the direction of the employee deduct contributions for the employee's wages and pay them to the fund in accordance with the direction of the employee and the rules of the fund.
- (3) Compliance, Nomination and Transition
- (a) For the purposes of this clause -
- (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. If the employee does not nominate a fund or scheme, or until such time as an employee nominates a fund or scheme, superannuation contribution shall be paid into the default fund.
- (c) The default fund shall be Westscheme Super Fund.
- (d) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme within fourteen (14) days;
- (e) Each employee shall be eligible to receive contributions from the date of eligibility, notwithstanding the date the membership application was forwarded to the Fund.
- (f) 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;
- (g) 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;
- (h) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee;
- (i) In the event that an employee has not, after 28 days of commencing employment, nominated a complying fund into which contributions may be made, the employer will forward contributions and employee details to the default scheme, Westscheme Super Fund.
- (j) Except where the Trust Deed provides otherwise employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer.
- (k) All contributions into the nominated Fund or scheme shall be paid on a quarterly basis/monthly and within thirty (30) days of the end of each month.
- (l) For the purpose of this clause the employee's ordinary time earnings are as defined in the Superannuation Guarantee (Administration) Act 1992 shall include base classification rate, shift penalties together with any other all purpose allowance or penalty payment for work in ordinary time and shall include in respect of casual employee's the casual loading prescribed by this Award, but shall exclude any payment for overtime worked, vehicle allowances, fares or travelling time allowances (excluding travelling related to distant work) commission or bonus as well as –
- (i) periods of unpaid leave or unauthorized absences; or
- (ii) annual leave or any other payments paid out on termination.
- (m) The employer shall continue to contribute to the nominated fund or scheme on behalf of an employee in receipt of payments under the Workers Compensation and Injury Management Act 1981 for not more than 52 weeks.

31. Clause 34. – Relationship to the National Training Wage Interim Award 1994: Delete this clause and insert the following in lieu thereof:**34. – NATIONAL TRAINING WAGE**

A party to this award shall comply with the terms of the National Training Wage Award 2000 [PR904174 (No. 277)] and as varied from time to time as though it was a party bound by Clause 3 - Parties Bound of that award.

32. Insert the following new clauses after Clause 34. – National Training Wage and before Appendix A – Parties to the Award:**35. – OTHER LAWS AFFECTING EMPLOYMENT**

- (1) INDUSTRIAL RELATIONS ACT 1979
www.wairc.wa.gov.au
- (2) MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993
www.slp.wa.gov.au

- (3) WORKPLACE RELATIONS ACT 1996
www.airc.gov.au or link to <http://www.airc.gov.au/procedures/wra/wra.html>
- (4) SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992
www.austlii.edu.au/au/legis/cth/consol_act/sga1992430/
- (5) OCCUPATIONAL SAFETY AND HEALTH ACT 1984
www.safetyline.wa.gov.au
- (6) EQUAL OPPORTUNITY ACT 1984
www.oeco.wa.gov.au
- (7) TERMINATION, REDUNDANCY AND INTRODUCTION OF CHANGE
GENERAL ORDER
www.wairc.wa.gov.au (under General Orders)
2005 WAIRC 01715
Western Australian Industrial Gazette vol. 85, p. 1667.
- (8) LONG SERVICE LEAVE STANDARD PROVISIONS
www.wairc.wa.gov.au (under General Orders)

36. – WHERE TO GO FOR FURTHER INFORMATION

- (1) Liquor, Hospitality and Miscellaneous Union
Western Australian Branch
Telephone: 08 9388 5400
Facsimile: 08 9382 3986
Email: lhmuwa@lhmu.org.au
- (2) Chamber of Commerce and Industry of Western Australia
180 Hay Street
EAST PERTH WA 6004
Telephone: 08 9365 7555.
Facsimile: 08 9365 7550
- (3) Western Australian Industrial Relations Commission
Level 16, 111 St Georges Terrace
PERTH WA 6000
Telephone: 08 9420 4444
Facsimile: 08 9420 4500
Email: webmaster@wairc.wa.gov.au
Web: www.wairc.wa.gov.au
Toll Free: 1800 624 263
- (4) Department of Consumer & Employment Protection, Labour Relations
3rd Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005
Telephone: 08 9222 7700
Facsimile: 08 9222 7777
Email: labourrelations@docep.wa.gov.au
Wageline: 1300 655 266

33. Appendix – Resolution of Disputes Requirements: Delete this Appendix in its entirety.

34. Schedule B – Respondents: Delete this schedule and insert the following in lieu thereof:

SCHEDULE B – RESPONDENTS

ALSCO Linen Service Pty Ltd
33 -37 Canvale Rd 6155
CANNING VALE WA 6155

The Fremantle Steam Laundry Co Pty Ltd
7 Emplacement Crs
Hamilton Hill WA 6163

Spotless Group Limited
355 Scarborough Beach Rd
OSBORNE PARK 6017

D & M Laundry Services
U 5/ 43 Buckingham Drv
Wangara W A 6065

Sun Laundry Services
24 Ewing St
BENTLEY WA 6102

Westralian Laundries & Linen Services
U1/ 7 Clavering Rd
BAYSWATER W A 6053

Silver Pty Ltd
41 Robinson Avenue
BELMONT WA 6104

Three Rings Pty Ltd t/as Prime Laundry & Drycleaning
41 Robinson Avenue
BELMONT WA 6104

35. **Appendix – S.49B – Inspection of Records Requirements: Delete this Appendix in its entirety.**

2006 WAIRC 04025

PUBLIC TRANSPORT AUTHORITY RAILCAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CHIEF EXECUTIVE OFFICER, PUBLIC TRANSPORT AUTHORITY

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST
AUSTRALIAN BRANCH

RESPONDENT

CORAM COMMISSIONER J H SMITH
DATE FRIDAY, 24 MARCH 2006
FILE NO/S APPL 26 OF 2006
CITATION NO. 2006 WAIRC 04025

Result Award varied
Representation
Applicant Mr S Majeks
Respondent Mr G W Ferguson

Order

Having heard Mr Majeks on behalf of the Applicant and Mr Ferguson on behalf of the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Public Transport Authority Railcar Drivers (Transperth Train Operations) Award 2006 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 24 March 2006.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

SCHEDULE

1. **Clause 3.2 – Overtime: After subclause 3.2.4 – Sunday and Saturday, insert a new subclause 3.2.5 – Bans and Limitations as follows:**

3.2.5 Bans and Limitations

- (a) The employer may require any employee to work reasonable additional hours at the additional hour rates provided under this Award, and such employee shall not unreasonably refuse to comply with such request, provided that an employee may refuse to work such additional hours if the employee has a family or community commitment or medical appointment. The employer shall be entitled to require evidence in relation to the commitment claimed by the employee.

- (b) No union or employee covered by this Award shall, in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of subclause 3.2.5(a).

2006 WAIRC 04011

RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD, 1979 (NO R48 OF 1978)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN
BRANCH

APPLICANT

-v-

RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN
AUSTRALIA INC AND OTHERS

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE FRIDAY, 24 MARCH 2006

FILE NO/S APPL 17 OF 2006

CITATION NO. 2006 WAIRC 04011

Result Varied

Order

HAVING heard Ms S Northcott on behalf of the applicant, Mr O Moon as agent on behalf of the Restaurant and Catering Industry Association of Employers of Western Australia Incorporated, Ms A Kearney on behalf of the Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) and Ms S Thorp as agent on behalf of a number of respondents, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the *Restaurant, Tearoom and Catering Workers' Award, 1979 (No R48 of 1978)* be varied in accordance with the following Schedule and that such variation shall have effect from 24 March 2006.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof:

2. – ARRANGEMENT

1. Title
2. Arrangement
3. Area
4. Scope
5. Term
6. Definitions
7. Contract of Service
8. Hours
9. Additional Rates for Ordinary Hours
10. Overtime
11. Casual Employees
12. Part-Time Employees
13. Meal Breaks
14. Meal Money
15. Sick Leave
16. Bereavement Leave
17. Public Holidays
18. Annual Leave
19. Long Service Leave
20. Payment of Wages
- 20A. Translation of Full-Time and Part-Time Employees
21. Wages
- 21A. Minimum Adult Award Wage
22. Junior Employees
23. Apprentices
24. Option for Annualised Salary
25. Higher Duties
26. Uniforms and Laundering
27. Protective Clothing

- 28. Employees' Equipment
- 29. No Reductions
- 30. Board and/or Lodging
- 31. Travelling Facilities
- 32. Employment Record
- 33. Roster
- 34. Change and Rest Rooms
- 35. First Aid Kit
- 36. Posting of Award and Union Notices
- 37. Superannuation
- 38. Supported Wage System for Employees with Disabilities
- 39. Prohibition of Contracting Out of Award
- 40. Breakdowns
- 41. Location Allowance
- 42. Parental Leave
- 43. National Training Wage
- 44. Enterprise Flexibility
- 45. Right of Entry
- 46. Termination, Introduction Of Change And Redundancy
- 47. Anti-Discrimination
- 48. Resolution of Disputes
- 49. Further Claims
- 50. Union Delegates and Meetings
- 51. School Canteen Workers
- Schedule A - Named Union Party
- Schedule B – Respondents
- Appendix – McDonald's Australia Limited Franchisees

2. Clause 6 – Definitions:

A. Delete subclause (6) of this clause and insert the following in lieu thereof:

- (6) **Food and Beverage Attendant (Tradesperson) Grade 4** means an employee who has completed the appropriate level of training or who has passed the appropriate trade test and as such carries out specialised skilled duties in a fine dining room or restaurant.

B. Immediately following subclause (26) of this clause insert a new subclause as per the following:

- (27) **Reasonable Evidence** means evidence that would satisfy a reasonable person.

3. Clause 10 – Overtime: Delete subclause (7) of this clause and insert the following in lieu thereof:

- (7) Requirement to work reasonable overtime:

- (a) Subject to subclause (5)(b) of this clause an employer may require an employee to work reasonable overtime at overtime rates specified or time off arrangements provided in this clause.
- (b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
 - (i) any risk to employee health and safety;
 - (ii) the employee's personal circumstances including any family responsibilities;
 - (iii) the needs of the workplace or enterprise;
 - (iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it.

4. Clause 10A. – Translation of Casual Employees: Delete this number, title and clause.

5. Clause 11. Casual Employees:

A. Delete subclause (4) of this clause and insert the following in lieu thereof:

- (4) In addition to the hourly base rate of pay prescribed in subclause (3) of this clause, a casual employee shall also be paid the following loading –

DAY	% PENALTY RATE
Monday to Friday	25
Saturday & Sunday	50
Public Holiday	125

B. Immediately following subclause (5) of this clause insert a new subclause as follows:

- (6) A casual employee is to be informed, before they are engaged, that they are employed on a casual basis and that there is no entitlement to paid sick leave or annual leave.

6. Clause 12. – Part-Time Workers: Delete the title of this clause and insert the following in lieu thereof:

12. - PART-TIME EMPLOYEES

7. Clause 15. – Sick Leave:

A. Delete paragraph (a) and (b) of subclause (1) of this clause and insert the following in lieu thereof:

- (1) (a) An employee who is unable to attend or remain at his place of employment during the hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.

- (b) Entitlement to payment shall accrue at the rate of one twenty sixth of a week for each completed week of service with the employer.

B. Delete subclause (4) of this clause and insert the following in lieu thereof:

- (4) An employee claiming entitlement under this clause is to provide the employer reasonable evidence of the entitlement.

C. Delete subclauses (6) and (7) of this clause and insert the following in lieu thereof:

- (6) Where a business has been transmitted from one employer to another and the worker's service has been deemed continuous in accordance with subclause (3) of Clause 2 of the Long Service Leave provisions published in the Western Australian Industrial Gazette as varied from time to time, the paid sick leave standing to the credit of the worker at the date of transmission from service with the transmitter shall stand to the credit of the worker at the commencement of service with the transferee and may be claimed in accordance with the provisions of this clause.
- (7) The provisions of this clause with respect to payment do not apply to workers who are entitled to payment under the Workers' Compensation and Injury Management Act 1981 nor to workers whose injury or illness is the result of the worker's own misconduct.

D. Immediately following subclause (8) of this clause insert new subclauses as follows:

- (9) An employee is entitled to use, each year, up to five (5) days of the employee's entitlement to sick leave, to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of the immediate care and attention. If requested, the employee must provide reasonable evidence of the entitlement to such leave.
- (10) A member of the employee's family mentioned within subclause (9) of this clause means any of the following:
- (a) the employee's spouse or de facto partner;
 - (b) a child of whom the employee has parental responsibility as defined by the Family Court Act 1997;
 - (c) an adult child of the employee;
 - (d) a parent, sibling or grandparent of the employee.
- (11) An employee may take unpaid carer's leave by agreement with the employer.

8. Clause 16. – Bereavement Leave - Delete this clause and insert the following in lieu thereof:

- (1) (a) Subject to subclause (2) of this clause, on the death of -
- (i) the spouse or de facto partner of an employee;
 - (ii) the child or step-child of an employee;
 - (iii) the brother or sister of an employee;
 - (iv) the parent, step-parent, parent-in-law or grandparent of an employee; or
 - (v) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,
- an employee is entitled to paid bereavement leave of up to 2 days.
- (b) The 2 days need not be consecutive.
- (c) Bereavement leave is not to be taken during a period of any other kind of leave.

(2) Proof in support of claim for leave

An employee who claims to be entitled to paid leave in accordance with subclause (1) hereof is to provide to the employer, if so requested by the employer, reasonable evidence as to -

- (a) the death that is the subject of the leave sought; and
- (b) the relationship of the employee to the deceased person.

9. Clause 17. – Holidays: Delete the title of this clause and insert the following in lieu thereof:

17. - PUBLIC HOLIDAYS

10. Clause 18. – Annual Leave:

A. Delete subclause (1) of this clause and insert the following in lieu thereof:

- (1) (a) An employee is entitled, for each year of continuous service, to a period of four (4) weeks annual leave with payment at the employee's ordinary rate of wage. Entitlements to annual leave will accrue at the rate of one-thirteenth of a week for each completed week of service.
- (b) Where pursuant to paragraph (3) of subclause (2) of the Long Service Leave provisions published in the Western Australian Industrial Gazette as varied from time to time, the period of continuous service which an employee has had with the transmitter (including any such service with any prior transmitter) is deemed to be service of the employee with the transferee then that period of continuous service shall be deemed to be service with the transferee for the purposes of this sub-clause.

B. Delete subclause (4) of this clause and insert the following in lieu thereof:

- (4) Employees continue to accrue annual leave while on paid leave including but not limited to:
- (a) annual leave
 - (b) long service leave
 - (c) observing a public holiday prescribed by this award
 - (d) sick leave
 - (e) bereavement leave.

C. Delete sub-paragraph (i) of paragraph (a) of subclause (5) of this clause and insert the following in lieu thereof:

(i) the transmission of a business where paragraph (b) of subclause (1) of this clause applies;

D. Delete paragraph (b) of subclause (6) of this clause and insert the following in lieu thereof:

(b) An employee whose employment terminates and who has not taken the leave prescribed under this clause shall be given payment in lieu of that leave at the rate of one thirteenth of a week's pay (2.923 hours pay) at their ordinary rate of wage for each completed week of service, or for part-timers the entitlement accrues pro rata to this rate.

E. Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) (a) An employer and employee may agree, in writing, that annual leave prescribed by this clause may be given and taken before the completion of 12 months continuous service as prescribed by subclause (1) of this clause.

(b) If the service of an employee terminates and the employee has taken a period of leave in accordance with this subclause and if the period of leave so taken exceeds that which would become due pursuant to subclause (6) of this clause the employee shall be liable to pay the amount representing the difference between the amount received by him/her for the period of leave taken in accordance with this subclause and the amount that would have accrued in accordance with subclause (6) of this clause. The employer may deduct this amount from monies due to the employee by reason of the other provisions of this award at the time of termination.

(c) The annual leave loading provided by subclause (2) of this clause, shall not be payable when annual leave is taken in advance pursuant to the provisions of this subclause. The loading not paid, for the period of leave taken in advance, shall be payable to the employee at the end of the first pay period following the employee completing the qualifying period of continuous service provided in subclause (1) of this clause.

11. Clause 19. – Long Service Leave: Delete this clause and insert the following in lieu thereof:

The Long Service Leave General Order provisions as varied from time to time published in the Western Australian Industrial Gazette, are hereby incorporated in and shall be deemed to be part of this award.

12. Clause 21A. – Minimum Wage – Adult Males & Females: Delete the title of this clause and insert the following in lieu thereof:

21A. - MINIMUM ADULT AWARD WAGE

13. Clause 22. – Junior Workers: Delete the title of this clause and insert the following in lieu thereof:

CLAUSE 22. - JUNIOR EMPLOYEES

14. Clause 23. – Apprentices: Delete this clause and insert the following in lieu thereof:

(1) Apprentices may be taken to the trade of cooking in the ratio of one apprentice for every two or fraction of two (the fraction being not less than one) tradesperson employed and shall not be taken in excess of that ratio unless -

- (a) the Union so agrees; or
- (b) the Commission so determines.

(2) Wages (per fortnight) expressed as a percentage of the "Tradesperson's Rate".

(a)	Four Year Term -	%
	First year	42
	Second year	55
	Third year	75
	Fourth year	88
(b)	Three and a Half Year Term -	%
	First six months	42
	Next year	55
	Next following year	75
	Final year	88
(c)	Three Year Term -	
	First year	55
	Second year	75
	Third year	88

(d) For the purposes of this subclause the term "Tradesperson's Rate" means the total rate payable to a "Qualified Cook", as prescribed in Clause 21. - Wages of this award.

15. Clause 26 – Uniforms and Laundering: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 48. - Resolution of Disputes of this award.

16. Clause 27. – Protective Clothing: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 48 - Resolution of Disputes of this award.

17. Clause 28. Workers' Equipment: Delete the title of this clause and insert the following in lieu thereof:

28. – EMPLOYEES' EQUIPMENT

18. Clause 30. – Board and/or Lodging: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 48. – Resolution of Disputes of this award.

19. Clause 32. – Record:**A. Delete the title of this clause and insert the following in lieu thereof:**32 - EMPLOYMENT RECORD**B. Delete subclause (1) of this clause and insert the following in lieu thereof:**

- (1) Each employer bound by this award shall maintain a record at each establishment in compliance with the requirements of the Industrial Relations Act 1979 or any other legislation that makes provision for employment records.

Such record shall also contain the following information relating to each worker:

- (a) The name and address given by the worker;
- (b) The age of the worker if paid as a junior worker;
- (c) The classification of the worker and whether the worker is full-time, part-time or casual;
- (d) The commencing and finishing times of each period of work each day;
- (e) The number of ordinary hours and the number of overtime hours worked each day and the totals for each pay period; and
- (f) The wages and any allowances paid to the worker each pay period and any deductions made therefrom.

C. Delete paragraph (c) and (d) of subclause (3) of this clause and insert the following in lieu thereof:

- (c) In this clause “relevant person” means –
 - (i) the employee concerned;
 - (ii) if the employee is a represented person, his or her representative;
 - (iii) a person authorized in writing by the employee; and
 - (iv) an officer referred to in section 93 of the Industrial Relations Act 1979 authorised in writing by the Registrar.
- (d) Before exercising a power of inspection the relevant person shall give reasonable notice of not less than 24 hours to the employer.
- (e) Subject to this clause the record shall be available for inspection by a relevant person on the employer's premises from Monday to Friday, both inclusive, between the hours of 9.00 am to 5.00 pm (excepting the period between 12.00 noon and 2.00 pm). In the case of any establishment which is only open for business after 5.00 pm or on a Saturday or Sunday, the record shall be open for inspection during all business hours of that establishment.
- (f) The relevant person shall be permitted reasonable time to inspect the record and, if the relevant person requires, take an extract or copy of any of the information contained therein.

D. Delete subclause (4) of this clause and insert the following in lieu thereof:

- (4) (a) If, for any reason, the record is not available for inspection by the relevant person when the request is made, the relevant person and the employer or the employer's agent may fix a mutually convenient time for the inspection to take place.
- (b) If a mutually convenient time cannot be fixed, the relevant person may advise the employer in writing that he or she requires to inspect the record in accordance with the provisions of this award and shall specify the period contained in the record which he or she requires to inspect.
- (c) Within 10 days of receipt of such advice:
 - (i) Employers who normally keep the record at a place more than 40 kilometres from the GPO, Perth shall send a copy of that part of the record specified to the office of the relevant person; and
 - (ii) Employers who normally keep the record at a place less than 40 kilometres from the GPO, Perth shall make the record available to the relevant person at the time specified by the relevant person. If the record is not then made available to the relevant person the employer shall within three days send a copy of that part of the record specified to the office of the relevant person.
- (d) In the event of a demand made by the relevant person which the employer considers unreasonable the employer may apply to the Western Australian Industrial Relations Commission for direction. An application to the Western Australian Industrial Relations Commission by an employer for direction will subject to that direction, stay the requirements contained elsewhere in this subclause.

20. Clause 33. – Roster: Delete subclause (3) of this clause and insert the following in lieu thereof:

- (3) The roster shall be open for inspection at such times and to such “relevant persons” as the Employment Record is open for inspection.

21. Clause 34. – Change and Restrooms: Delete this clause and insert the following in lieu thereof:

Each employer shall provide a change and rest room in cases where workers do not reside on the premises, which shall be adequately lighted and ventilated and be sufficiently roomy to accommodate all workers likely to use it at the one time. Such rest rooms shall be provided with a lounge, couch or bed, steel or vermin-proof lockers, suitable floor coverings, and a table or tables with adequate seating accommodation where workers may partake of meals. These workers shall have access to a bathroom with hot and cold water facilities.

Any dispute in respect to the application of this clause may be dealt with in accordance with Clause 48.- Resolution of Disputes of this award.

22. Clause 37. – Superannuation: Delete this clause and insert the following in lieu thereof:

- (1) The employer shall contribute on behalf of the employee in accordance with the requirements of the Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992 and the Superannuation (Resolution of Complaints) Act 1993 as varied from time to time.

- (2) Contributions shall be paid into one of the following funds:
 - (a) Any complying fund nominated by the employee; or
 - (b) Hostplus Super Fund, which shall become the "nominated fund" if no fund is nominated by the employee.
- (3) Contributions shall be paid into the nominated fund on a quarterly basis, within thirty (30) days of the end of each quarter.
- (4) For the purposes of this clause the employee's ordinary time earnings shall include base classification rate, shift and weekend penalties and any other all purpose allowance or penalty payment for work in ordinary time and in respect of casual employees the casual loading.
- (5) Employee's Options
 - (a) Within 14 days of commencing employment, the employer shall notify the employee of the employee's entitlement to nominate a complying fund.
 - (b) Any failure by the employee to nominate a fund shall not affect the employee's eligibility to receive contributions.
 - (c) 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.
 - (d) The employer shall not unreasonably refuse to agree to a change of complying fund requested by an employee.
 - (e) Employees' Additional Voluntary Contributions

The employer shall deduct additional contributions from an employee's wages and pay them to the fund in compliance with both of the following:

 - (i) the rules of the fund; and
 - (ii) the directions of the employee;
 but not otherwise.

23. Clause 38. - Over-Award Payments to Clause 54. - School Canteen Workers inclusive: Delete these numbers, titles and clauses and insert the following in lieu thereof:

38. - SUPPORTED WAGE SYSTEM FOR EMPLOYEES WITH DISABILITIES

- (1) Workers eligible for a supported wage

This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:

 - (a) Supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability, as documented in Supported Wage System: Guidelines and Assessment Process.
 - (b) Accredited assessor means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
 - (c) Disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme.
 - (d) Assessment instrument means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.
- (2) Eligibility criteria
 - (a) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.
 - (b) The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment.
 - (c) The Award does not apply to employers in respect of their facility, programme, undertaking service or the like which receives funding under the *Disability Services Act 1986* and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s.10 or s.12A of the *Disability Services Act 1986*, or if a part only has received recognition, that part.
- (3) Supported wage rates
 - (a) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this award for the class of work which the person is performing according to the following schedule:

Assessed capacity	% of prescribed award rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

- (b) Provided that the minimum amount payable shall be not less than as provided by the National Supported Wage System.
- (c) Where a person's assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.
- (4) Assessment of capacity
For the purpose of establishing the percentage of the award rate to be paid to an employee under this award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:
- (a) the employer and a union party to the award, in consultation with the employee or, if desired by any of these;
- (b) the employer and an Accredited Assessor from a panel agreed by the parties to the award and the employee.
- (5) Lodgement of assessment instrument
- (a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Industrial Relations Commission.
- (b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.
- (6) Review of assessment
The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.
- (7) Other terms and conditions of employment
Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other workers covered by this award paid on a pro rata basis.
- (8) Workplace adjustment
An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the areas.
- (9) Trial period
- (a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except in some cases additional work adjustment time (not exceeding four weeks) may be needed.
- (b) During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
- (c) The minimum amount payable to the employee during the trial period shall be no less than as provided by the National Supported Wage System.
- (d) Work trials should include induction or training as appropriate to the job being trialled.
- (e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (4) of this clause.

39. - PROHIBITION OF CONTRACTING OUT OF AWARD

All workers covered by the terms of this award shall be paid not less than the wages prescribed by this award and shall work in accordance with provisions not less advantageous to him than the provisions of this award, notwithstanding anything that may be determined to the contrary by the employer, or by the employer in agreement with the worker.

40. - BREAKDOWNS

The employer shall be entitled to deduct payment for any day or portion of a day upon which the worker cannot be usefully employed, because of any strike by the Union or Unions affiliated with it, or by any other Association or Union, or through the breakdown of the employer's machinery or any stoppage of work by any cause which the employer cannot reasonably prevent.

41. - LOCATION ALLOWANCE

- (1) Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	\$17.30
Argyle	\$45.60
Balladonia	\$17.40
Barrow Island	\$29.70
Boulder	\$7.20
Broome	\$27.70
Bullfinch	\$8.20
Carnarvon	\$14.20
Cockatoo Island	\$30.40

TOWN— <i>continued</i>	PER WEEK
Coolgardie	\$7.20
Cue	\$17.70
Dampier	\$24.00
Denham	\$14.20
Derby	\$28.80
Esperance	\$5.20
Eucla	\$19.40
Exmouth	\$25.00
Fitzroy Crossing	\$34.80
Goldsworthy	\$15.40
Halls Creek	\$39.90
Kalbarri	\$6.00
Kalgoorlie	\$7.20
Kambalda	\$7.20
Karratha	\$28.60
Koolan Island	\$30.40
Koolyanobbing	\$8.20
Kununurra	\$45.60
Laverton	\$17.60
Learmonth	\$25.00
Leinster	\$17.30
Leonora	\$17.60
Madura	\$18.40
Marble Bar	\$43.80
Meekatharra	\$15.20
Mount Magnet	\$19.00
Mundrabilla	\$18.90
Newman	\$16.60
Norseman	\$14.90
Nullagine	\$43.70
Onslow	\$29.70
Pannawonica	\$22.40
Paraburdoo	\$22.30
Port Hedland	\$23.90
Ravensthorpe	\$9.20
Roebourne	\$32.90
Sandstone	\$17.30
Shark Bay	\$14.20
Shay Gap	\$15.40
Southern Cross	\$8.20
Telfer	\$40.50
Teutonic Bore	\$17.30
Tom Price	\$22.30
Whim Creek	\$28.40
Wickham	\$27.60
Wiluna	\$17.60
Wittenoom	\$38.70
Wyndham	\$42.90

- (2) Except as provided in subclause (3) of this clause, an employee who has:
- (a) a dependant shall be paid double the allowance prescribed in subclause (1) of this clause;
 - (b) a partial dependant shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.
- (3) Where an employee:
- (a) is provided with board and lodging by his/her employer, free of charge; or
 - (b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;
- such employee shall be paid $66\frac{2}{3}$ per cent of the allowances prescribed in subclause (1) of this clause.
- (4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.
- (5) Where an employee is on annual leave or receives 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.
- (6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.
- (7) For the purposes of this clause:
- (a) "Dependant" shall mean -
 - (i) a spouse or defacto partner; or
 - (ii) a child where there is no spouse or defacto partner;
 who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.
 - (b) "Partial Dependant" shall mean a "dependant" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.
- (8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.
- (9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

42. - PARENTAL LEAVE

- (1) Subject to the terms of this clause employees are entitled to parental leave.
- (2) For the purposes of this clause "continuous service" is work for an employer on a regular and systematic basis (including any period of authorised leave or absence).
- (3) Definitions
- In this clause -
- "adoption", in relation to a child, is a reference to a child who -
- (a) is not the child or the step-child of the employee or the employee's partner;
 - (b) is less than 5 years of age; and
 - (c) has not lived continuously with the employee for 6 months or longer;
- "continuous service" means service under an unbroken contract of employment and includes -
- (a) any period of parental leave; and
 - (b) any period of leave or absence authorised by the employer;
- "expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;
- "parental leave" means leave provided for by subclause (4)(a);
- "partner" means a spouse or *de facto* partner.
- (4) Entitlement to Parental Leave
- (a) Subject to subclauses (6), (7)(a) and (8)(a), an employee, other than a casual employee, is entitled to take up to 52 consecutive weeks of unpaid leave in respect of -
 - (i) the birth of a child to the employee or the employee's partner; or
 - (ii) the placement of a child with the employee with a view to the adoption of the child by the employee.
 - (b) An employee is not entitled to take parental leave unless the employee -
 - (i) has, before the expected date of birth or placement, completed at least 12 months' continuous service with the employer; and
 - (ii) has given the employer at least 10 weeks written notice of the employee's intention to take the leave.

- (c) An employee is not entitled to take parental leave at the same time as the employee's partner but this paragraph does not apply to one week's parental leave -
- (i) taken by the employee and the employee's partner immediately after the birth of the child; or
 - (ii) taken by the employee and the employee's partner immediately after a child has been placed with them with a view to their adoption of the child.
- (d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except the period of one week's leave referred to in paragraph (c) of this subclause.
- (5) Maternity leave to start 6 weeks before birth
A female employee who is pregnant and who has given notice of her intention to take parental leave is to start the leave 6 weeks before the expected date of birth, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.
- (6) Medical certificate
An employee who has given notice of the employee's intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's partner, as the case may be, is pregnant and the expected date of birth.
- (7) Notice of partner's parental leave
- (a) An employee who has given notice of the employee's intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.
 - (b) Any notice given under paragraph (a) is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.
- (8) Notice of parental leave details
- (a) An employee who has given notice of the employee's intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave no less than four weeks before the proposed commencement date.
 - (b) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.
 - (c) The starting and finishing dates of a period of parental leave are to be agreed between the employee and employer.
- (9) Return to work after parental leave
- (a) An employee shall confirm the employee's intention of returning to work by notice in writing to the employer given not less than four weeks prior to the expiration of the period of parental leave.
 - (b) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12) of this clause, to the position the employee held immediately before such transfer.
 - (c) If the position referred to in paragraph (b) of this subclause is not available, the employee is entitled to an available position -
 - (i) for which the employee is qualified; and
 - (ii) that the employee is capable of performing, most comparable in status and pay to that of the employee's former position.
 - (d) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of the position referred to in paragraph (b) of this subclause, that paragraph applies only in respect of the position held by the employee immediately before taking the acting or temporary position.
 - (e) Notwithstanding paragraphs (b) and (c) of this subclause, an employer and an employee may agree to an alternative return to work arrangement such as part-time employment, having regard to:
 - (i) applicable discrimination legislation;
 - (ii) the requirements of the employee;
 - (iii) the operational needs of the employer; and
 - (iv) any other relevant matter.
- (10) Effect of parental leave on employment
Absence on parental leave -
- (a) does not break the continuity of service of an employee; and
 - (b) is not to be taken into account when calculating the period of service for the purpose of this award.
- (11) Sick Leave
Where an employee not then on maternity leave suffers an 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 duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed 52 weeks.
- (12) Transfer to a Safe-Job
Where in the opinion of a duly qualified 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 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 maternity leave for the purposes of this clause.

- (13) Variation of Period of Parental Leave
- (a) Provided the addition does not extend the parental leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days' notice in writing stating the period by which the leave is to be lengthened.
 - (b) The period of 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.
- (14) Cancellation of Parental Leave
- (a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee or the employee's partner, as the case may be, terminates other than by the birth of a living child.
 - (b) Where the pregnancy of an employee or an employee's partner, as the case may be, then on parental leave terminates other than by the birth of a living child, it shall be 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 the employee desires to resume work.
- (15) Special Maternity Leave
- (a) Where the pregnancy of a female employee not then on parental leave terminates after 28 weeks other than by the birth of a living child then:
 - (i) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work; or
 - (ii) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a duly qualified medical practitioner certifies as necessary before her return to work.
 - (b) For the purposes of subclauses (10), (16) and (17) hereof, maternity leave shall include special maternity leave.
 - (c) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to subclause (12), to the position the employee held immediately before such transfer.
Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which the employee 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.
- (16) Parental Leave and Other Leave Entitlements
- Provided the aggregate of leave including leave taken pursuant to subclauses (12) and (15) hereof does not exceed 52 weeks:
- (a) 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 the employee is then entitled.
 - (b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during absence on parental leave.
- (17) Termination of Employment
- (a) An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.
 - (b) An employer shall not terminate the employment of an employee on the ground of the employee's absence on maternity leave or, in the case of a female employee, her pregnancy, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.
- (18) Replacement Employees
- (a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave.
 - (b) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
 - (c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
 - (d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.
 - (e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employee's employment continues beyond the 12 months qualifying period.

43. - NATIONAL TRAINING WAGE

The terms of the federal National Training Wage Award 2000 (as subsequently amended from time to time) apply to this award provided the following clauses and Schedules are excluded –

- Clause 3. - Anti-discrimination
- Clause 4. - Parties Bound
- Clause 6. - Super-session
- Clause 7. - Period of Operation
- Schedule A
- Schedule B

44. - ENTERPRISE FLEXIBILITY

- (1) Employers and employees covered by this award may negotiate and reach agreement to apply to vary any provision of this award so as to make the enterprise or workplace operate more efficiently according to its particular needs.
- (2) Employees may seek advice from, or be represented by, the union during the negotiations for an agreement.

- (3) Where agreement is reached at an enterprise or workplace and where giving effect to such agreement requires this award, as it applies at the enterprise or workplace, to be varied, an application to vary the award shall be made to the Commission.
- (4) A copy of the agreement shall be made available in writing to all employees at the enterprise or workplace and to the union party to this award.
- (5) The union shall not unreasonably oppose the application to vary the award to give effect to the terms of the agreement.
- (6) When this award is varied to give effect to an agreement made pursuant to this clause the variation shall become a schedule to this award and the variation shall take precedence over any provision of this award to the extent of any expressly identified inconsistency.
- (7) The agreement must meet the following requirements to enable the Commission to vary this award to give effect to it:
 - (a) that the purpose of the agreement is to make the enterprise or workplace operate more efficiently according to its particular needs;
 - (b) that the majority of employees covered by the agreement genuinely agree to it;
 - (c) where the union has members at the enterprise or workplace, the union has been given reasonable advice of the intention to negotiate an agreement, provided that this paragraph shall not apply where the employer could not reasonably be expected to have known the union has members at the enterprise or workplace;
 - (d) that the award variation necessitated by the agreement does not in relation to their terms and conditions of employment, disadvantage the employees who would be affected by the variation.
- (8) For the purposes of subclause (7) hereof, an agreement is taken to disadvantage employees in relation to their terms and conditions of employment only if:
 - (a) it would result in the reduction of any entitlements or protection of those employees under:
 - (i) the award; or
 - (ii) any other law of the Commonwealth or State that the Commission thinks relevant; and
 - (b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest.
- (9) Nothing in this clause shall be taken as limiting the right of any party to apply to give effect to an enterprise agreement under any other provisions of the Industrial Relations Act, 1979.

45 - RIGHT OF ENTRY

An authorised representative of the union shall be entitled to exercise right of entry in accordance with the provisions of the Industrial Relations Act 1979 or any other legislation that makes provision for right of entry.

46. - TERMINATION, INTRODUCTION OF CHANGE AND REDUNDANCY

- (1) **Statement of Employment**
An employer shall, in the event of termination of employment, provide upon request to the employee who has been terminated a written statement specifying the period of employment and the classification or type of work and duties performed by the employee.
- (2) **Job Search entitlement**
 - (a) 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. The time off shall be taken at times that are convenient to the employee after consultation with the employer.
 - (b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, 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.
- (3) **Introduction of Change - Employer's Duty to Notify**
 - (a) Where an employer decides to introduce changes in production, program, organisation, structure or technology, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and, if an employee nominates a union to represent him or her, the union nominated by the employee.
 - (b) "Significant effects" includes termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of a job opportunity, a promotion opportunity or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.
- (4) **Employer's Duty to Consult over Change**
 - (a) The employer shall consult the employees affected and, if an employee nominates a union to represent him or her, the union nominated by the employee, about the introduction of the changes, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals), and the ways to avoid or minimise the effects of the changes (e.g. by finding alternate employment).
 - (b) The consultation shall commence as soon as practicable after making the decision referred to in the "Employer's Duty to Notify" clause.
 - (c) For the purpose of such consultation the employer shall provide in writing to the employees concerned and, if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees, and any other matters likely to affect employees, provided that any employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.
- (5) **Redundancy**
 - (a) **Definitions**

“Business” includes trade, process, business or occupation and includes part of any such business.

“Redundancy” occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.

“Transmission” includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and “transmitted” has a corresponding meaning.

“Weeks’ pay” means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:

- (i) overtime;
- (ii) penalty rates;
- (iii) disability allowances;
- (iv) shift allowances;
- (v) special rates;
- (vi) fares and travelling time allowances;
- (vii) bonuses; and
- (viii) any other ancillary payments of a like nature.

(b) Consultation Before Terminations

- (i) Where an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer shall consult the employee directly affected and if an employee nominates a union to represent him or her, the union nominated by the employee.
- (ii) The consultation shall take place as soon as is practicable after the employer has made a decision to which subclause (5)(b)(i) applies and shall cover the reasons for the proposed terminations, measures to avoid or minimise the terminations and/or their adverse affects on the employees concerned.
- (iii) For the purpose of the consultation the employer shall, as soon as practicable, provide in writing to the employees concerned and if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that an employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer’s interests.

(c) Transfer to lower paid duties

- (i) Where an employee is transferred to lower paid duties by reason of redundancy the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if the employee’s employment had been terminated.
- (ii) The employer may, at the employer’s option, make payment in lieu thereof of an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.
- (iii) The amounts must be worked out on the basis of:
 - (aa) the ordinary working hours to be worked by the employee; and
 - (bb) the amounts payable to the employee for the hours including for example, allowances, loading and penalties; and
 - (cc) any other amounts payable under the employee’s contract of employment.

(d) Severance Pay

- (i) In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service: Provided that the entitlement of any employee whose employment terminates on or before 1 February 2006 shall not exceed 8 weeks’ pay.

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks’ pay
2 years and less than 3 years	6 weeks’ pay
3 years and less than 4 years	7 weeks’ pay
4 years and less than 5 years	8 weeks’ pay
5 years and less than 6 years	10 weeks’ pay
6 years and less than 7 years	11 weeks’ pay
7 years and less than 8 years	13 weeks’ pay
8 years and less than 9 years	14 weeks’ pay
9 years and less than 10 years	16 weeks’ pay
10 years and over	12 weeks’ pay

- (ii) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee’s normal retirement date.
- (iii) For the purpose of this clause continuity of service shall not be broken on account of -

- (aa) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding the obligations of this clause in respect of leave of absence;
- (bb) any absence from work on account of leave granted by the employer; or
- (cc) any absence with reasonable cause, proof whereof shall be upon the employee;

Provided that in the calculation of continuous service any time in respect of which any employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.

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) or (4) of the Long Service Leave Provisions published in Part 1 (January) of each volume of the Western Australian Industrial Gazette shall also constitute continuous service for the purpose of this clause.

(e) Employee leaving during notice period

An employee whose employment is terminated by reason of redundancy may terminate his/her employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.

(f) Alternative employment

- (i) An employer, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied if the employer obtains acceptable alternative employment for an employee.
- (ii) This subclause does not apply in circumstances involving transmission of business as set out in subclause (5)(g) of this clause.

(g) Transmission of business

- (i) The provisions of subclause (5) are not applicable where a business is before or after the date of this order, transmitted from an employer (in this subclause called "the transmitter") to another employer (in this subclause called "the transferee"), in any of the following circumstances:
 - (aa) Where the employee accepts employment with the transferee which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service of the employee with the transferee; or
 - (bb) Where the employee rejects an offer of employment with the transferee:
 - (A) in which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmitter; and
 - (B) which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service with the transferee.
- (ii) The Commission may vary 5(g)(i)(bb) if it is satisfied that this provision would operate unfairly in a particular case.

(h) Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in the "Consultation Before Terminations" clause, the employer shall notify Centrelink as soon as possible giving all relevant information about the proposed terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.

(i) Employees exempted

This clause does not apply:

- (i) Where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice.
- (ii) Except for subclause (5)(b), to employees with less than one year's service.
- (iii) Except for subclause (5)(b), to probationary employees.
- (iv) To apprentices.
- (v) To trainees.
- (vi) Except for subclause (5)(b), to employees engaged for a specific period of time or for a specified task or tasks; or
- (vii) To casual employees.

(j) Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, subclause (5)(d) shall not apply to employers who employ less than 15 employees.

(k) Incapacity to pay

An employer or a group of employers, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied on the basis of the employer's incapacity to pay.

47. - ANTI-DISCRIMINATION

- (1) It is the intention of the respondents to this award to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, natural extraction or social origin.
- (2) Accordingly, in fulfilling their obligations under the dispute avoidance and settling clause, the respondents must make every endeavour to ensure that neither the award provisions nor their operation are directly or indirectly discriminatory in their effects.
- (3) Nothing in this clause is taken to affect:
 - (a) any different treatment (or treatment having different effects) which is specifically exempted under the State or Commonwealth anti-discrimination legislation;
 - (b) junior rates of pay;
 - (c) an employee, employer or registered organisation, pursuing matters of discrimination in any State or federal jurisdiction, including by application to the Human Rights and Equal Opportunity Commission;
 - (d) a reason for terminating employment if the reason is based on the inherent requirements of the particular position concerned; or
 - (e) a reason for terminating a person's employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.

48 – RESOLUTION OF DISPUTES.

Subject to the *Industrial Relations Act 1979* (as amended) in the event of a problem, grievance, question, dispute, claim or difficulty that affects one or more employees, or arises from the employees work or contract of employment, the following procedure shall apply:

- (1) At first instance the matter shall be raised at site level with the foreman/supervisor/manager as appropriate.
- (2) In the event that the matter is unresolved it may be raised at the enterprise level by the individual concerned (or his/her representative), or the shop steward or union official involved.
- (3) If the matter is still not resolved it may be referred to the Western Australian Industrial Relations Commission for determination, and if necessary arbitration.
- (4) The parties will attempt to resolve the matter prior to either party referring the matter to the Western Australian Industrial Relations Commission.
- (5) Nothing in this clause shall be read so as to exclude an organisation party to or bound by the award/industrial agreement from representing its members.

49. - FURTHER CLAIMS

- (1) The consent variations made to the award in matters 381 of 1995 and 582 of 1994 do not prejudice either party in respect of any further claim made after 1 July 2003 in relation to the following matters or matters that reasonably relate to those matters –
 - (a) penalty rates for ordinary hours for casuals on week-ends or public holidays; and
 - (b) 'additional rates' for ordinary hours for casuals.
- (2) The parties will not seek to rely on the consent variations as a basis for any future claims of the above matters and any such claim must be established on its merits.
- (3) Further, the parties agree that in any future arbitration of the above matters the onus lies with the party then seeking the variation.

50. - UNION DELEGATES AND MEETINGS

- (1) In an establishment a Union Delegate may be elected by the employees. Such Delegate shall be recognised by the employer, and shall be allowed all necessary time during working hours to submit to the employer industrial matters affecting the employees whom he represents and further shall be allowed reasonable time during working hours to attend to any industrial dispute or industrial matter that may arise affecting the employees in that establishment.
- (2) The Union and an employer may agree to further delegates having regard for the size of the establishment and the shift arrangements for the work performed.
- (3) Prior to the intended dismissal of a Union Delegate, the employer shall notify the union accordingly of the reasons for such dismissal.
- (4)
 - (a) At each employer's establishment the union shall be allowed to convene one "Union Meeting" each year, during ordinary working hours, in accordance with the following conditions:-
 - (i) such meeting shall be held on any day of the week other than a Thursday, Friday or Saturday, Sunday or public holiday;
 - (ii) the duration of such meeting shall not exceed three hours;
 - (iii) the time, date and venue of such meeting shall be agreed between the Union and the employer;
 - (iv) each employee attending the meeting during ordinary rostered working hours, shall be paid for such hours, provided that the employee produces satisfactory evidence of having been in attendance at the meeting to his or her employer.
 - (b) For the purposes of this sub-clause and by agreement between the Union and the employer, the term "Union Meeting", may mean several individual meetings held at different times, dates and venues to discuss the same subject matter provided that an employee shall only be entitled to attend or be paid for attending one (1) meeting each year.
- (5) To avoid doubt, agreement in this clause may not be unreasonably withheld.

51. – SCHOOL CANTEEN WORKERS

- (1) Without limiting the scope of this Award, the provisions of this clause shall only apply to canteen workers employed in government schools.
- (2) This clause shall not apply to canteen workers employed by the Director General of the Department of Education and Training.
- (3) To the extent that the provisions of this clause are inconsistent with the provisions in any other clause of this Award, the provisions of this clause shall prevail.

(4) Definitions**(a) Canteen Worker**

Means an employee who works in a school canteen.

(b) Committee

Means a person or persons delegated with the function of overseeing the management of a school canteen.

(c) Canteen Worker Grade 2

Means a canteen worker who is engaged in any of the following:

- Supplying, dispensing, warming or generally preparing light snack meals;
- Undertaking general serving duties of both food and/or refreshments;
- Maintaining canteen cleanliness;
- Attending a canteen customer service counter;
- Receipt of monies and dispensing change;
- Delivery duties to classrooms, when required.

(d) Canteen Worker Grade 3

Means a canteen worker who coordinates volunteers and a maximum of two other canteen workers who work a combined maximum total of 55 hours per week, and/or in addition to Grade 2 is engaged in any of the following:

- Controls canteen stock (including the weekly receipt, recording and ordering of basic pro forma stock);
- In consultation with Committee coordinates rosters for staff and volunteers;
- In consultation with Committee coordinates and/or prices snack food menus.

(e) Canteen Supervisor Grade 4

Means a canteen worker who supervises volunteers and more than two other canteen employees and/or in addition to Grade 3;

- Manages canteen stock (including responsibility for stock take and budgeted ordering).

- (5) Canteen workers shall commence employment at a level not lower than Food and Beverage Attendant Grade 2.

(6) Part-time Canteen Worker

- (a) A part-time canteen worker shall mean a worker who, subject to the provisions of Clause 8. Hours, regularly works no less than twenty ordinary hours per fortnight nor less than three hours per work period.
- (b) Notwithstanding the provisions of Clause 12. – Part Time Workers and subclause (6)(a) of this clause a worker employed in a canteen may be employed for less than twenty ordinary hours per fortnight but for no less than three hours per day on a regular and rostered basis on set hours of the day and set days of the week.
- (c) A worker employed in a canteen in accord with subclause (6)(b) of this clause and rostered for less than twenty ordinary hours per fortnight shall be paid in accord with Clause 10. – Overtime, for hours worked in excess of such rostered hours.
- (d) Notwithstanding any other provisions of this award, the employer and the worker, other than a worker employed in accord with subclause (6)(b) of this clause may, by agreement, increase the ordinary hours to be worked in any particular pay period to a maximum of seventy-six ordinary hours. Such extra hours shall be paid for at ordinary rates of pay.
- (e) A part-time worker shall receive payment for wages, annual leave, holidays, bereavement leave and sick leave on a pro-rata basis in the same proportion as the number of hours worked each fortnight bears to seventy-six hours.

(7) No Reductions

Nothing contained in this clause shall operate to reduce the wages of any employee who, at the date of insertion of this clause, was being paid a higher rate of wage than the minimum prescribed for their class of work.

24. Appendix – Resolution of Disputes Requirement: Delete this title and appendix.**25. Schedule A – Named Parties: Delete this schedule and insert the following in lieu thereof:**

The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch
 Restaurant and Catering Industry Association of Employers of Western Australia Inc
 Western Australian Hotels and Hospitality Association Incorporated (Union of Employers)

26. Schedule B – Respondents: Delete this schedule and insert the following in lieu thereof:

Frasers Restaurant
 Forum Tea & Coffee Lounge
 San Remo Pizza Parlour
 Chesterton Lodge Catering

Shell Roadhouse Karratha
 Meals on Wheels
 Perth City Council
 The City of Stirling
 Westralian Farmers Co-Op Ltd
 Co-Operative Bulk Handling Ltd
 Peters Ice-Cream (W.A.) Pty Ltd
 Arnott Biscuits Ltd
 The Shell Co. of Australia Ltd
 B.P. Refinery Pty Ltd
 Yule Brook College Parents and Citizens' Association Incorporated
 Fast Eddy's Café

27. **Schedule C – Letter to Employees: Delete this title and schedule.**

28. **Appendix – S.49B – Inspection of Records Requirements: Delete this title and appendix.**

2006 WAIRC 04051

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PUBLIC TRANSPORT AUTHORITY OF WA

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH AND OTHERS

RESPONDENTS

CORAM

COMMISSIONER J H SMITH

DATE

THURSDAY, 23 MARCH 2006

FILE NO/S

APPL 4 OF 2006

CITATION NO.

2006 WAIRC 04051

Result

Award varied

Representation

Applicant

Ms J Bishop and Mr D C McLane

Respondents

Mr G W Ferguson and Mr R Christison

Order

Having heard Ms Bishop and Mr McLane on behalf of the Applicant and Mr Ferguson and Mr Christison on behalf of the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Railway Employees' Award No. 18 of 1969 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 17 March 2006.

[L.S.]

(Sgd.) J H SMITH,
 Commissioner.

SCHEDULE

1. **Delete the entire Award and insert the following in lieu thereof:**

PART 1. - APPLICATION AND OPERATION

1.1. - TITLE

This award shall be known as the "Railway Employees' Award No. 18 of 1969" as amended and consolidated.

1.2. - ARRANGEMENT

Part 1. APPLICATION AND OPERATION

- 1.1 Title
- 1.2 Arrangement
- 1.3 Area and Scope
- 1.4 Term
- 1.5 No Reduction

- 1.6 Introduction of Change
- 1.7 Definitions
- 1.8 Structural Efficiency
- Part 2. CONTRACT OF EMPLOYMENT
 - 2.1 Contract of Employment
 - 2.2 Notice of Termination
 - 2.3 Charges against Employees
 - 2.4 Absence from Duty
 - 2.5 Employee Performing Higher Duties
- Part 3. HOURS OF DUTY
 - 3.1 Traffic Section
 - 3.2 Other than Traffic
 - 3.3 Overtime Traffic Section
 - 3.4 Overtime – Other than Traffic
 - 3.5 Meal and Rest Breaks
 - 3.6 Minimum Time off Duty
 - 3.7 Guaranteed Week
- Part 4. CLASSIFICATION STRUCTURE RATES OF PAY
 - 4.1 Award Classification Structure
 - 4.2 Rates of Pay
 - 4.3 Experience Allowance
 - 4.4 Tool Allowance
 - 4.5 Leading Hand Allowance
 - 4.6 Electrical Licence Allowance
 - 4.7 Apprentices
 - 4.8 Traineeships
 - 4.9 Minimum Wage
 - 4.10 Supported Wage
 - 4.11 Classification Definitions
 - 4.12 Criteria Progression
- Part 5. ALLOWANCES AND FACILITIES
 - 5.1 On Call Allowance
 - 5.2 Signal Technicians Stand By Roster Provisions
 - 5.3 After Hours Contact: Meals and Expenses
 - 5.4 Away from Home and Meal Allowance
 - 5.5 Travelling Time – Other Than Traffic
 - 5.6 Travelling Time – Traffic
 - 5.7 Meal Allowance
 - 5.8 Shift Allowance
 - 5.9 Uniforms, Protective Clothing and Equipment
- Part 6. LEAVE
 - 6.1 Annual Leave
 - 6.2 Public Holidays
 - 6.3 Sick/Carer's Leave
 - 6.4 Bereavement Leave
 - 6.5 Study Leave
 - 6.6 Blood/Plasma Donor Leave
 - 6.7 Emergency Services Leave
 - 6.8 Defence Force Reserves Leave'
 - 6.9 Leave Without Pay
 - 6.10 Parental Leave
 - 6.11 Long Service Leave
 - 6.12 Training
 - 6.13 Leave to Attend Union Business
- Part 7. DISPUTE RESOLUTION PROCEDURE
- Part 8. SUPERANNUATION
- Part 9. NAMED PARTIES TO THE AWARD
- Part 10. REGISTERED ORGANISATION MATTERS
 - 10.1 Facilities for Workplace Delegates
 - 10.2 Right of Entry to Investigate Breaches
- Part 11. WHERE TO GO FOR FURTHER INFORMATION
- Part 12. OTHER LAWS AFFECTING EMPLOYMENT
 - Schedule A
 - Schedule B

1.3. - AREA AND SCOPE

This award shall apply to employees employed by the Public Transport Authority (herein after referred to as "the employer") in and about the working and maintenance of the railways operated by the said employer, and shall not apply to special maintenance, reconstruction or construction works in the Permanent Way, and/or Structure Sections, the estimated cost of which on account of wages exceeds \$50 000.

1.4. - TERM

The currency of this award shall be for one month commencing from and including the date hereof. (Award was delivered on the 25th day of July, 1969)

1.5. - NO REDUCTION

This award shall not operate to reduce the wage of any employee who is at present receiving above the minimum rate prescribed for this class of work.

1.6. - INTRODUCTION OF CHANGE

1.6.1 Employers Duty to Notify

- (a) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch; (CEPU) and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch (AMWU).
- (b) “Significant Effects” include termination of employment, major changes in the composition, operation or size of the employers workforce or in the skills required, the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

1.6.2 Employer’s Duty to Discuss Change

The employer shall discuss with the employees affected and their union/s, the introduction of the changes referred to in the sub-clause (1.6.1) hereof, the effects the changes are likely to have on employees, measure to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by employees and/or their union in relation to changes.

1.6.3 The discussion shall commence as early as reasonably practicable after a firm decision has been made by the employer to make changes referred to in sub-clause 1.6.1.

1.6.4 For the purposes of such discussion, the employer shall provide to the employees concerned and their union/s, all relevant information about the changes proposed; the expected effects of the changes on employees and any other matters likely to affect employees, provided that any employer shall not be required to disclose confidential information that may harm the employer’s business undertaking or the employer’s interest in carrying on, or disposition, of the business undertaking.

1.7. - DEFINITIONS

“Union” means - The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch and /or The Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch (CEPU) and/or The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch (AMWU).

“Employer” means – The Public Transport Authority (PTA) or its successor.

“WAIRC” means – Western Australian Industrial Relations Commission.

“Head of Branch” means – a General Manager of the Network and Infrastructure Division, General Manager of the Transperth Train Operations Division, and/or an Executive Director employed by the Public Transport Authority.

“Traffic Section” means – wage employees employed in classifications covered by this award in Transperth Train Operations excluding employees in Network and Infrastructure Division and tradespersons in all branches.

“Other than Traffic Section” means – all wage employees in classifications covered by this award employed in Network and Infrastructure Division.

1.8. - STRUCTURAL EFFICIENCY

1.8.1 The parties to this award are committed to co-operating positively to increase the efficiency, productivity and organisational competitiveness of the rail industry and to enhance career opportunities and job security of employees, with regard to the quality of working life including the need to enhance skills and job satisfaction. Award restructuring and structural efficiency principle measures shall not be used as a vehicle for job shedding.

1.8.2 Measures raised for consideration consistent with this clause shall be related to implementation of the new classification structure, the facilitative provisions contained in this award and, subject to other provisions of this Award, matters concerning training.

PART 2. - CONTRACT OF EMPLOYMENT2.1. - CONTRACT OF EMPLOYMENT

2.1.1 Commencement

- (a) The employer shall advise each employee, prior to the time of engagement, if they are to be employed as a permanent full time, permanent part-time, fixed term or casual employee.
- (b) Prior to engagement, an employee shall be notified by the employer whether the duration of employment is expected to exceed one month and if hired as a casual shall be advised in accordance with Clause 2.1.5.
- (c) Advise such employee that employment will be subject to the provisions of statutory and employer rules, regulations and policies, as amended from time to time.

2.1.2 Probation

- (a) A new employee’s appointment to a position in the Public Transport Authority will be subject to a probationary period of three months which may be extended another three months provided that prior to the expiration of the initial period of probation the employee was informed which areas of performance have to be improved.
- (b) Subject to satisfactory performance an employee’s appointment will be confirmed at the conclusion of the probationary period.

(c) During the probation period, if the employee’s performance is not satisfactory, the employer may terminate the contract of employment by giving the employee one-week notice or payment in lieu of notice.

2.1.3 Full Time Employee

An employee engaged for a minimum of thirty-eight (38) ordinary hours per week worked on any day Monday –Saturday –(Traffic section) or Monday to Friday –(Other Than Traffic) as the case may be.

2.1.4 Part Time Employee

An employee engaged for a minimum of fifteen-(15) hours up to a maximum of thirty-eight –(38) ordinary hours per week; worked on any day Monday to Saturday –(Traffic section) or Monday to Friday –(Other Than Traffic) and shall be entitled to all the conditions of employment as a full time employee on a pro rata basis.

2.1.5 Casual Employee

- (a) An employee who is engaged for less than one (1) week continuously, provided that this shall not include an employee who, when work is available, leaves their employment before the expiry of one week.
- (b) A casual is engaged by the hour and paid as such and has no entitlements to paid leave, except bereavement leave and who is informed of these conditions of employment before they are engaged.
- (c) The service of a casual employee may be terminated by one (1) hour’s notice, given by either side, on any day.
- (d) A casual employee shall be paid the ordinary rate prescribed for the classification of work performed with the addition of twenty percent (20%).

2.2. - NOTICE OF TERMINATION

2.2.1 Notice Periods

- (a) The employment of any employee (other than a casual employee) may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of serious misconduct in which case the employee shall be paid up to the time of dismissal.
- (b) The period of notice shall not apply to employees engaged for a specific period of time or for a specific tasks or tasks.

Employee’s Period of Continuous Service with the Employer	Period of Notice
Not more than six (6) months	At least one (1) week
More than six-(6) months but not more than (3) years	At least two (2) weeks
More than three (3) years but not more than five (5) years	At least three (3) weeks
More five (5) years	At least four (4) weeks

(c) An employee who at the time of being given notice is over forty five (45) years of age and has completed two (2) years’ continuous service with the employer shall be entitled to one (1) weeks additional notice.

2.2.2 Payment in lieu of notice prescribed in sub clause 2.2.1 shall be made if appropriate notice period is not given. The employment may be terminated by part of the period specified and part payment in lieu thereof.

2.2.3 In calculating any payment in lieu of the notice the employer shall pay the employee the ordinary wages for the period of notice had the employment not been terminated.

2.2.4 The period of notice an employee must give to their employer, is the same as applies to the employer, except the extra week for being forty- five (45) years of age; provided the employer and the employee may agree to a shorter period of notice.

2.2.5 If the required notice is not given, either by the employer or the employee, the wages for that period shall be either paid by the employer or forfeited by the employee for the period (as the case may be) in lieu of the notice.

2.2.6 Where an employer has given notice of termination to an employee, an employee shall be allowed up to one day’s time off without loss of pay for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

2.3. - CHARGES AGAINST EMPLOYEES

2.3.1 If in the opinion of the officer in charge, any irregularity on the part of any employee should be reported, the officer in charge will within seven days (or, if not the main depot or station then within 10 days) from the officer in charges first knowledge of the occurrence notify such employee that the employee has been so reported.

2.3.2 When a charge has been made against any employee, the employee shall be supplied with a copy of such charge and a copy of any report other than reports to the head of the branch, which is to be used in relation to such charge.

2.3.4 Each employee shall provide, when called upon, with the least possible delay, any report or statement, which may be required by the officer in charge.

2.3.5 When an employee against whom a charge is pending has made a statement to an officer in charge, and which statement the officer in charge has taken down in writing, such employee shall either be furnished with a copy of such statement, or be allowed to take a copy of it.

2.3.6 If a final decision in any case in which a charge has been made against an employee be not given within three –(3) calendar months of the occurrence first coming to the knowledge of the head of Branch or within fourteen –(14) days of the final determination of any charge relating to the occurrence brought against any employee by any person other than the employer (which ever is the later), the charge in question shall lapse.

2.3.7 An employee who is suspended from duty for any reason shall not be kept under suspension in excess of six days (excluding Sundays and holidays) following the date on which the employee was suspended. Except in cases where dismissal follows suspension, an employee shall be paid for any time under suspension in excess of six days referred to, provided the employee has not delayed the submission of the explanation of the offence for which the employee was suspended.

2.3.7 Where an employee exercises a right of appeal no deduction shall be made from the employees wages in respect of any fine until a final decision has been given.

2.3.8 Where an employee has been fined an amount exceeding one day’s pay, the amount deducted from any fortnights pay shall not be greater than one day’s pay except with the consent of the employee concerned.

- 2.3.9 Where, owing to the absence from duty of an employee through leave or illness, it is not possible to notify the employee within the period prescribed in sub-clause 2.3.1 that such employee has been reported, the provision shall be regarded as having been complied with if the employee is so notified within seven days of resuming duty following such absence. In such cases, the period in which a final decision, as per sub-clause 2.3.5 may be made shall be extended to three calendar months from the date of the employee's resumption of duty following the absence.

2.4. - ABSENCE FROM DUTY

- 2.4.1 An employee, being unable to attend for duty through illness, shall notify the officer in charge as soon as is reasonably possible to permit alternative arrangements to cover the employee's absence. Any such employee who fails to do so shall be treated as absent without leave.
- 2.4.2 Any such employee who has notified an absence in accordance with sub clause 2.4.1, shall not again be booked up for duty unless the employee notifies the officer in charge not later than 1200 hours on any day that such employee is fit to resume, and in such case there shall be no obligation to employ the employee until the following working day. An employee who books off duty on afternoon shift who reports for duty before 1000 hours on the following day shall be provided with work on that day.

2.5. - EMPLOYEE PERFORMING HIGHER DUTIES

- 2.5.1 An employee performing duties attracting a higher rate of pay than the employee's ordinary classification shall be paid the higher rate for the time the employee is so engaged, but if so engaged for more than two (2) hours of one day or shift, the employee shall be paid the higher hourly rate of pay for the whole day or shift.
- 2.5.2 Provided however that acting time of less than twenty minutes in any one-day or shift shall not be counted, provided further that the conditions applicable to such higher duties shall apply.
- 2.5.3 Should any employee be required to perform duties in a lower grade, the employee's weekly rate of pay shall not be reduced whilst employed in such capacity.

PART 3. - HOURS OF DUTY

3.1. - TRAFFIC SECTION

- 3.1.1 The ordinary hours of employment shall be thirty – eight –(38) hours per week, and shall be worked between 6.00am and 6.00pm on any five days Monday to Saturday inclusive.
- 3.1.2 The employer may, if the employer so desires, work any part of its business on shift work in accordance with Clause 5.8 – Shift and Night Work Allowances, and such hours will be deemed to be ordinary hours for the purposes of the weeks guarantee.
- 3.1.3
- (a) Where an employee is called upon to work on the employees rostered day off shown on the roster the employee shall be paid at the overtime rates prescribed under this award for work performed on that day and double time if the rostered day off falls on a Saturday.
 - (b) Where an employee's rostered day off shown on the roster is altered and an alternative day substituted as the rostered day off so that the employee is required to work on the first day first shown as the rostered day off as part of the ordinary hours of work the employee shall be paid at over-time rates prescribed under this award for such work unless given at least twenty- four (24) hours notice of the alteration.
 - (c) Employees shall not be rostered for duty within 24 hours of booking off or before 0600 hours the day following their rostered day off, whichever is the earlier, and if called upon to commence a shift before such time has elapsed that shift shall be deemed to have been worked on their rostered day off.
 - (d) Where such employees work a continuous shift – Sunday into Monday – such, unless it extends into four hours on Monday will not be counted as one of the five-week day shifts.

3.2. - OTHER THAN TRAFFIC SECTION

- 3.2.1 The ordinary hours of employment shall be thirty-eight –(38) hours per week, and shall be worked continuously except for meal breaks between 6.00am and 6.00pm Monday to Friday inclusive.
- 3.2.2 Notwithstanding the provisions of sub-clause 3.2.1 the thirty eight (38) hour week nine day fortnight shall be arranged as per the order of the WAIRC arising from C1304 of 1988, attached at schedule "B".
- 3.2.3 Provided that:
- (a) the actual ordinary hours of work shall be determined by agreement between the employer and the majority of employees in the plant or work section or sections concerned; and
 - (b) Provided further that work prior to the spread of hours fixed in accordance with this sub clause for which overtime rates are payable shall be deemed for the purpose of this sub clause to be part of the ordinary hours of work.

3.2.4 Call out Payments

An employee "called out" for an emergency on the rostered day off, shall be paid in accordance with the overtime provisions for working on a day normally rostered off duty.

3.2.5 Leave and Public Holidays

- (a) An employee on a rostered day off will not be entitled to claim either sick leave or compassionate leave for that day.
- (b) Where a public holiday falls on a rostered day off, the preceding or following working day as determined by the employer shall be observed in lieu of the rostered day off.
- (c) A paid holiday or a day cleared in lieu of work on such day shall be the usual rostered hours of 7.6 hours, 8 hours or 8.5 hours as the case may be as provided in this clause.

3.3. - TRAFFIC SECTION OVERTIME PAYMENTS

3.3.1 Public Holidays

- (a) Employees required to work on a Public Holiday shall be paid for all time worked at the rate of time and a half for the first 7.6) hours worked on any shift on that day and at the rate of double time and a half for all time

worked in excess of 7.6 hours on any shift in lieu of all other penalties which may be payable for work on that day under this award, provided that a minimum payment of four –(4) hours shall be paid to the employee concerned.

- (b) In addition to payment described in 3.3.1-(a) an employee required to work on a Public Holiday shall be paid a further 7.6 hours, provided that the employee may elect in lieu of being paid for that 7.6 hours, to be granted a day's holiday with pay which may be cleared with the annual leave or taken at some subsequent date when the employee so agrees.

3.3.2 Sunday and Saturday

- (a) All time worked on a Sunday shall be paid at the rate of double time, provided that a minimum payment of four –(4) hours shall apply.
- (b) When Saturday is an additional shift all time worked will be paid at double time, provided that a minimum payment of four –(4) hours shall apply.
- (c) Ordinary time worked on Saturday by shift employees shall be paid at a rate of an additional fifty –(50%) percent loading in addition to the employee's hourly rate.
- (d) Where an employee works a continuous shift Sunday into Monday, such shift, unless it extends into four hours on Monday, will not be counted as one of the five shifts.
- (e) No employee shall be brought on duty on a Sunday for less than four –(4) hours.

3.3.3 Weekly - Overtime

- (a) All time (exclusive of Sunday time) worked in excess of 38 hours in any one week shall be paid at the rate of time and a half.
- (b) All time worked in excess of 7.6 hours or 8 hours as the case may be in any one of the first five shifts in a week shall be paid for at the rate of time and one half for the first three hours and double time thereafter, provided that all time paid at the rate of double time shall stand alone and be paid for in addition to the week's work.
- (c) The overtime rates shall be computed on the rate applicable to the day on which the overtime is worked provided that double time shall be the maximum.

3.3.4 Reasonable Overtime Provisions

- (a) Subject to the provisions of this Award, the employer may require any employee to work reasonable overtime at the overtime rates and such worker shall work overtime in accordance with such requirement.
- (b) No organisation party to this award or employee or employees covered by this award shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements set out in (a) hereof.

3.4. - OTHER THAN TRAFFIC

3.4.1 Public Holidays

- (a) Employees required to work on a Public Holiday shall be paid for all time worked at the rate of time and a half for the first eight –(8) hours worked on any shift on that day and at the rate of double time and a half for all time worked in excess of eight hours on any shift in lieu of all other penalties which may be payable for work on that day under this award, provided that a minimum payment of four –(4) hours shall be paid to the employee concerned.
- (b) In addition to payment described in 3.4.1-(a) an employee required to work on a Public Holiday shall be paid a further eight hours, provided that the employee may elect in lieu of being paid for that eight hours, to be granted a day's holiday with pay which may be cleared with the annual leave or taken at some subsequent date when the employee so agrees.

3.4.2 Sunday and Saturday

- (a) All time worked on a Sunday shall be paid at the rate of double time, provided that a minimum payment of four –(4) hours shall apply.
- (b) All time worked on Saturday by an employee shall be paid at a rate of time and a half, for the first two hours and double time thereafter. Provided that a minimum payment of four –(4) hours shall apply.
- (c) Where an employee works a continuous shift Sunday into Monday, such shift, unless it extends into four hours on Monday, will not be counted as one of the five shifts.
- (d) No employee shall be brought on duty on a Saturday or Sunday for less than four –(4) hours, but shall not be required to work for the four hours if the work does not last that period: Provided further that if the employee is again called out for duty within the first period of four hours the employee shall not receive further payment until the expiration of the first four hours when payment shall be made at the appropriate rate for all time worked with a minimum of four hours.

3.4.3 Calculation of Overtime

- (a) All time (exclusive of Sunday time) worked in excess of or outside of the usual working hours in any one day shall be paid at the rate of time and a half for the first two hours and thereafter double time.
- (b) Extra rates shall be computed on the rate applicable to the day on which the time is worked. Provided that double time ie twice the ordinary rate shall be the maximum.
- (c) Time worked on Sundays shall be paid for at the rate of double time.
- (d) Any employee brought on to work outside ordinary working hours shall, except when such work, exclusive of meal time, is continuous with the ordinary shift, be paid a minimum of three hours at the rate applicable to the day: Provided that the employee shall not be obliged to work for three hours if the work required has been completed in less time.

3.4.4 Reasonable Overtime Provisions

- (a) Subject to the provisions of this Award, the employer may require any employee to work reasonable overtime at the overtime rates and such employee shall work overtime in accordance with such requirement.

- (b) No organisation party to this award or employee or employees covered by this award shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements set out in (a) hereof.

3.5. - MEAL AND REST BREAKS

- 3.5.1 An employee shall not be permitted to continue work longer than five –(5) hours without taking a meal break of at least thirty –(30) minutes, provided that such break is not taken before the third hour of duty; and
- 3.5.2 An employee who, for operational reasons as determined by the employer, may require an employee to work longer than five –(5) hours without a meal break. In such circumstances the employee will be paid at double time rates until such meal break time is made available to the employee concerned and/or up to the conclusion of the employee's rostered hours for the day.

3.6. - MINIMUM TIME OFF DUTY

- 3.6.1 An employee shall be allowed off duty for a minimum of ten hours, except as provided hereunder.
- 3.6.2 When an employee is brought on duty without the prescribed period of rest, such employee shall be paid continuous duty as from the time the employee booked on the previous shift for which the employee had less than the stipulated rest period. This shall not apply where the time by which the rest period falls short of the prescribed time does not exceed sixty- (60) minutes, in which case the employee shall be paid at the double rate for the time between the actual rest period and the minimum period of the rest prescribed in this Award.
- 3.6.3 No employee shall be called or booked up for duty without having the prescribed period of rest while there is another qualified employee available who has had the prescribed rest.

3.7. - GUARANTEED WEEK

- 3.7.1 Subject to the provisions of this clause the employer shall guarantee to each employee, other than a casual, a full week's work, exclusive of Sunday time.
- 3.7.2 The employer shall guarantee part time employees with a guarantee weeks work in accordance with the minimum hours prescribed in Clause 2.1.4 and/ or the rostered ordinary hours as posted on the roster, whichever is the greater.
- 3.7.3 Notwithstanding anything elsewhere contained in this award and notwithstanding any implications arising in the provisions of Section 73 of the Government Railways Act 1904, as amended from time to time, the guaranteed week may be reduced as follows: the employer shall be entitled to deduct payment for any day, or portion of a day, upon which an employee cannot be usefully employed because of any strike or to deduct payment for any day upon which an employee cannot be usefully employed for any cause beyond the employer's control whereby the employer is unable to carry on either wholly or partially the complete running of trains, services or other normal operations.
- 3.7.4 Provided that an employee, who cannot be usefully employed because of any strike and who is required to report for duty on any day and does so report shall be paid a minimum of four hours at ordinary rates;
- 3.7.5 Provided further that an employee stood down in accordance with this paragraph may elect to be paid accrued annual leave entitlements for time stood down.
- 3.7.6 An employee stood down in accordance with the provisions of this clause, shall not lose any sick leave credit or other privileges to which such employee would ordinarily be entitled under this award provided that employee resumes work within a reasonable time of being so required after such stand down. Provided further that this provision does not entitle an employee to payment for any holiday occurring during period of stand-down
- 3.7.7 The employer shall not stand down an employee who is working away from the employee's home station or depot until the employee is returned to that station or depot.
- 3.7.8 The guaranteed week's work may also be reduced as follows:
- (a) In respect of any employee under suspension, provided that any employee suspended on a charge which is not sustained shall be entitled to the benefit of the guarantee during the period of suspension;
- (b) In respect of any day an employee is absent except through sickness or other form of approved leave.

PART 4. - CLASSIFICATION STRUCTURE RATES OF PAY

4.1. - AWARD CLASSIFICATION STRUCTURE

- 4.1.1 The REA classification structure is based on the following criteria:
- (a) job requirements as defined by role, responsibilities, indicative tasks and qualifications for each position;
- (b) AQF training and competency levels required; and
- (c) relativities with metal trades award classifications.
- 4.1.2 The following table summarises Railway Employees Award classifications.

REA Level	RELATIVITY	NETWORK & INFRASTRUCTURE	TRANSPERTH TRAIN OPERATIONS
		OTHER THAN TRAFFIC	TRAFFIC
Level 10	135%	Integrated Systems Technician; Engineering Associate	
Level 9	130%	Electrical Systems Technician; Senior Engineering Technician	
Level 8	125%	Systems Technician; Technician: Data, Radio, Security, Communication Systems	

REA Level	RELATIVITY	NETWORK & INFRASTRUCTURE	TRANSPERTH TRAIN OPERATIONS
		OTHER THAN TRAFFIC	TRAFFIC
Level 7	115%	Perway Patroller; Supervisory/specialized electrical trades; Supervisory/specialized mechanical trades; Engineering Technician; Signals Technician	Transit Guard Team Leader
Level 6	110%	Advanced Maintainer (Systems); Perway Patroller; Signal Fitter/Senior Mech. Tradesperson; Electrical Technician; Electrical Fitter/Senior Tradesperson	Control Monitoring Room (CMR) Operator
Level 5	105%	Senior Maintainer (Systems); Senior Maintainer (Civil); Mechanical Fitter/Tradesperson; Electrical Fitter/Tradesperson	Customer Service Assistant; Transit Guard
Level 4 (tradesperson*** or equivalent entry level)	100%	Maintainer (Systems); Maintainer (Civil); Perway Patroller; Mechanical Tradesperson/Fitter; Electrical Tradesperson/Fitter	Suburban Rail Ticketing Assistant
Level 3A	96.9%	Maintainer (Signals)	
Level 3	93.6%	Maintainer (Systems); Maintainer (Civil)	Suburban Rail (Station) Attendant; Carpark Attendant; Depot Surveillance Attendant
Level 2	89.01%	Maintainer (Systems); Maintainer (Civil)	Suburban Rail Attendant
Level 1 (non-trade entry)	84.2%	Maintainer (Systems)*; Maintainer (Civil)**	Suburban Rail Attendant Trainee

*Maintainer (Systems) includes Signalling, Overhead Catenary and/or Communications unless otherwise specified.

**Maintainer (Civil) includes Reserve, Track and/or Landscape unless otherwise specified, and may include Perway if specified.

4.2. - RATES OF PAY

The rates of pay in this award include arbitrated safety net adjustments since December 1993, under the Arbitrated Safety Net Adjustment Principle. These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement. Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

REA	Previous Rate	2005 Flat Hourly	2005 Weekly Wage
Level 10	747.60	\$ 23.10	\$ 877.85
Level 9	725.80	\$ 22.25	\$ 845.60
Level 8	704.00	\$ 21.39	\$ 812.95
Level 7	660.40	\$ 19.67	\$ 747.27
Level 6	638.60	\$ 18.84	\$ 715.81
Level 5	618.80	\$ 18.15	\$ 689.85
Level 4	597.00	\$ 17.33	\$ 658.38
Level 3A	583.50	\$ 16.82	\$ 639.11
Level 3	567.10	\$ 16.27	\$ 618.27
Level 2	547.10	\$ 15.53	\$ 589.95
Level 1	526.10	\$ 14.70	\$ 558.49

4.3. - EXPERIENCE ALLOWANCE

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - \$ 4.91

After 24 months service with the employer - \$9.83

4.4. - TOOL ALLOWANCE

4.4.1 All tradespersons shall be paid a tool allowance in accordance with the following provisions:

- (a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:

\$12.26 per week to such tradesperson/apprentice

This allowance is paid for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice:

- (b) Any tool allowance paid pursuant to paragraph (a) of this sub clause shall be included in, and form part of, the ordinary base wage for all purposes.
- (c) The employer shall provide for the use of tradesperson or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through the employee's negligence.

4.5. - LEADING HANDS

Leading Hands shall be paid the following rate per week:

- (a) Class 3
When in charge of not less than three and not more than ten others, paid extra per week 22.47
- (b) Class 2
When in charge of more than 10 but fewer than twenty others, paid extra per week 33.93
- (c) Class 1
When in charge of more than twenty others, a leading hand shall be paid extra per week 43.58

4.6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of \$16.12 per week.

4.7. - APPRENTICES

The weekly wage rate shall be a percentage of the tradesperson's rate as under:

	%	TOTAL RATE
FIVE YEAR TERM:		
First Year	40	
Second Year	48	
Third Year	55	
Fourth Year	75	
Fifth Year	88	
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 following year	75	
Final Year	88	
THREE YEAR TERM:		
First Year	55	
Second Year	75	
Third Year	88	

NOTE: The rates above are calculated on the REA L4 tradesperson rate listed in Clause 4.2.

For the purpose of this part "tradesperson's rate" means the rate of pay payable to a fitter under the Engineering Trades (Government) Award numbered 29, 30 and 31 of 1961 and 3 of 1962 as amended.

4.8. - TRAINEESHIPS

The wages applicable to trainees while undergoing training shall be no less than as prescribed in the National Training Wage Award 2000 for employees up to and including 20 years of age. Adult trainees will be paid no less than the rate prescribed under the Minimum Conditions of Employment Act 1993 for the minimum weekly rate of pay for employees 21 years or older.

4.9. - MINIMUM WAGE:

- 4.9.1 No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.
- 4.9.2 The Minimum Adult Award Wage for full time adult employees is \$484.40 per week payable on and from 7th July 2005.

- 4.9.3 The Minimum Adult Award Wage of \$484.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.
- 4.9.4 Unless otherwise provided in this clause adults employed as casuals, part time employees or piece employees or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.
- 4.9.5 Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the Minimum Adult Award Wage of \$484.40 per week.
- 4.9.6 (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.
- (b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.
- 4.9.7 Subject to this clause the Minimum Adult Award Wage shall:
- (a) apply to all work in ordinary hours.
- (b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.
- 4.9.8 Minimum Adult Award Wage
- (a) The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2005 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum adult award wage.
- (b) Adult Apprentices
- (i) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than \$406.70 per week.
- (ii) The rate paid at paragraph (i) above is payable on superannuation and during any period of paid leave prescribed by this Award.
- (iii) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of the apprenticeship.
- (iv) Nothing in this sub-clause shall operate to reduce the rate of pay fixed by this Award for an adult apprentice in force immediately prior to 5th June 2003.

4.10. - SUPPORTED WAGE

- 4.10.1 This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:
- (a) 'Supported Wage System' means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability as documented in "[Supported Wages System: Guidelines and Assessment Process]".
- (b) 'Accredited Assessor' means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
- (c) 'Disability Support Pension' means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.
- (d) 'Assessment instrument' means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.
- 4.10.2 Eligibility Criteria
- Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension. (The clause does not apply to any existing employee who has a claim against the employer that is subject to the provisions of employees' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment).
- The clause also does not apply to employers in respect of their facility, programme, undertaking, services or the like which receives funding under the Disability Services Act 1988 and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s10 or s12A of the Act, or if a part has received recognition, that part.
- 4.10.3 Supported Wage Rates
- Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:

Assessed Capacity (subclause 4)	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than \$56.00 per week).* Where a person's assessed capacity is 10%, they shall receive a high degree of assistance and support.

4.10.4 Assessment of Capacity

For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

- (a) The employer and the union in consultation with the employee or, if desired by any of these; or
- (b) The employer and an accredited Assessor from a panel agreed by the parties to the Award and the employee.

4.10.5 Lodgement of Assessment Instrument

- (a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Western Australian Industrial Relations Commission.
- (b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within ten (10) working days.

4.10.6 Review of Assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

4.10.7 Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this Award paid on a pro-rata basis.

4.10.8 Workplace Adjustment

An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the area.

4.10.9 Trial Period

- (a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.
- (b) During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
- (c) The minimum amount payable to the employee during the trial period shall be no less than \$56.00 per week; or, in the case of paid rates award, the amount payable to the employee during the trial period shall be \$56.00 per week or such greater amount as is agreed from time to time between the parties.
- (d) Work trials should include induction or training as appropriate to the job being trialled.
- (e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (4) of this clause.

4.11. - CLASSIFICATION DEFINITIONS

The classification definitions under this Award are as follows:

4.11.1 (a) Traffic – Transperth Train Operations

REA LEVEL ONE

SUBURBAN RAIL ATTENDANT L1 (TRAINEE)

Key Responsibilities:

To assist in the provision of quality service to passengers by ensuring a high standard of presentation on railway platform and associated facilities, while learning about other aspects of passenger service.

Indicative Tasks:

- Cleaning tasks in relation to railway facilities, equipment or vehicles.

- Report damage or maintenance needs.
- Attend induction-training courses as required.
- Provides basic passenger assistance eg train information; loading; and unloading luggage.
- Undergo training at AQF Level 1 or equivalent.

Qualifications:

Track Access

C Class Driver's Licence

REA LEVEL TWO

SUBURBAN RAIL ATTENDANT L2

Key Responsibilities:

Assist in providing quality service to passengers by ensuring a high standard of presentation of railway station facilities and equipment.

Indicative Tasks:

- Monitor platforms and facilities at stations to ensure area and associated equipment are kept clean, tidy, well-presented and in good working order.
- Report damage or maintenance needs to appropriate personnel.
- Minor manual or machine assisted tasks (eg specific cleaning, tidying or similar duties) for maintaining tidy and orderly presentation of station facilities and equipment.
- Keeping records or basic documentation (eg relating to lost property).
- Assist L3 attendants as required.
- Undergo training at AQF Level 2 or equivalent.

Qualifications:

AQF level 1 or equivalent

Track Access

C Class Driver's Licence

REA LEVEL THREE

SUBURBAN RAIL (STATION) ATTENDANT L3

Key Responsibilities:

To assist in the provision of quality service to passengers by ensuring high standards of presentation of railway station facilities, equipment and surrounds and assisting passengers on station platforms.

Indicative Tasks:

- Monitor station platforms, buildings, equipment and facilities to ensure these are kept in a clean and tidy, safe and well presented condition.
- Perform manual and machine assisted tasks in relation to monitoring and maintenance of station facilities and equipment – including operating tools or equipment that are ancillary to this role eg fare-gates.
- Provide information and other assistance to passengers where practicable, including responding to customer complaints or problems, and routine PA announcements if required.
- Random surveillance of railway property and reporting of any unusual activities.
- Report damage or theft of railway property, urgent repair needs, vandalism, etc, in relation to platform facilities or equipment.
- Report complaints, issues or security incidents as required including fare evasion.
- Undergo training at AQF Level 3.

Qualifications:

AQF level 2 or equivalent

Track Access

C Class Driver's Licence

CARPARK ATTENDANT L3

Key Responsibilities:

Monitor and maintain car-park security and deliver associated customer service; including issuing infringements for breaches of parking by laws.

Indicative Tasks:

- General non-trade tasks appropriate to customer service & security role.
- Patrol and monitor allocated car parks for security related matters.
- Respond to security incidents within the car park and render first aid if required.
- Monitor CCTV security monitoring systems.
- Security reports of mishaps, incidents and malfunctioning equipment, damaged machines, vandalism, graffiti, cleaning requirements and infrastructure damage.
- Issue parking infringements.
- Use base radio and other equipment as needed.
- Light vehicle driving.
- Ensure car-park environment is secure, clean and tidy.
- Undergo training at AQF Level 3 or equivalent enterprise specific skills.

Qualifications:

AQF level 2 or equivalent
 First Aid
 C Class Driver's Licence

DEPOT SURVEILLANCE ATTENDANT L3

Key Responsibilities:

Monitor surveillance of railcars, buildings and other property within the depot.
 Assist in the provision of a quality customer service to passengers

Indicative Tasks:

- Surveillance of railcars, buildings/ facilities within depot & report unusual incidents.
- Arrange appropriate action on damage reports.
- Remove and replace videotapes from railcars daily.
- In an emergency ie operational/evacuation, liaise with Train Control and Emergency Services; and provide ground base safe working and customer service support.
- Assist in the provision of passenger security on the Suburban Rail System.
- Carry out motor vehicle driving duties as required.
- Performs general non-trade tasks appropriate to surveillance role.
- Undertake training at AQF Level 3 or equivalent.

Qualifications:

AQF level 2 or equivalent
 Track Access
 C Class Driver's Licence

REA LEVEL FOURSUBURBAN RAIL TICKETING ASSISTANT L4

Key Responsibilities:

To assist in the provision of quality services to passengers by:

- Monitoring equipment and facilities at railway stations and reporting malfunctions and vandalism.
- Providing basic information and assistance to passengers for entry, exit and ticket enquiries.
- Providing members of the public with basic information regarding train tickets.

Indicative Tasks:

- Monitor and assist public with access to and from stations and use of facilities- (fare gates, control booths).
- Report damage, vandalism, graffiti, misuse or malfunctions relating station facilities and equipment.
- Submit reports on urgent cleaning, maintenance or repair requirements.
- Ensure railway platforms & facilities are clean, well-presented & secure.
- Use relevant equipment and machinery on platforms as required to control access to exit/entry points.
- Maintain a physical presence and point of assistance for members of the public seeking access to stations, platforms and facilities, eg viewing tickets at station exit and entry points on platforms.
- Assist members of the public with basic ticket enquiries, directions or information to the extent of skills and training required at this level.
- Call for security staff or other personnel as required to deal with non-routine issues eg fare evasion, first aid emergencies, vandalism etc.
- Maintain surveillance of railway property and equipment, and report any unusual activities to security personnel.
- Undergo related enterprise specific training at this level.

Qualifications:

AQF level 3 or equivalent
 Track Access
 First Aid
 C Class Driver's Licence

REA LEVEL FIVECUSTOMER SERVICE ASSISTANT L5

Key Responsibilities:

To provide quality service to passengers by ensuring a high standard of presentation of facilities at stations; offering a wide range of assistance to passengers; assisting in the provision of a pleasant and secure environment for travel.

Indicative Tasks:

- Carry out frequent inspections of all stations in the group with respect to cleanliness; equipment serviceability; condition of buildings, fixtures and platform surfaces and as appropriate the cleanliness and condition of pedestrian mazes/ footpaths, footbridges, subways, car parks and bus interchange facilities.
- Report maintenance or work required to relevant personnel.
- Post/remove notices as required.
- Lock/unlock passenger facilities as necessary.

- Provide physical assistance and/or advice to passengers.
- Assist passengers with ticketing problems as required.
- Provide travel information to passengers.
- Observe passenger behaviour and take appropriate action including actions in relation to fare evasion and revenue protection.
- Monitor bus/train integration at interchanges, stations, reporting problems/actions taken.
- Supervise group travel passengers.
- Assist passengers entraining and detraining.
- Observe passenger behaviour and take appropriate actions required to maintain safety and security at stations and in adjoining areas.
- Assist in maintaining tidy condition of railcars on traffic – remove litter as far as practicable and notify driver of any other servicing requirements.
- In emergency, co-operate with driver and emergency personnel as required.
- Carry out safeworking and/or other duties for which qualified.
- Carry out cannas counts.
- Perform random surveillance of railway property and report any unusual activities.
- By manner and personal presentation promote high quality service to passengers.
- Drive motor vehicles as required.
- Undergo training as required.

Qualifications:

AQF level 3 or equivalent

Plus 1-2 units of competency at AQF Level 4 or agreed equivalent knowledge

Track Access and Safe working qualifications

C Class Driver's Licence

TRANSIT GUARD L5

Key Responsibilities:

To provide quality service and security for travelling public at stations and on trains; offering assistance to passengers and staff to ensure provision of a pleasant and secure environment for the travelling public; provide security function, physical assistance and/or customer service advice to passengers

Indicative Tasks:

- Inspect passengers' tickets and issue infringements for fare evasion.
- Provide customer service, information and assistance to passengers, including ticket advice.
- By manner and personal presentation promote the concept of high quality service to passengers.
- Carry out safeworking and/or other duties for which qualified when requested to do so.
- Undertake surveillance of railway property and report any unusual activities.
- Circulate on trains and stations as directed to ensure safe, secure environment for Passengers.
- Patrol and inspect stations and railcars to monitor and report on cleanliness; equipment serviceability; condition of buildings, fixtures and platform surfaces and as appropriate the cleanliness and condition of pedestrian mazes/footpaths, footbridges, subways, car parks and bus interchange facilities.
- Report damage, maintenance or work required to relevant personnel.
- Lock/unlock passenger facilities as necessary.
- Observe passenger behaviour and take appropriate action as required under PTA policy and regulations to protect revenue, safety and security.
- Collect evidence, file reports and process associated documentation.
- Monitor passenger bus/train integration at interchange stations and advise of any problems and/or action taken.
- Drive motor vehicles as required.
- Undergo training as required.

Qualifications:

AQF level 3 or equivalent

Additional 1 or 2 units at AQF Level 4 or equivalent

Track Access

C Class Driver's Licence

REA LEVEL SIX

CONTROL MONITORING ROOM (CMR) OPERATOR L6

Key Responsibilities:

To ensure customer service and surveillance at the standard necessary to meet Public Transport Authority's passenger requirements.

Training, advice & assistance in CCTV/CMR equipment in accordance with PTA policies and procedures.

Indicative Tasks:

An employee at this level may be required to perform all or some of the following tasks: -

- Provide assistance and information to passengers and staff on railway property.
- Use CMR equipment, including CCTV cameras, to observe, obtain and deliver information in relation to PTA security or revenue functions.
- Perform monitoring and surveillance tasks to help ensure rail and train facilities are operational and meet safety requirements.
- Regularly check and report on CCTV and other equipment and amenities on railway property, including working order of cameras at stations, and perform necessary follow up tasks.
- Monitor public and security staff on railway property to ensure public and rail safety, in accordance with PTA regulations and procedures.
- Interact with staff and members of the public, as required.
- Assist in implementing security and emergency procedures as part of CMR team, under leadership of Shift Commander.
- Can be called upon to relieve in other CMR positions as required
- Prepare and deliver training and workplace assessment in relation to CMR equipment and procedures.
- Undertake administrative tasks including documentation and reports.
- Dealing with customer complaints and problems.
- Undergo training as required at AQF 4 or equivalent.

Qualifications:

AQF level 3 certificate qualifications in Asset Security

Additional minimum of 70% of competencies towards relevant AQF level 4 certification

Probity requirements/clearances specific to CCTV operations

Track Access to the extent required in this position

CCTV Camera/CMR Security Training Course

REA LEVEL SEVEN

TEAM LEADERS (TRANSIT GUARD UNIT) L7

Key Responsibilities:

Provides leadership, advice, guidance and assistance to transit guards undertaking security safe-work and customer service functions on trains and at stations, working as part of a team and under limited supervision; required to maintain special constable status; and attend to more serious offences and incidents to guide delivery and response from transit guards and assist in maintaining appropriate levels of safety and security at operational level.

Indicative Tasks:

- Guides and assists individuals or small groups of transit guards in performing security, revenue protection and customer service tasks.
- Responsible for providing on site guidance, advice and back-up to transit guards on each shift.
- Provides mobile response service and exercises judgement in more complex incidents and responses.
- Attends and provides directions and advice in relation to an appropriate security response in cases of more serious offences including those involving detention and/or arrests.
- Undertakes tasks necessary for prosecutions for fare evasion, including preparing briefs and collecting evidence.
- Assists, communicates and interacts with passengers to maintain customer well being, safety and security.
- Provides information to staff and passengers as required.
- Provides detailed verbal and written reports.
- Day-to-day role in mentoring and supervision of transit guards and other traffic wages employees, including field training for transit guards, monitoring of performance on trains and at stations and identifying further training needs.
- Prepare and deliver training and workplace assessments, as required, under guidance of RTO.
- Exercises discretion in performing the Team Leader role, consistent with the skills and training required at this level, including planning and implementing patrol schedules within the parameters of set rosters and operating procedures and developing pre-emptive strategies for preventing security incidents and fare evasion.
- Responsible for implementing emergency procedures and safe working; including emergency First Aid as required.
- Liaises with other PTA staff, including Train Control, during incidents and emergencies individuals or groups.
- Undergo further training as required.

Qualifications:

Completed AQF level 4 certificate or equivalent

Plus additional relevant competencies at higher level eg administration/ management units, or AQF level 5, as required

Demonstrated proficiency in customer service and security service delivery

Track Access & First Aid

C Class Driver's Licence

4.11.1 (b) Other Than Traffic – Network and Infrastructure

REA LEVEL ONE

MAINTAINER L1 SYSTEMS: COMMUNICATIONS, SIGNALS & OVERHEAD

Key Responsibilities:

Undertakes routine manual duties including cleaning, under direct supervision, usually in a team.

Indicative Tasks:

- Performs general non-trade tasks as appropriate in relevant branches.
- Perform routine maintenance and basic fault finding on vehicles and mechanical plant.
- Operates relevant hand tools, equipment & machinery associated with work area.
- Drives light vehicles.
- Exercises safety within the workplace.
- Performs measuring, lifting, loading, cleaning and manual handling.
- Undertakes pick up and deliveries.
- General assistance to crane drivers, tradespersons, maintainers and other staff on worksite, within the limits of training and competency.
- Undertake training at AQF Level 1 or equivalent, and for Track Access.

Qualifications:

Track Access (various levels)

C Class Driver's licence

MAINTAINER L1 CIVIL: PERWAY, LANDSCAPE, RESERVE, TRACK

Key Responsibilities:

Undertakes routine manual duties on and around the railway reserve, including gardening, basic maintenance, cleaning up, working under direct supervision, usually in a team.

Indicative Tasks:

- Performs general non-trade tasks as appropriate.
- Collection of general rubbish, leaves, debris, in car park areas, pedestrian maze ways, rail reserve along fence line, and perway but not within 3 meters of the overhead traction line or running line.
- Basic customer service tasks eg providing directions to passengers, directing passengers to avoid work site areas on and around stations.
- Perform basic maintenance, cleaning up and gardening tasks, including rubbish removal.
- Manual and machine-assisted cleaning/maintenance tasks including lifting, loading, digging.
- Uses light hand tools.
- Drives light vehicles.
- Maintain records as necessary.
- Exercises safety within the workplace.
- May be required to Undertakes pick up and deliveries.
- Undertake training at AQF Level 1 or equivalent.

Qualifications:

Track Access

C Class Driver's licence

REA LEVEL TWOMAINTAINER L2 SYSTEMS: COMMUNICATIONS, SIGNALS & OVERHEAD

Key Responsibilities:

Utilises manual and mechanical aids, provides assistance and exercises basic skills on a wide range of non-trade tasks under direct supervision individually or in team to the level of training.

Carries out minor maintenance tasks and assist with maintenance of machinery, plant, systems and equipment (overhead, signals, communications areas).

Indicative Tasks:

- Performs general non-trade tasks as appropriate in relevant branches.
- Operates relevant hand tools, equipment & machinery associated with work area.
- Performs specific manual or machine assisted cleaning, lifting, loading and unloading tasks.
- Recognises basic quality standards/faults.
- Digs trenches, lays cables.
- Performs manual or machine assisted tasks incidental to maintenance role.
- Maintains necessary records.
- Exercises safety within the workplace.
- Drives light vehicles.
- Assist staff in servicing, maintenance, and repair of vehicles.
- Perform specific cleaning tasks using manual or mechanized means.
- Perform routine maintenance tasks on plant and equipment.
- Keyboard operation.
- Training at AQF Level 2 or equivalent.

Qualifications:

AQF level 1 or equivalent

Track Access

C Class Driver's Licence

MAINTAINER L2 CIVIL: RESERVE, LANDSCAPE, TRACK

Key Responsibilities:

Undertakes routine manual duties on and around the railway reserve, including gardening, basic maintenance, cleaning up, working under direct supervision, usually in a team.

Performs miscellaneous tasks of a non trade nature around stations, yards, passenger areas and depots; may work at more than one location during a shift.

Indicative Tasks:

- Performs general non-trade tasks as appropriate.
- Collection and removal of general rubbish, leaves, debris, in car park areas, pedestrian maze ways, rail reserve along fence line, and perway but not within 3 meters of the overhead traction line or running line.
- Basic customer service tasks such as providing directions to passengers, directing passengers to avoid work site areas on and around stations.
- Perform general maintenance, cleaning up and gardening tasks, including rubbish removal.
- Manual and machine-assisted cleaning/maintenance tasks including lifting, loading, digging.
- Uses hand tools, machinery and equipment incidental to task.
- Drives light vehicles.
- Maintain records as necessary.
- Exercises safety within the workplace.
- May be required to undertake pick up and deliveries.
- Undertake training at AQF Level 2 or equivalent.

Qualifications:

AQF level 1 or equivalent

Track Access

C Class Driver's Licence

REA LEVEL THREE

MAINTAINER L3 SYSTEMS: SIGNALS, OVERHEAD & COMMUNICATIONS

Key Responsibilities:

Utilises manual and mechanical aids, motor trucks, mechanical plant and mobile and fixed overhead cranes; provides assistance and exercises basic mechanical and related skills on a wide range of non-trade tasks under direct supervision either individually or in a team to the level of training.

Indicative Tasks:

- Perform general non-trade and trade support /assistance tasks (exercising basic work skills) under direct supervision either individually or assisting more senior staff, or in a team to the level of training.
- Performs routine maintenance, running repairs and basic fault finding to vehicles, mechanical plant, mobile cranes and other equipment as appropriate.
- Climb and work on communication and power poles and signal masts; work in confined spaces; traverse perway and various railway reserve terrain in performance of duties.
- Dig trenches and lays cables; erect and position C & C systems structures and mechanical equipment along the railway.
- Operates relevant hand & power tools, equipment and machinery associated with work area including base radio; performs specific manual or machine assisted cleaning tasks.
- Recognises basic quality standards/faults.
- Provides and maintains records and documentation incidental to role.
- Exercises safety within the workplace.
- Exercises and implements safety procedures.
- Performs light vehicle and motor truck driving duties as required.
- Licensed, Certified and Qualified operation of fixed and mobile plant, motor trucks and cranes as appropriate.
- Operates motor trucks and attachments, and other mechanical plant and equipment as required.
- Assists in general office administration tasks; keyboard operation.
- Undertake training at AQF Level 3 or equivalent enterprise specific skills /knowledge.

Qualifications:

AQF level 2 or equivalent

Track Access & First Aid

Vehicle/ equipment operator & C Class Driver's Certificates and Licences

MAINTAINER L3 CIVIL: RESERVE, TRACK & LANDSCAPE

Key Responsibilities:

Undertakes routine cleaning and maintenance tasks on and around the railway reserve, including gardening, basic maintenance, cleaning up sites, working under direct supervision, usually in a team; may work at various locations during one shift.

Indicative Tasks:

- Performs general non-trade tasks as appropriate for maintenance of rail reserve, track and landscape and associated areas.

- Collection of general rubbish, leaves, debris, in car park areas, pedestrian maze ways, rail reserve along fence line, and perway but not within 3 meters of the overhead traction line or running line.
- Basic customer service tasks eg providing directions to passengers, directing passengers to avoid work site areas on and around stations.
- Perform basic maintenance, cleaning up and gardening tasks, including rubbish removal.
- Manual and machine-assisted cleaning/maintenance tasks including lifting, loading, digging.
- Uses tools, plant, machinery and equipment as required for maintenance.
- Drives light vehicles and motor trucks; operates licensed and certificated fixed and mobile mechanical plant and equipment if required.
- Maintain records as necessary.
- Exercises safety within the workplace.
- May be required to undertake pick up and deliveries.
- Undertake training at AQF Level 3 or equivalent, and for Track Access.

Qualifications:

Track Access

AQF Level 2 or equivalent

Vehicle/operator licences as required

REA LEVEL THREE(A)

MAINTAINER L3A (SIGNALS)

Key Responsibilities:

Required to work or assist signals maintenance work groups or tradespersons to carry out effective and efficient basic service restoration and maintenance tasks on power/mechanical signalling, level crossing protection equipment and overhead communication /power lines.

Indicative Tasks:

- Perform basic maintenance functions and a wide range of non-trade tasks (exercising basic work skills) either individually or assisting more senior staff, or in a team to the level of training.
- Perform routine maintenance and basic fault finding on electrical signalling within level of training, competence and licensing requirements.
- Climb and work up communication and power poles and signal masts; work in confined spaces; digs trenches and lays cables.
- Traverse Perway and various railway reserve terrain in performance of duties.
- Erect and position signals structures and mechanical equipment along the railway.
- Operate motor trucks and attachments, mechanical plant and equipment, and drive light vehicles.
- Perform routine maintenance and safe running repairs to vehicle and plant.
- Utilise range of tools, equipment and machinery associated with work area.
- Perform specific manual or machine assisted cleaning and maintenance tasks.
- Maintain documentation and records.
- Undertake training at AQF Level 3 or equivalent.

Qualifications:

Part completion of AQF level 3 or equivalent

Stipulated enterprise specific signals skills & knowledge.

Vehicle/operator licences as required

Track Access

REA LEVEL FOUR

MAINTAINER L 4 SYSTEMS: SIGNALS, COMMUNICATIONS, OVERHEAD

Key Responsibilities:

Utilises manual and mechanical aids, vehicles and plant as appropriate on a wide range of tasks and coordinates the allocation and maintenance of those items as necessary; responsible for team or small groups when required; assists with both coordination of work and with provision of on the job training of staff, exercises discretion and works in a team or individually under minimal supervision.

Indicative Tasks:

- Performs general non trade tasks and basic trade tasks, for purposes of maintenance, running repairs and fault finding to limit of training required for this level.
- Plans, organizes, leads and performs tasks in team.
- Maintains documentation and records including performing necessary administrative tasks.
- Performs manual tasks and operates/adjusts machinery and equipment to perform a range of maintenance/repair tasks including welding & lifting, setting up and dismantling of scaffolding.
- Undertakes running repairs on a range of machines/work stations including cleaning and preventative maintenance.
- Operates as required and performs or co-ordinates the necessary maintenance to relevant tools, equipment, plant and machinery, including driving vehicles or trucks where necessary.
- Understands and applies quality control techniques.
- Detects faults and where appropriate arrange rectification.

- Performs the necessary administrative duties.
- Supervises, controls and co-ordinates group or individuals activities.
- Provides on-the-job training.
- Exercises and implements safety procedures and requirements.
- Utilises computers, radio, communications equipment and associated technology to extent of training at this level.
- Undertake general office administration duties at a higher level than L3, including inventory and stock control.
- Provides on the job supervision and training.
- Undertake training at AQF Level 4 or equivalent.

Qualifications:

AQF level 3 or equivalent

Track Access

Vehicle and operators' licences as required

MAINTAINER L4 CIVIL: RESERVE, TRACK, LANDSCAPE

Key Responsibilities:

Utilises manual and mechanical aids, vehicles, plant, equipment and machinery as appropriate on a wide range of maintenance tasks and co-ordinates the allocation and maintenance of those items as necessary.

Responsible for a team or small groups when required, assists with both the co-ordination of work and with the provision of on-the-job training of staff, exercises discretion and works in a team or individually under minimal supervision.

Indicative Tasks:

- Performs basic mechanical and general non-trade tasks appropriate to workplace at various locations.
- Performs range of maintenance tasks and operates/adjusts tools, plant, machinery and equipment to perform maintenance/repair duties including welding & lifting, setting up and dismantling of scaffolding.
- Undertakes running repairs on a range of machines/work stations including cleaning and preventative maintenance.
- Operates plant and machinery as required and performs or co-ordinates the necessary maintenance to relevant hand, power and pneumatic tools, equipment and machinery.
- Understands and applies quality control and rail safety procedures.
- Detects faults and where appropriate arrange rectification.
- Performs the necessary administrative duties.
- Supervises, controls and co-ordinates group or individuals activities.
- Provides on-the-job training and supervision.
- Exercises and implements safety procedures and requirements.
- Operate all mobile plant and machinery including motor trucks and vehicles.
- Utilises computers and communication equipment, and associated technology eg keyboard and software.
- Undertake general office administration duties at a higher level than L3.
- Undertake training at AQF Level 4 or equivalent.

Qualifications:

AQF level 3 or equivalent

Track Access

Vehicle and operator licences as required

PERWAY PATROLLER L4: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Examine, protect, repair, maintain and report on the safe and proper condition of the perway, railway reserve and infrastructure to level of skills and training at this level; exercises discretion; safeworking responsibilities.

Indicative Tasks:

- Inspect railway reserve, perway and identify evidence of irregularities, safety and operational difficulties/variations; arrange corrective action as and when required
- Protect, carry out maintenance, and arrange for repairs to perway assets and rail reserve/infrastructure.
- Operate on track equipment and plant; including rail inspection vehicles.
- Use associated tools, machinery and equipment incidental to main functions.
- Monitor, review /report tasks in relation to work undertaken by contractors on perway.
- Utilise computers and associated technology required in this role, which may include data loggers and standard computer programs.
- Participate in training/safety planning and program maintenance activities.
- Liaise with relevant PTA and other staff in relation to work outcomes.
- Commence training at AQF Level 4 or equivalent.

Qualifications:

AQF level 3 or equivalent

Track Access

Vehicle and operator licences as stipulated

MECHANICAL TRADESPERSON/FITTER L4: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises trade skills and knowledge under minimal supervision either individually or in a team environment.

Develops independent judgement and exercises a wider range of skills than at L4 trades level, relevant to the special requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault finds on equipment, plant, vehicles, machinery components or instruments including any associated systems.
- Understands and exercises safety.
- Works from drawings prints or plans.
- Applies calculations where necessary.
- Uses fixed, portable and hand machines, including hand tools and precision instruments.
- Material/tooling/component identification, selection, application and installation.
- Writes NC (Numerical Control) programmes.
- Performs marking out tasks.
- Undertakes welding, cutting and heat treatment.
- Understands quality assurance and applies quality control techniques.
- Undertakes tasks incidental or peripheral to the performance of the main task or function.
- Provides guidance and assistance to other non-trades staff.
- Uses computer keyboard and software.
- Provides verbal and written reports.
- Undertake training at AQF Level 4 or equivalent.

Qualifications:

Mechanical Trades Certificate

Track Access

Vehicle and operator licences as required

ELECTRICAL TRADESPERSON/FITTER L4: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises trade skills and knowledge under minimal supervision either individually or in a team environment.

Develops independent judgement and exercises a wide range of skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies commissions and fault finds on equipment, plant, vehicles, machinery, components or instruments.
- Understands and exercises safety.
- Works from drawings, prints or plans.
- Applies calculations where necessary.
- Utilises fixed, portable and hand machines, tools & instruments.
- Material/component identification, selection, application and installation.
- Performs marking out tasks.
- Undertakes soldering and/or welding and cutting.
- Understands quality assurance and applies quality control techniques.
- Wide range of tasks incidental/peripheral to main task or function.
- Provides guidance and assistance to other staff.
- Uses computer keyboards; provides verbal and written reports.
- Undergo training including at AQF Level 4 or equivalent.

Qualifications:

Electrical Trades Certificate

Track Access

Vehicle and operator licences as required

REA LEVEL FIVESENIOR MAINTAINER L5 SYSTEMS: SIGNALS, OVERHEAD, COMMUNICATION

Key Responsibilities:

Operation, supervision, control and coordination as appropriate, of work groups or other functions; performs and supervises maintenance work in Signals, Overhead Catenary or Communications areas.

Exercises discretion on a wide range of non-trade tasks or some basic trade tasks, under general supervision either individually or in a team to the level of training.

Indicative Tasks:

- Supervises and guides individuals or groups, including on the job training on site, and supervises other activities as required.

- Performs, assists and supervises maintenance tasks as required.
- Performs basic trade and non trade tasks as appropriate for role.
- Operates, controls and performs routine maintenance to complex specialised machinery.
- Understands and implements quality control techniques.
- Detects faults and where appropriate arranges rectification.
- Provides on-the-job training.
- Performs necessary administrative tasks.
- Exercises and implements safety procedures and requirements.
- Undertake training at AQF Level 4 or equivalent.

Qualifications:

AQF level 3 or trade certificate, or equivalent

Plus 1 – 2 units at AQF 4 or equivalent

Track Access

Vehicle and operator licences as required

SENIOR MAINTAINER L5 CIVIL: TRACK, RESERVE, PERWAY, AND LANDSCAPE

Key Responsibilities:

Work on per-way, railway reserve and related areas on rail reserve.

Inspections, supervision of reserve maintainers, operate related equipment and machinery, co-ordination, as appropriate, of work groups.

Exercises discretion on a wide range of non-trade tasks, or some basic trade tasks, under general supervision either individually or in a team to the level of training.

Indicative Tasks:

- Supervises individuals or groups on site; provides on the job training; or exercises additional skills and responsibilities for maintenance of perway (specialist role).
- Utilises such tools, equipment and machinery, and operates or supervises operation of equipment, plant and machinery as required.
- Performs, guides, assists and supervises maintenance tasks as required.
- Performs basic trade and non trade tasks as appropriate for role.
- Operates, controls and performs routine maintenance to complex specialised machinery.
- Understands and implements quality control techniques.
- Detects faults and where appropriate arranges rectification.
- Provides on-the-job training and workplace assessments.
- Performs necessary administrative tasks at this level.
- Exercises and implements safety procedures and requirements.
- Undertake training at AQF Level 4 or equivalent.

Qualifications:

AQF level 3 or trade certificate, or equivalent

Plus 1-2 units at AQF 4 or equivalent

Track Access & First Aid

Vehicle and operator licences as required

MECHANICAL FITTER/TRADEPERSON L5: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises improved trade skills and knowledge under limited supervision either individually or in a team environment.

Develops independent judgement and exercises a wider range of skills relevant to the specific requirements of the organisation.

Maintains infrastructure by providing support for technicians and technical officers.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions & fault finds on equipment, plant, vehicles, machinery, components or instruments including any associated systems.
- Understands and exercises safety.
- Works from drawings, prints or plans.
- Applies calculations where necessary.
- Uses fixed, portable and hand machines, hand tools and instruments.
- Material/tooling/component, identification, selection, application and installation.
- Writes, finds and edits faults on NC programmes.
- Performs marking out tasks.
- Undertakes welding, cutting and heat treatment.
- Undertakes a wider range of tasks incidental or peripheral to the performance of the main task or function.
- Provides guidance and assistance to other staff.
- Uses computer keyboards.

- Provides verbal and written reports.

Qualifications:

Trade Certificate - (AQF 3-equivalent)

Additional 1 or 2 units at AQF 4 or equivalent

Track Access

Vehicle and operator licences as required

ELECTRICAL FITTER/TRADEPERSON L5: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises improved trade skills and knowledge of the stream under limited supervision either individually or in a team environment.

Develops independent judgement and exercises a wider range of skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies commissions and fault finds on equipment, plant, vehicles, machinery, components or instruments.
- Understands and exercises safety.
- Works from drawings, prints or plans.
- Applies calculations where necessary.
- Uses fixed, portable and hand machines, tools instruments.
- Material/component identification, selection, application & installation.
- Performs marking out tasks.
- Undertakes soldering and/or welding and cutting.
- Understands quality assurance and applies quality control techniques.
- Undertakes a wider range of tasks incidental or peripheral to the performance of the main task or function.
- Provides guidance and assistance to other staff.
- Uses computers and associated technology eg keyboards.
- Provides verbal and written reports.
- Undertake training at AQF Level 4 or equivalent.

Qualifications:

Trades certificate & post-trade competencies eg 1 or 2 units at AQF 4, or equivalent

Track Access

Vehicle and operator licences as required

REA LEVEL SIX

ADVANCED MAINTAINER L6 SYSTEMS: SIGNALS, OVERHEAD & COMMUNICATIONS

Key Responsibilities:

Planning, direction, supervision, control and co-ordination, as appropriate of more than one work group or function above the requirements at REA L5 classifications; and exercises discretion in a wide range of non-trade tasks or basic trade tasks, under general supervision, either individually or in a team as consistent with this role.

Indicative Tasks:

- Supervises individuals or groups and supervises other activities required.
- Ensures maintenance work complies with operating and rail safety rules.
- Performs trade and non trade tasks as appropriate for role at this level.
- Undertakes maintenance, inspection, construction and repair tasks within the limits of skills and training.
- Operates full range of on track equipment, plant, tools and machinery needed to perform more complex maintenance tasks in signals, overhead or communications.
- Plans, directs and co-ordinates complex specialised machinery.
- Understands and implements safety and quality control techniques.
- Detects faults and where appropriate arranges rectification.
- Prepares and delivers on-the-job training and workplace assessment.
- Performs necessary administrative tasks including documentation, maintaining records, performance management, inventory & stores duties, and other administrative and supervisory tasks as required for the allocated maintenance area.
- Responsibility for groups or activities the classification criterion for which is specifically nominated at this level.
- Undertake training for completion of AQF 4 certificate.

Qualifications:

Minimum of 70% or more towards AQF 4 certificate including training/workplace assessment competencies

Enterprise specific skills and specialized knowledge to the required level in specified area of maintenance (signals, overhead catenary or communications)

Track Access & First Aid

Vehicle and operator licences as required

PERWAY PATROLLER L6: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Planning, direction, supervision, control and co-ordination, as appropriate of work groups or other functions above the classification criteria for Level 5 and exercises discretion in a wide range of non-trade tasks, or some basic trade tasks, under general supervision either individually or in a team to the level of training.

Plans, coordinates, directs, examines, protects, repairs, maintains and reports on the safe and proper condition of the permanent way, railway reserve and infrastructure.

Indicative Tasks:

- Supervises individuals or groups.
- Supervises other activities as required.
- Performs basic trade tasks as appropriate.
- Undertakes inspection and organizes repairs to railway infrastructure, including signalling equipment, perway, or overhead catenary.
- Operates on a wide range of on track equipment, plant, tools and machinery as needed to perform maintenance functions.
- Plans, directs and co-ordinates use of complex specialised machinery.
- Understands and implements quality control techniques.
- Detects faults and where appropriate arranges rectification.
- Participates in Safety planning tasks.
- Provides on-the-job training and performs necessary administrative tasks.
- Report writing and documentation.
- Liaison and communication with relevant personnel as required for rail and perway maintenance and safety.
- Exercises and implements safety procedures and requirements.
- Responsibility for groups or activities the classification criterion for which is specifically nominated at this level.
- Undertake training for completion of AQF level 4 competencies.

Qualifications:

Minimum of 70 % or more competencies towards AQF 4 certificate, or equivalent, including training & workplace assessment competencies

Enterprise specific knowledge and skills required

Safeworking knowledge, Track Access & First Aid

Vehicle and operator licences as required

SIGNAL FITTER/SENIOR MECHANICAL TRADESPERSON L6: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises advanced trade skills and knowledge under limited supervision either individually or in a team environment.

Exercises independent judgement and a wider range of skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault find/diagnosis on equipment, plant, vehicles, machinery, components or instruments which may utilise circuitry or control systems.
- Understands and exercises safety.
- Works from drawings, prints or plans and develops drawings as required. Applies calculations where necessary.
- Uses fixed, portable and hand machines.
- Utilises hand tools and precision instruments.
- Material/tooling/component, identification, selection, application and installation.
- Writes programmes, set up prove, edit and verify first-off samples for a range of NC/CNC machines and control units. Performs operations on CAD/CAM terminals for NC programming.
- Performs marking out tasks.
- Undertakes welding, cutting and heat treatment.
- Applies quality control and exercises quality assurance techniques.
- Undertakes a wider range of tasks incidental or peripheral to the performance of the main task or function.
- Provides guidance and assistance to other staff.
- Uses computer keyboards.
- Provides verbal and written reports.
- Undertake training for completion of AQF 4 qualifications.

Qualifications:

AQF 3 in relevant competencies (trade certificate) & further qualifications ie completion of 70% or more units required for AQF 4 or equivalent (post trade certificate in relevant field)

Track Access & First Aid

Vehicle and operator licences as required

ELECTRICAL TECHNICIAN L6: NETWORK & INFRASTRUCTURE

An Electrical Technician Level 6 means an employee who has the equivalent level of training and/or experience to a Tradesperson Level 5 and is engaged in detail drafting or planning or technical work which requires the exercise of judgement and skill in excess of that required of an employee at Level 5 under the supervision of technical staff.

Key Responsibilities:

Responsible for monitoring, maintenance and minor repairs of electrical installations and advises of faults or safety hazards.

Exercises specialized technical skills and knowledge under limited supervision either individually or in a team environment.

Exercises independent judgement and a wider range of skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Maintenance of electrical installations.
- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault finds on equipment, plant, vehicles, machinery, components or instruments.
- Understands and exercises safety.
- Works from drawings prints or plans and develops drawings as required. Applies calculations where necessary.
- Documents and plans maintenance work, provides reports.
- Uses fixed, portable and hand machines.
- Utilises hand tools and precision instruments, including specialized equipment and machinery incidental to role.
- Material/tooling/component, identification, selection, application and installation.
- Write and uses computer programs and associated technology at this level of training and skill, works on range of machines and control units.
- Undertakes range of trade-related tasks to level of training.
- Undertakes small installation works.
- Prepares and plans electrical works.
- Applies quality control and exercises quality assurance techniques.
- Undertakes a wider range of tasks incidental or peripheral to the performance of the main task or function.
- Provides guidance and assistance to other staff including subcontractors carrying out electrical repairs/installation.
- Uses computer keyboards.
- Provides verbal and written reports including maintenance/ installation documentation.
- Undertake training for completion of AQF 4 qualifications.

Qualifications:

Electrical Trades certificate or equivalent certification for technician at AQF level 3

70% or more of units for Diploma at AQF 4 (post trade certificate)

Track Access

Vehicle and operator licences as required

ELECTRICAL FITTER/SENIOR TRADESPERSON L6: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises advanced trade skills and knowledge under limited supervision either individually or in a team environment.

Exercises independent judgement and exercises a wider range of skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault finds on equipment, plant, vehicles, machinery, components or instruments.
- Understands and exercises safety.
- Works from drawings, prints or plans and develops drawings as required. Applies calculations where necessary.
- Uses fixed, portable and hand machines.
- Utilises hand tools and precision instruments.
- Material/component identification, selection, application and installation.
- Performs marking out tasks.
- Undertakes soldering and/or welding and cutting.
- Applies quality control and exercises quality assurance techniques.
- Undertakes a wider range of tasks which are incidental or peripheral to the performance of the main task or function.
- Provides guidance, assistance and training to other staff.
- Uses computer keyboards and undertakes basic computer programming.
- Performs work of a general nature on radio, communication and electronic equipment.
- Provides verbal and written reports.
- Undertake training for completion of AQF 4 competencies

Qualifications:

Electrical trades certificate & minimum 70% or more of units towards AQF 4 or equivalent post trade certificate

Track Access

Vehicle and operator licences as required

REA LEVEL SEVEN - (Post-Trade Qualifications, Senior Supervisory Roles)

PERWAY PATROLLER L7: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Provides leadership, advice, guidance and assistance to perway maintenance staff, working as part of a team and under limited supervision; required to inspect, protect, maintain and report on the safe and proper condition of the perway, railway reserve and railway infrastructure; required to attend to non-routine matters and recommend appropriate actions and liaise with authorities and staff as appropriate to maintain necessary safety of passengers and staff on and about railway.

Indicative Tasks:

- Guide, supervises and assists individuals and small groups performing perway maintenance and repairs; checks work complies with rail safety and quality standards.
- Responsible for inspecting, protecting, maintaining, repairing and reporting evidence of variations from safety and operational limits.
- Undertakes tasks necessary for reserve maintenance, including detailed reports or more complex inspection/repair tasks.
- Provides written documentation, reports and information to PTA, authorities and staff on perway and other matters, as required.
- On the job supervision of perway staff including on the job training, performance review and identifying training needs.
- Exercises discretion in performing role, including planning and implementing maintenance and repair schedules and developing pre-emptive strategies for preventing difficulties or incidents on the track or perway.
- Responsible for implementing emergency procedures.
- Safe-working role and provide first aid if required.
- Liaises with other PTA staff, including Train Control, during incidents and emergencies.
- Supervision of individuals or small groups.
- An employee at this level may be required to undertake on the job training, workplace assessment and supervision.
- Undertake relevant training.

Qualifications:

Completed AQF 4 Certificate or equivalent

Additional enterprise specific skills/understanding eg rail reserve, safeworking, including at least one higher unit of competency in administration/management

Track Access

Vehicle and operator licences as required

SUPERVISORY/SPECIALISED ELECTRICAL TRADES L7: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises specialised trade skills and knowledge under minimal supervision either individually or in a team environment.

Exercises a high level of judgement and a wider range of skills relevant to the specific requirements of the organisation.

Supervises, inspects and reports on work done by tradespersons/contractors.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault finds on equipment, plant, vehicles, machinery, components or instruments which utilise circuitry or control systems.
- Understands and exercises safety.
- Works from drawings, prints or plans and develops drawings and undertakes basic design as required. Applies calculations where necessary.
- Uses fixed, portable and hand machines.
- Utilises hand tools and precision instruments.
- Material/component identification, selection, application and installation.
- Performs marking out tasks.
- Undertakes soldering and/or welding and cutting.
- Applies quality control and quality assurance techniques.
- Undertakes a wider range of advanced tasks incidental or peripheral to the performance of the main tasks or function.
- Provides training, assessment, guidance and assistance to other staff.
- Uses computer and undertakes computer programming.
- Performs work on radio, communication and electronic systems and equipment.
- Provides verbal and written reports of a technical nature.
- Undertake training including training at AQF 5 level.

Qualifications:

Electrical Trades Certificate – Licensed Fitter/Mechanic & AQF 4 (post trades certificate) or equivalent

Vehicle and operator licences as required

Track Access

Additional enterprise specific knowledge including at least one higher unit of competency unit at administration/management or AQF 5 level

SUPERVISORY/SPECIALISED MECHANICAL TRADES L7: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises specialised trade skills and knowledge of the stream under minimal supervision either individually or in a team environment.

Exercises a high level of judgement and a wider range of skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault find/diagnosis on equipment, plant, vehicles, machinery, components or instruments which utilise complex circuitry or control systems.
- Understands and exercises safety.
- Works from drawings prints or plans and develops drawings and undertakes basic design as required. Applies calculations where necessary.
- Uses fixed, portable and hand machines.
- Utilises hand tools and precision instruments.
- Material/tooling/component, identification, selection, application and installation.
- Writes NC/CNC programmes for a range of NC/CNC machines and control units.
- Applies Computer Numerical Control techniques in machining.
- Applies quality control and quality assurance techniques.
- Undertakes wider range of tasks incidental or peripheral to performance of main task/ function.
- Advises in development of training and provides guidance and assistance to other staff.
- Uses computer keyboards and undertakes computer programming.
- Provides verbal and written reports of a technical nature.
- Undertake training at AQF 5.

Qualifications:

Vehicle and operator licences as required

Track Access

AQF 4 certificate or equivalent

PLUS additional enterprise specific knowledge including at least one unit at administration/management or AQF 5 level

ENGINEERING TECHNICIAN L7: NETWORK & INFRASTRUCTURE

Engineering Technician Level 7 means an employee who has the equivalent level of training and/or experience to a - Tradesperson Level 6 but is engaged in one of the following areas:

- Detail drafting or planning or technical duties requiring judgement and skill in excess of that required of a technician at Level 6 under the supervision of Technical Staff; or
- Possesses a level of training and/or experience at Level 6 and exercises cross skilling in technical fields as defined.

Qualifications:

Relevant trade/technician certificate and licence

Relevant post trade/higher technician qualifications AQF 4 certificate or equivalent

PLUS At least one unit of competency at administration/management or AQF 5 level

Additional enterprise specific knowledge/understanding

Vehicle and operator licences as required

Track Access

SIGNALS TECHNICIAN L7: NETWORK & INFRASTRUCTURE

Signals Technician Level 7 means an employee who has equivalent level of training and/or experience to a - Special Class Level 6 but is engaged in one of the following areas:

- Detail drafting or planning or technical duties requiring judgement and skill in excess of that required of a technician at Level 6 under the supervision of Technical Staff; or
- Possesses a level of training and/or experience at Level 6 and exercises cross skilling in technical fields as defined.

Key Responsibilities:

Exercises specialised trade skills and knowledge of the stream under minimal supervision either individually or in a team environment.

Exercises a high level of judgement and a wider range of skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault find/diagnosis on equipment, plant, vehicles, machinery, components or instruments utilising complex circuitry or control systems.
- Understands and exercises safety.
- Works from drawings prints or plans and develops drawings and undertakes basic design as required.

- Applies calculations where necessary.
- Uses fixed, portable and hand machines and specialised equipment.
- Utilises hand tools and precision instruments.
- Material/tooling/component, identification, selection, application & installation.
- Applies quality control and quality assurance techniques.
- Undertakes wide range of tasks including advanced specialized trade or technical tasks incidental or peripheral to the performance of main tasks or functions.
- Supervision, assessment, training and provides guidance and assistance to personnel as required at this level.
- Performs general work on signals, radio, communication and/or electrical and electronic systems and equipment, as required.
- Uses computer and associated technology, eg keyboards and undertakes computer programming.
- Provides verbal and written reports of a technical nature.
- Undertake training at AQF Level 5 or equivalent.

Qualifications:

AQF 4 certificate or equivalent PLUS at least one higher level unit at administration/management or AQF 5 level

Additional enterprise specific knowledge

Track Access and First Aid

Vehicle and operator licences as required

REA LEVEL EIGHT

SYSTEMS TECHNICIAN L8: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises specialised trade and technical skills and knowledge in signalling, or other electrical/electronic systems at a level higher than technicians Level 7 and working under minimal supervision with broad discretion within their work environment.

Exercises a high level of judgement and exercises a wider range of skills including administrative/management skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault finds on equipment, machinery, plant, vehicles, instruments and components which utilise complex electrical, electronic, mechanical and fluid power principles and controlled by complex digital and/or analogue control systems using integrated circuitry.
- Understands and exercises safety.
- Works from drawings, prints or plans and develops drawings and undertakes basic design as required.
- Applies calculations where necessary.
- Uses fixed, portable and hand machines.
- Utilises hand tools and precision instruments.
- Material/component identification, selection, application and installation.
- Performs marking out tasks.
- Undertakes soldering and/or welding and cutting.
- Responsible for quality control and ensure adherence to quality assurance procedures and work organisation.
- Undertakes wider range of tasks incidental or peripheral to the performance of the main task or function.
- Provide trade/technical guidance and training to other staff.
- Uses computer and undertakes computer programming.
- Applies computer integrated manufacturing techniques.
- Plan maintenance programmes.
- Provides verbal and written reports of a technical nature.
- Performs work on signals, radio and/or communication systems complex specialized equipment.

Qualifications:

Relevant AQF 5 certificate competencies

Track Access & First Aid

ACA Open Cabler Registration

Vehicle and other licences as required

TECHNICIAN L8: DATA, RADIO, SECURITY, COMMUNICATION SYSTEMS:
NETWORK & INFRASTRUCTURE

An Engineering Technician Level 8 means an employee who has the equivalent level of training and/or experience to an Advanced Tradesperson - Level 8 but is engaged in one of the following areas to the extent of that training:

- Detail drafting involving originality of thought which requires the exercise of judgement and skill in excess of that required of a Technician at Level 7 under the supervision of Technical and/or professional Staff; or
- Is engaged in planning or technical duties requiring judgement and skill in excess of that required of a Technician at level 7 under the supervision of Technical and/or professional Staff; or
- Exercises a level of cross skilling in technical fields as defined.

Key Responsibilities:

Exercises specialised trade skills and knowledge of the stream under minimal supervision with broad discretion within their work environment. Exercises a high level of judgement and exercises a wider range of skills relevant to the specific requirements of the organisation.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault finds on equipment, machinery, plant, vehicles, instruments and components which utilise complex electrical, electronic, mechanical and fluid power principles and controlled by complex digital and/or analogue control systems using integrated circuitry.
- Understands and exercises safety.
- Works from drawings, prints or plans and develops drawings and undertakes basic design as required.
- Applies calculations where necessary.
- Uses fixed, portable and hand machines.
- Utilises hand tools and precision instruments.
- Material/component identification, selection, application and installation.
- Performs marking out tasks.
- Undertakes soldering and/or welding and cutting.
- Responsible for quality control and ensure adherence to quality assurance procedures and work organisation.
- Undertakes wider range of tasks incidental or peripheral to performance of main task/ function.
- Provide trade/technical guidance and training to other staff.
- Uses computer and undertakes computer programming.
- Applies computer integrated manufacturing techniques; develops computer programs to aid setting up, commissioning, maintenance and operation of equipment and systems computer operating and programming.
- Plan maintenance programmes. Provides verbal and written reports of a technical nature; prepare technical reports on specific tasks.
- Performs work on complex radio and communication systems and complex equipment.

Qualifications:

AQF 5 (Diploma) or equivalent

Track Access

Vehicle and other licences as required

REA LEVEL NINE**ELECTRICAL SYSTEMS TECHNICIAN/TRADES L9: NETWORK & INFRASTRUCTURE****Key Responsibilities:**

Exercises advanced specialised trade/technician skills and knowledge.

Plans and organizes tasks and exercises a high level of judgement/broad discretion within the work environment and a wider range of technical skills relevant to the specific requirements of the organisation.

Exercises a level of cross skilling in technical fields as defined consistent with training and experience requirements at this grade.

In addition to responsibilities at L8, employees at L9 undertake drafting, planning or technical duties requiring exercising of judgement and skills in excess of that required at L8.

Indicative Tasks:

- Assembles, manufactures, installs, repairs, maintains, examines, inspects, tests, measures, modifies, commissions and fault finds on equipment, machinery, plant, vehicles, instruments and components utilising complex electrical, electronic, mechanical and fluid power principles & controlled by complex digital &/or analogue control systems using integrated circuitry.
- Understands and exercises safety.
- Works from drawings prints or plans and develops drawings and undertakes basic design as required. Applies calculations where necessary.
- Uses fixed, portable and hand machines, Utilises hand tools and precision instruments.
- Material/component identification, selection, application and installation.
- Performs marking out tasks; undertakes soldering and/or welding and cutting.
- Responsible for quality control and ensure adherence to quality assurance procedures and work organisation.
- Undertakes wider range of tasks incidental/peripheral to performance of main task or function.
- Provide trade/technical guidance and training to other staff.
- Develops computer programmes to aid setting up, commissioning, maintenance and operation of equipment and/or systems.
- Applies computer integrated manufacturing techniques involving computer operating and programming.
- Plan maintenance programmes and prepare technical reports on specific tasks.
- Performs work on complex radio and communication systems.
- Undertake training at AQF 6.

Qualifications:

AQF 5 (Diploma) or equivalent, PLUS at least one higher level unit at administration/management level or AQF 6 or equivalent

Additional enterprise specific knowledge/understanding

Track Access

Vehicle and other licences as required

SENIOR ENGINEERING TECHNICIAN L9: NETWORK & INFRASTRUCTURE

An Engineering Technician Level 9 has an equivalent level of training and/or experience to that of an Advanced Tradesperson Level 9 but is engaged on one of the following areas:

- Undertakes drafting or planning or technical duties which requires the exercise of judgement and skill in excess of that required at the Level 8; or
- Exercises a level of cross skilling in technical fields as defined, consistent with the training and experience at this grade.

Qualifications:

AQF 5 or equivalent PLUS at least one unit at AQF 6 or equivalent

Enterprise specific knowledge/understanding

Track Access

REA LEVEL TEN

INTEGRATED SYSTEMS TECHNICIAN L10: NETWORK & INFRASTRUCTURE

Key Responsibilities:

Exercises specialised advanced trade skills at the level attained by post trade qualifications or accreditations thereto, relevant to the specific requirements of the organisation.

Indicative Tasks:

- Exercises a high level of judgement whilst working on advanced equipment, machinery, plant, vehicles, instruments and components which utilise complex electrical, electronic, mechanical and fluid power principles & are controlled by complex digital and or analogue circuitry.
- Works independently and without supervision.
- Applies task organisational skills and broader discretion within the work environment.
- Undertakes design, prototype and development work in collaboration with Engineer.
- Understands and exercises safety in the workplace.
- Works from drawings prints or plans and develops drawings as required.
- Applies calculations.
- Uses wide range of fixed, portable and hand machines; tools and precision instruments.
- Material/component identification, selection, application and installation.
- Undertakes soldering and/or welding and cutting.
- Responsible for quality control and ensure adherence to quality assurance and rail safety procedures and work organisation.
- Undertakes wider range of tasks incidental/peripheral to performance of main task or function.
- Provides technical guidance, assessment and training.
- Performs marking out or measuring tasks.
- Possesses and uses computer programming skills to set up, commission, maintain and operate equipment and/or systems OR Applies Advanced computer and integrated manufacturing techniques involving computer operating and programming.
- Plan maintenance programs & prepare technical reports on specific tasks.
- Undertake training equivalent to AQF Level 6 towards accredited relevant 3 year university/tertiary qualification.

Qualifications:

Advanced Diploma level competencies or equivalent technical studies eg 2 years towards an undergraduate degree

Track Access

Vehicle and other licences as required

ENGINEERING ASSOCIATE LEVEL 10: NETWORK & INFRASTRUCTURE

An Engineering Associate Level 10 means an employee who works above and beyond a Technician at Level 9 and has successfully completed 3rd year part time of an Advanced Diploma or the equivalent level of accredited tertiary technical training and is engaged in:

- Making of major design drawings or graphics or performing technical duties in a specific field of engineering, laboratory or scientific practice such as research design, testing, manufacture, assembly, construction, operation, diagnostics and maintenance or equipment facilities or products, including computer software, quality processes, occupational health and safety and/or standards and plant and material security processes and like work; or

- Planning of operations and/or processes including the estimation of requirements of staffing, material cost and quantities and machinery requirements, purchasing materials or components, scheduling, work study, industrial engineering and/or materials handling process.
- Undergo relevant training as required.

Qualifications:

Advanced Diploma at AQF 6 or accredited equivalent eg partial completion of relevant tertiary degree

Track Access

Vehicle and other licences as required

4.11.2 Competency Based Classifications

(a) Competency profiles.

(i) The parties to this Award have agreed to continue to develop and implement a competency based classification structure aligned to appropriate competency standards for the public transport industry. This will require the ongoing development and updating of competency profiles for specific workplaces within each Division, conducted by the Registered Training Organisation in consultation with PTA managers and employees directly concerned.

(ii) Units of competency

Units of competency for any particular position will reflect the skills and knowledge required in order to perform the job. "AQF level" reflects levels of competencies from nationally accredited and endorsed training packages under the Australian Qualifications Framework.

(iii) For the purposes of classifications under this award, the Transport and Distribution Training package is used, with competencies from alternative training packages only utilized if considered necessary due to specific circumstances, where there is agreement between the parties. The two packages considered relevant to specialised areas are Asset Security (for CMR employees) and Electrotechnology (Network and Infrastructure tradespersons and technicians).

(iv) Classification Determination

AQF levels are used to assist in determining classification levels under this award, and refer to the skills and competencies required of employees to perform the core functions of the job. Competencies will be documented through competency profiles constructed for each position or group of positions. Profiles will be constructed on a consultative basis. Identification of the competencies required at each level and the training requirements is presently being carried out by classification review working parties.

(v) Employee obligations

Employees shall be required to maintain currency in their qualifications and competencies they possess. Currency may be maintained by regular performance of tasks requiring the specified skills. Employees who fail to maintain currency of their qualifications or who choose not to carry out duties within their level may be reduced to a lower level.

Employees undergoing training for advancement or promotion to a higher level will not be eligible for payment of higher duties allowance when carrying out work at the higher level in connection with their training.

As a consequence of the competency based classification structure, employees will be expected to undertake a wider range of tasks provided that such duties are within the limits of the employees competence and training including work which is incidental and peripheral to the employees main tasks and without reference to traditional demarcations.

4.11.3 Qualifications & Relativities

<u>REA Level</u>	<u>Qualification</u>			<u>Metals%</u>
10	Advanced Trades	C4	3rd Year of Associated Diploma	135%
9	Advanced Trades	C5	Advanced Certificated/Formal Equiv	130%
8	Advanced Trades	C6	1st Year of Advanced Cert	125%
7	Trades Special Class	C7	Post Trade Cert or Formal Cert	115%
6	Trades Special Class	C8	Completion of 66% of Qual I 7	110%
5	Tradesperson	C9	Completion of 33% of Qual I 7	105%
4	Tradesperson	C10	Trade Cert/Eng.Prod'n Cert	100%
3	Workshop Prod'n	C11	Prod'n/Eng. Certificate II	
2	Workshop Prod'n	C12	Prod'n/Eng Certificate I	
1	Workshop Prod'n	C13/14		

AQF Qualifications and Relativities

Benchmarks	Lvl	Minimum Training	REA n	Minimum Training Requirement Electrotechnology Competence	Prerequisite Qualifications-
C4 Advanced Trades qual'n's	10		Technician/ Tech support	Complete Advanced Diploma (AQF 6)	AQF Certificate 6
C5 Advanced Tradesperson 66% advanced trade qual'n	9		Technician	Units towards Advanced Diploma (AQF 6) or equivalent	AQF 5 Certificate or equiv. enterprise specific skills/ knowledge + unit at AQF 6 level /equiv:
C6 Advanced Tradesperson 33% advanced trade qual'n	8		Technician	Complete Diploma AQF 5	AQF Certificate 5
Special Class Tradesperson With Post trade qualification	7		Technician	Units towards Diploma at AQF 5 or equivalent	Post Trade Certificate or AQF Level 4 ; enterprise specific skills/knowledge; & unit at AQF 5/ equiv.
C8 Special Class Tradesperson 66% post trade qualification	6	Complete Certificate 4		Complete AQF Certificate 4	AQF Cert 4 or Post trade certificate equivalent
C9 Exp'd Trades + 33% post trade qualification	5	Units towards AQF Certificate 4	Tradesperson with enterprise specific skills	Units towards AQF Certificate 4	Trade Certificate or AQF 3 or equivalent; enterprise specific skills/ knowledge & unit at AQF 4/ equiv.
C10 Fitter/Trades Certificate With trade qualification	4	Trade or AQF Certificate 3/ equivalent	Tradesperson (without enterprise skills/ expce) Maintainer	Complete Trade Certificate or equivalent AQF 3	AQF Cert 3 Or trade certificate
	3A		Maintainer		
	3	Part –way towards Certificate 3	Maintainer Attendant		AQF Certificate 2
	2	Completed Certificate 2	Maintainer		AQF Certificate 1 + Track Access Requirement for substantive position
C14	1	Units toward Certificate 1	Maintainer		

4.12. - CRITERIA PROGRESSION

- Employees within this structure will have the opportunity to move progressively from Level 1 to 4 through acquisition of stipulated competencies gained by on the job and off the job training and assessments. Progression beyond REA L4 is subject to a vacancy arising or through reclassification. Criteria progression will cease at REA Level 4 for signal maintainers and overhead catenary maintainers.
- An integral part of this structure is that whilst there is the opportunity to automatically progress to a higher level, it will be expected that employees will still continue to undertake lower level tasks that are associated with that area of operation.
- For criteria progression, appointment to the higher level is subject to the employee satisfactorily completing all of the required training and achieving the competencies essential at the higher level.
- Regression to a lower classification level may occur if an employee is not qualified or competent to perform work, for reasons which may include inability to meet licensing or certification requirements, failure to demonstrate required competencies or physical incapacity. Should an employee be unable to perform tasks at that lower level, the employer may review the employee's contract of employment.

PART 5. - ALLOWANCES AND FACILITIES5.1. - ON CALL ALLOWANCES

5.1.1 Call Out Provisions

The provisions of this sub clause shall be limited to those employees who occupy positions that are agreed between the parties as positions to which the call out provisions should apply, but shall not apply to employees to whom the provisions of sub-clause 5.2 of this Award applies.

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of \$3.33 per hour.

5.1.3 Except when an employee is recalled to duty and reports for work and overtime payment applies, no additional payment shall be made to an employee in receipt of an on call allowance for contact made with the employee while on call.

5.1.4 To be eligible for payment of the On Call Allowance prescribed in sub clause 5.1.2, an employee must be contactable and be available for return to duty during the times such employee is required to be on call.

5.1.5 Recall to Duty

On call allowance shall not apply to any employee after recalled to duty and receiving payment in accordance with overtime provisions. All travelling time attending to call outs shall be deemed as time worked for the purpose of this subclause and be paid as per the entitlements of this Award.

5.2. - SIGNAL TECHNICIANS STAND-BY ROSTER ARRANGEMENTS

5.2.1 The following Signals Stand By Roster provisions apply to Signals Technicians working in the field on the maintenance of Safeworking, signalling and level crossing protection equipment.

5.2.2 Employees shall be rostered for the Signals Stand By Roster outside of their ordinary hours of duty on weekdays, on weekends and public holidays.

5.2.3 The rostered period for such stand-by shall be from the completion of the normal shift on Thursday until commencement of the normal shift on the following Thursday.

5.2.4 Signal Technicians Stand-by Roster Allowance

(a) Signal technicians, when rostered on and available for stand-by outside of the ordinary hours of duty shall be paid twenty three hours at ordinary rates for stand-by in accordance with sub clause 5.2.3. The payment consists of three hours per day for stand by Monday to Friday inclusive and four hours per day for stand by on the Saturday or Sunday.

(b) An immediate response to call out is required from employees on the stand by roster. In addition to the allowance prescribed in paragraph (a), employees shall be entitled to receive overtime payments prescribed under this Award.

(c) Relief Payments for Stand By Roster

Signals Technicians utilized for stand by roster relief shall be paid a flat weekly allowance calculated at 4.6% of the Level 7 weekly rate, but this allowance shall not be paid when such employee is not available to be called out.

(d) Public Holidays

An employee on Signals Stand By Roster on a Public Holiday shall receive a day in lieu of the Public Holiday to be taken on a mutually agreed day; provided that an employee called out on a Public Holiday shall not be entitled to receive a second day in lieu of the Public Holiday.

(e) Vehicles and mobile phones shall be supplied to employees on the Signals Stand-by Roster. Where no mobile phones are supplied, telephone or other expenses can be reimbursed. Head of Branch authorization is required prior to an employee incurring such expenses and employees may be required to produce receipts prior to reimbursement of such expenses.

5.3. - AFTER HOURS CONTACT: MEALS AND EXPENSES

5.3.1 Meal Breaks

(a) An employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of \$8.73 as provided under this Award.

(b) For the purpose of this sub-clause recognized meal periods shall be defined as:

Breakfast	0530 hours to 0730 hours
Lunch	1200 hours to 1400 hours
Dinner	1700 hours to 1900 hours

5.3.2 Other Expenses

(a) The employer shall supply mobile phones or other equipment as needed, to employees for the purpose of meeting after hours contact requirements. Where mobile phones are not provided, necessary and reasonable telephone costs may be reimbursed to employees on production of receipts eg connections; rental and call costs.

(b) Provided such claims are authorized by the Head of Branch before the employee incurs that expense, and provided such calls are in connection with Public Transport Authority business. The employer has the discretion to reimburse other reasonable expenses incurred by the employee where these are necessarily incurred due to after hours contact requirements. To claim additional expenses requires prior authorization from the Head of Branch and the employee must be able to produce receipts.

5.4. - AWAY FROM HOME ALLOWANCES

Where an employee is required by the employer to travel away from home for work related purposes, and such travel necessitates an overnight stay away from that employee's usual place of residence, the following allowances shall apply:

5.4.1 Where the employer has accommodation of a reasonable standard available at the location or within reasonable proximity to it, the employee may be required to use such accommodation.

5.4.2 Where sub clause 5.4.1. applies, the employee shall be paid an allowance of \$36.18 per day except when the accommodation includes dining facilities and meals, in which case an allowance of \$27.15 per day shall be paid.

5.4.3 Where the employer does not provide accommodation, the employee shall be entitled to an allowance to cover accommodation, meals and incidentals as follows. These rates shall be adjusted automatically in line with variations to Schedule I, Travelling, Transfer and Relieving Allowances in the Public Service Award 1992.

Overnight Stay at:	Employees Up to 42 days	Employees with dependants After 42 days	Employees without Dependents After 42 days
Hotel/Motel Perth Suburban Area	\$ 210.05 per day	\$ 105.00 per day	\$70.00 per day
Hotel/Motel WA South of 26° Latitude	\$ 168.60 per day	\$ 84.30 per day	\$ 56.20 per day
Other than hotel/motel	\$79.40 per day		

- 5.4.4 An employee claiming the allowance as prescribed by sub clause 5.3.1 shall provide the employer with details of the accommodation occupied and certification of the occupancy.
- 5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of \$9.50 per day.
- 5.4.6 In addition to the allowances provided for within this sub clause, an employee temporarily lodging in a district carrying a district allowance shall be granted such allowance; a day's allowance to be granted for the first twenty- four hours or any part thereof, time calculated from time of departure from home station to time of departure from a foreign station.
- 5.4.7 No away-from-home allowance shall be granted to any employee stationed in the suburban area in respect of any absence from the home station within the suburban area, unless in special circumstances upon the approval of the Chief Executive Officer.
- 5.4.8 The foregoing allowances will not be paid -during any period of absence from duty unless such absence is due to sickness of the employee, and does not exceed one week; or during any period of annual or long service leave.

5.5. - TRAVELLING TIME - OTHER THAN TRAFFIC

- 5.5.1. Where an employee is temporarily required to start/finish work at a location other than usual workplace or home depot, and the distance is further than ordinarily required from the employee's usual residence to work, the following provisions may apply.
- Providing nothing in this clause prevents the employer from permanently transferring an employee to another location or relocating a workplace or home depot, in which case traveling allowance provisions shall not apply.
- 5.5.2 An employee stationed in the suburban area who is required to start work at some place other than the employee's home station or depot within the suburban area shall,
- (a) if the time taken in travelling from the employee's usual place of residence to the temporary work place and return exceeds the time normally taken in travelling from the usual place of residence to the home station or depot and return, be paid for such excess travelling time at ordinary rates, calculated on the basis of the mode of transport used on the day concerned.
 - (b) if the fares actually and reasonably incurred in such travelling exceed the fares normally paid by the employee in travelling from the usual place of residence and return, the employee will be reimbursed the amount by which such fares exceed those usually paid for travelling to and from the home station or depot; provided that if suburban rail travel is used to travel to the temporary workplace, free rail travel shall be allowed.
 - (c) Subject to the prior approval of the Head of Branch, where an employee uses the employee's own means of transport and the distance the employee is required to travel from the usual place of residence to the station or depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the station or depot where the employee is usually stationed will be paid the rate per kilometer as prescribed by the Public Service Award 1992 Schedule F for any additional distance traveled. Rates to be adjusted automatically with the adjustments to Schedule F.
 - (d) If an employee of the Network and Infrastructure Division is required to attend the depot and is transported to and from the work site by departmental vehicle, travel both ways between the depot and the work site shall be in the employer's time.

5.6. - TRAVELLING TIME - TRAFFIC

- 5.6.1 When a Traffic Section employee in the suburban area is required to temporarily work at a suburban depot or station other than the depot or station at which the employee is usually stationed the following shall apply, unless the employee is compensated through an "end station" or "other line" allowance which would apply instead of this provision. -
- 5.6.2 When the distance the employee is required to travel from the usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employees home depot, the employee shall be paid an allowance of \$1.20 per kilometer in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance traveled;
- 5.6.3 When the period of relief is for one week or less an allowance of \$5.59 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.
- 5.6.4 The rates referred to in this subclause will be adjusted from time to time in accordance with the Taxi Control Board metropolitan rates.

5.7. - MEAL ALLOWANCE

- 5.7.1 Refreshment Allowance
- An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of \$4.37 where:
- (a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and
 - (b) The employee is not entitled to a meal allowance as prescribed elsewhere under this Award.
- 5.7.2 Meal Allowance
- Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid \$8.73 in lieu where:

- (a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or
- (b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

5.8. - SHIFTS AND/OR NIGHT WORK ALLOWANCE - (SIX - DAY SHIFT WORK)

5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

- (a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of \$2.01, an hour on all time paid at the ordinary rate.
- (b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of \$2.33 an hour on all time paid at ordinary rate.
- (c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of \$2.01 an hour for all time paid at ordinary rate.
- (d) In addition to the hourly shift work allowance an employee will be paid an allowance of \$2.33 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
- (e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of \$2.39 per hour.

Provided that shift penalties do not apply to Saturday and Sunday hours, which are paid as follows: ordinary hours on Saturday are paid with a 50% loading in accordance with sub clause 3.3.2(c), additional hours on Saturday are paid at double time in accordance with clause 3.3.2(b), and all time on Sunday is paid at double time in accordance with sub clause 3.3.2(a).

5.8.2 Other Than Traffic and Car Park Attendants - (Five Day Shift Work)

- (a) The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Friday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work.
- (b) The employer shall post the shift work roster at least 14 days in advance of the start date.
- (c) An employee shall be rostered to work no less than five consecutive afternoon or night shifts, for the roster to constitute shift work for the purposes of this sub clause.
- (d) An employee who is not rostered to work five consecutive afternoon or night shifts, is not considered to be working shifts pursuant to this sub clause. In which case, all time worked outside the ordinary spread of hours between 0600 to 1800 Monday to Friday, shall be paid at overtime rates of time and a half for the first two hours, and double time thereafter, with each day to stand alone.
- (e) For the purposes of this sub clause, day shift means an ordinary working shift commencing after 0600 hours and ending at or before 1800 hours, Mondays to Fridays .
- (f) All time worked on shifts except the day shift shall be paid at the rate of time and a quarter (1.25) times the ordinary hourly rate, for the first eight hours of the shift.
- (g) When working afternoon or night shifts, and required to work beyond eight hours in the shift, the additional hours shall be paid at overtime rates calculated on the ordinary hourly shift work rate inclusive of the 25% loading for afternoon or night shift, provided that in no circumstances shall the maximum payment exceed double time.
- (h) Any time worked on Saturday and Sunday is considered additional hours for the purposes of this sub clause and is paid at weekend overtime rates of double the ordinary hourly rate from midnight Friday to midnight Sunday.

5.9. - UNIFORMS, CLOTHING AND PROTECTIVE EQUIPMENT

5.9.1 The employer shall supply uniforms and protective clothing; as agreed from time to time between the employer and the union or unions concerned.

5.9.2 An employee shall sign an acknowledgement on receipt of uniforms and/or protective clothing thereof, and on leaving employment shall return the same to the employer.

5.9.3 An employee shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use expected.

PART 6. - LEAVE

6.1 - ANNUAL LEAVE

6.1.1 Annual Leave Entitlements

- (a) Except as provided otherwise, a period of four consecutive weeks' leave on full pay shall be allowed annually to an employee after a period of 12 months' continuous service with the employer; provided that such leave may be cleared in more than one part and where the employer and the employee agree the leave may be cleared in two or three separate periods.

Provided further that an employee may, with the consent of the employer, take short term annual leave, not exceeding five days in any leave year. Provided further that with consent of the employer leave may be allowed to accumulate for two years.

- (b)
 - (i) Employees working continuous 24/7 shift work rosters, consistent with sub clause 5.8.1 of this Award, or working other than regular day shift shall be allowed an additional week's holiday in each year on full pay to that prescribed in paragraph (a) above.
 - (ii) This provision shall also apply to any other employee whose ordinary hours of work can be extended (as with guards etc.) over Saturdays and holidays and whose hours of duty vary throughout the twenty-four hours of the day and who may be called upon to work on Sundays.
 - (iii) Notwithstanding anything elsewhere contained herein this subclause shall not apply to any employee whose ordinary hours of work must be completed between Monday to Friday inclusive.

- (c) Employees shall accrue annual leave as hours, accruing time on a pro rata weekly basis, as prescribed under the Minimum Conditions of Employment Act 1993.
- (d) Employees shall be paid for annual leave at their graded rates of pay when such annual leave is taken: Provided that if within two weeks before such annual leave is taken the employee is acting in a higher capacity and has been so acting for a period of not less than two months the annual leave shall be paid for at the rate applicable to such higher capacity position.
- (e) No deduction shall be made from annual leave for the period any employee is off duty on paid sick leave. In the case of sick leave without pay for which a medical certificate has been provided only that period in excess of three months shall be deducted from qualifying service for annual leave.
- (f) Holiday Lists
 - (i) Unless otherwise agreed between the employees and managers in a particular branch, every year prior to the 31st August a statement shall be posted in each depot or station showing the dates on which each employee will go on annual leave and resume duty. The annual leave for such employees shall be calculated up to 30th June each year, and only leave up to that date shall be granted each year except in cases where leave has been allowed to accumulate.
 - (ii) Holiday lists are not to be departed from without the consent of the employee concerned, except for reasons of sickness, accident or traffic requirements not foreseeable at the date of preparing lists.
 - (iii) Where an employee's holidays have been cancelled the employee shall be notified within one month after such cancellation of the date on which the employee is to be again booked off and this date shall not be departed from.
 - (iv) With the Manager's approval, an employee may exchange leave dates with another employee.
- (g) Any employee who may resign or be dismissed from the service for any cause, other than for peculation or theft from the Department, shall be entitled to receive payment for any annual leave which may have been due up to the time of leaving the service: Provided always that if the employee has been dismissed for peculation or theft no claim for annual leave shall be recognised. Misconduct shall not affect accumulated annual leave or payment.
- (h) Unless at the employee's own request, no employee shall be booked off for annual leave at a foreign or at temporary home station.
 - (i) If an employee is booked off for annual leave when away from the employee's permanent home station, the employee shall be allowed travelling time to and from the place the employee is working at and such home station; the leave to count as starting and finishing at the employee's permanent home station.

6.1.2 Loading on Annual Leave

- (a) Employees entitled to four weeks annual leave hereof shall be paid a loading on such leave calculated as follows:
 - (i) Employees referred to in subclause (1)(a)(i) - 17-1/2 per cent of the award rate of pay for the period of leave being cleared.
 - (ii) Employees referred to in subclauses (1)(b)(i) and (ii) and who qualify for one week's extra leave - 20 per cent of the award rate of pay for the period of leave being cleared.
 - (iii) Employees referred to in subclauses (1)(b)(i) and (ii) and who qualify for additional leave but who do not qualify for the full week's leave - 18-3/4 per cent of the award rate of pay for the period of leave being cleared.
 - (iv) The amount of loading calculated shall not exceed the following percentages of the amount set out in the Australian Bureau of Census and Statistics publication for average weekly earnings per male employed unit in Western Australia for the September quarter immediately preceding the date on which the clearance of leave commences:
 - for employees entitled to 4 weeks annual leave 17.5% loading
 - for employees entitled to 5 weeks annual leave 20% loading
- (b) If it gives a greater amount than the amount of loading calculated as per (a), an employee shall be entitled to payment of:
 - (i) shift penalties Monday to Friday inclusive
 - (ii) Saturday penalty and
 - (iii) Sixth shift penalty on time worked on a rostered sixth shift falling within the rostered 38 hours for the week but not otherwise:

which the employee would have received for ordinary time had the employee not proceeded on annual leave.
- (c) Where all or any part of the annual leave carrying the loading is not cleared in the year following the date on which it falls due the loading will be calculated at the employees' graded rate of pay at June 30 or December 31 as the case may be and the amount of the loading recorded and paid to the employee when he clears the leave.
- (d) The loadings in subclause (2)(a) shall apply to annual leave commencing to accrue on July 1 1973. The loadings in subclause (2)(b) shall apply to annual leave commencing to accrue on July 1 1972.
- (e) Where annual leave is taken in more than one period as prescribed in subclause (1)(a)(i) the loading will only be paid on periods of 1 week or more.
- (f) In accordance with the long service leave conditions for State Government wages employees any holiday occurring during the period in which an employee is on long service leave shall be calculated as portion of the long service leave and extra days in lieu shall not be granted.
- (j) A casual employee shall not be entitled to any paid holidays.

6.2. - PUBLIC HOLIDAYS

- 6.2.1 The following days or days observed in lieu shall, subject to Clause (4.3.2) Overtime, be allowed as holidays without deduction of pay, namely:

New Years Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day, any other day proclaimed as a general public holiday.

- 6.2.2 When any of the above-mentioned days 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 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.
- 6.2.3 Whenever any holiday falls on an employee's ordinary working day and the employee is not required to work on such day the employee shall be paid eight-(8) ordinary hours –(permanent full time employee) or pro rata entitlement in the case of an part-time employees.
- 6.2.4 (i) If an employee is required to work on a holiday the employee shall be paid for all time worked at the rate of time and one half for the first eight- (8) hours worked on any shift on that day and at the rate of double time and one half for all time worked in excess of eight –(8) hours on any shifts in lieu of all penalties which may be payable for work on that day under this award.
- (ii) In addition to the payment prescribed within sub-paragraph (d)-(i) an employee required to work on a public holiday shall be paid a further eight –(8) hours: Provided that the employee may elect in lieu of being paid for that eight –(8) hours, to be granted a day's holiday with pay which may be cleared with the annual leave or taken at some subsequent date when the employee so agrees.
- 6.2.5 If a public holiday falls on a weekday within an employee's 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 of eight –(8) hours for each such holiday observed.
- 6.2.6 An employee who returns to the home station or finishes a shift at the home station, not later than 0400 hours on any holiday and is not booked on duty for that day shall be treated as having had a paid holiday.
- 6.2.7 When an employee is off duty owing to leave without pay or sickness, including accidents on or off duty except time for which the employee is entitled to claim sick pay, any holiday falling during such absence shall not be treated as a paid holiday. Where the employee, however, is on or is available for duty on the working day immediately following a holiday, the employee shall be entitled to a paid holiday on such holiday.

6.3. - SICK LEAVE & CARER'S LEAVE

- 6.3.1 An employee shall be entitled to payment for non attendance on the grounds of personal ill health at the rate of 1/6th of the guaranteed week's work for each completed month of service.
- 6.3.2 The unused portion of the entitlement prescribed hereof in any accruing year shall be allowed to accumulate and may be availed of in next or any succeeding year.
- 6.3.3 Sick leave accrues on a weekly pro rata basis, according to the number of ordinary weekly hours prescribed for that position.
- 6.3.4 This clause shall not apply where the employee is entitled to employees compensation.
- 6.3.5 No employee shall be entitled to the benefit of this clause unless the employee produces reasonable evidence in support of claims of genuine illness/ ill health, provided however that the employer shall not be entitled to a medical certificate for absences of less than three consecutive working days unless the total of such absences in any accruing year exceeds the hours prescribed for that employee for an ordinary week's work.
- 6.3.6 For the purpose of this clause the term "accruing year" means the year ending 30th June or 31st December according to which of these dates the annual leave of the employee is calculated.
- 6.3.7 If an employee falls sick while on annual leave and produces at the time satisfactory medical evidence that the employee is or was confined to the employee's place of residence or hospital for a period of at least one week the employee may, with the approval of the employer, be granted at a time convenient to the employer, additional leave equivalent to the period of sickness falling within the rostered period of annual leave.
- 6.3.8 An employee's paid sick leave entitlement is taken at the employee's graded rate of pay. In addition payment shall include (i) Shift penalties Monday to Friday inclusive (ii) Saturday and Sunday penalties
- 6.3.9 Provided that if the employee was engaged on duties carrying a higher rate and was entitled to payment at that higher rate for the whole of the day or shift immediately prior to the employee ceasing duty the employee shall be paid for sick leave at that higher rate for the period the employee would have continued to work in the higher position had the employee not ceased duty because of ill health.
- 6.3.10 Carer's leave
An employee may use a portion of sick leave to care for sick relatives or family members, in accordance with the following minimum conditions.
- (a) An employee is entitled to use, each year, up to 5 days of the employee's sick leave entitlements for that year to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of immediate care and attention.
- (b) In paragraph (a) —
"member of the employee's family" means any of the following persons —
- (i) the employee's spouse or de facto partner;
- (ii) a child for whom the employee has parental responsibility as defined by the Family Court Act 1997;
- (iii) an adult child of the employee;
- (iv) a parent, sibling or grandparent of the employee.

6.4. - BEREAVEMENT LEAVE

- 6.4.1 An employee shall, on the death within Australia of a spouse, parent, step parent, grandparents brother, sister, child or stepchild and the grandparents, father, mother, brother or sister of the spouse of the employee concerned be entitled, on notice, to leave of absence without deduction of pay. Bereavement leave is also available to employees on the death of any other person who, immediately before that person's death, lived with the employee as a member of the employee's family, and the employer may require reasonable evidence of this relationship to the family.

- 6.4.2 Such leave of absence up to and including the day of the funeral of the relation shall be for a period up to but not exceeding the number of hours worked by the employee in three ordinary working days having regard to the circumstances of the particular case. These days need not be taken consecutively.
- 6.4.3 Reasonable evidence supporting a claim for bereavement leave shall be supplied by the employee as soon as practicable.
- 6.4.4 Payment in respect of Bereavement Leave shall be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned would have been off duty in accordance with the employee's roster, or on long service leave, annual leave, sick leave, employees' compensation, leave without pay or on a public holiday.
- 6.4.5 Employees requiring more than two (2) days bereavement leave in order to travel overseas or interstate in the event of the death overseas or interstate of a member of an employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave in weekly multiples and/or leave without pay provided all accrued leave is exhausted.

6.5. – STUDY LEAVE

- 6.5.1 Conditions for granting time off
- (a) An employee may be granted time off with pay for part-time study purposes at the discretion of the employer.
- (b) Part-time employees are entitled to study leave on the same basis as full time employees.
- (c) Employees working shift work or on fixed term contracts also have the same access to study leave as all other employees.
- 6.5.2 Time off with pay may be granted up to a maximum of five hours per week, including travelling time, where subjects of approved courses are conducted during normal working hours. The equivalent applies if studying by correspondence.
- 6.5.3 Employees who are obliged to attend educational institutions for compulsory block sessions may be granted time off with pay, including travelling time, up to the maximum annual amount allowed to an employee in subclause 6.5.2.
- 6.5.4 Employees shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study or for the mature age entrance examination for tertiary admission conducted by the Tertiary Institution Service Centre.
- 6.5.5 In every case the approval of time off to attend lectures and tutorials will be subject to:
- (i) the employer's convenience;
- (ii) the course being undertaken on a part-time basis;
- (iii) employees undertaking an acceptable formal study load in their own time;
- (iv) employees making satisfactory progress with their studies; and
- (v) the course being relevant to the employee's career in the public sector and being of value to the state.
- 6.5.6 A service agreement or bond will not be required.
- 6.5.7 For the purposes of this clause:
- (a) In determining the employer's convenience, employers should give due emphasis to the employee's career aspirations and relevance to working at the Public Transport Authority.
- (b) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition or the equivalent if studying by correspondence with at least half of the total formal study commitment being undertaken in the employee's own time, except in special cases such as where the employee is in the final year of study and requires less time to complete the course, or the employee is undertaking the recommended part-time year or stage and this does not entail five hours formal study.
- (c) A first degree or Associate Diploma course does not include the continuation of a degree or Associate Diploma towards a higher postgraduate qualification.
- (d) In cases where employees are studying subjects that require fortnightly classes, the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.
- (e) Travelling time returning home after lectures or tutorials is in the employee's time.
- (f) An employee shall not be granted more than five hours time off with pay per week except in exceptional circumstances where the employer may decide otherwise.

6.6. – BLOOD/PLASMA DONORS LEAVE

- 6.6.1 Subject to operational requirements, employees shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:
- (a) prior arrangements with the supervisor has been made and at least two (2) days' notice has been provided; or
- (b) the employee is called upon by the Red Cross Blood Centre.
- 6.6.2 The notification period shall be waived or reduced where the line manager is satisfied that operations would not be unduly affected by an employee's absence.
- 6.6.3 Employees shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.
- 6.6.4 Employees shall be entitled to two (2) hours of paid leave per donation for the purpose of donating blood or plasma to the Red Cross Blood Centre.

6.7. – EMERGENCY SERVICES LEAVE

- 6.7.1 Subject to operational requirements, paid leave of absence shall be granted by the employer to an employee who is an active volunteer member of State Emergency Service, St John Ambulance Brigade, Volunteer Fire and Rescue Service, Bush Fire Brigades, Volunteer Marine Rescue Services Groups or FESA Units, in order to allow for attendances at emergencies as declared by the recognised authority.
- 6.7.2 The employer shall be advised as soon as possible by an employee, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.
- 6.7.3 The employee must complete a leave of absence form immediately upon return to work.
- 6.7.4 The application form must be accompanied by a certificate from the emergency organization certifying that the employee was required for the specified period.

6.7.5 An employee who, during the course of an emergency, volunteers their services to an emergency organisation, shall comply with subclauses 6.7.2, 6.7.3 and 6.7.4.

6.8. – DEFENCE FORCE RESERVES LEAVE

6.8.1 The employer must grant leave of absence for the purpose of defence service to an employee who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.

6.8.2 Leave of absence may be paid or unpaid in accordance with the provisions of this clause.

6.8.3 Application for leave of absence for defence service 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 provide a certificate of attendance to the employer.

6.8.4 Paid leave

- (a) An employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for defence service, subject to the conditions set out hereunder.
- (b) Part-time employees shall receive the same paid leave entitlement as full-time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.
- (c) On written application, an employee shall be paid wages in advance when proceeding on such leave.
- (d) Casual employees are not entitled to paid leave for the purpose of defence service.
- (e) An employee is entitled to paid leave for a period not exceeding 105 hours on full pay in any period of twelve months commencing on 1 July in each year.
- (f) An employee is entitled to a further period of leave not exceeding 16 calendar days in any period of twelve months commencing on July 1. Pay for this leave shall be at the rate of the difference between the normal remuneration of the employee and the Defence Force payments to which the employee is entitled if such payments do not exceed normal wages.

In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered 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.

6.8.5 Unpaid leave

- (a) Any leave for the purpose of defence service that exceeds the paid entitlement prescribed in subclause (4) of this clause shall be unpaid.
- (b) Casual employees are entitled to unpaid leave for the purpose of defence service.

6.8.6 Use of other leave

- (a) An employee may elect to use annual or long service leave credits for some or all of their absence on defence service, in which case they will be treated in all respects as if on normal paid leave.
- (b) An employer cannot compel an employee to use annual leave or long service leave for the purpose of defence service.

6.9. - LEAVE WITHOUT PAY

6.9.1 Subject to the provisions of paragraph (b) of this clause, the employer has discretion to grant an employee leave without pay for any period and is responsible for that employee on their return. There is no obligation to offer leave without pay unless otherwise provided for by agreement or policy provisions.

6.9.2 Every application for leave without pay will be considered on its merits and shall not be considered unless the following conditions are met:

- (i) The work of the employer is not inconvenienced; and
- (ii) All other leave credits of the employee are exhausted.

6.9.3 An employee on a fixed term appointment may not be granted leave without pay for any period beyond that employee's approved period of engagement.

6.9.4 Leave without pay for full time study

The employer may grant an employee without pay to undertake full time study, subject to a yearly review of satisfactory performance.

Leave without pay for this purpose shall not count as qualifying service for leave purposes.

6.9.5 Leave without pay for Australian Institute of Sport scholarships

Subject to the provisions of paragraph (b) of this clause, the employer may grant an employee who has been awarded a sporting scholarship by the Australian Institute of Sport, leave without pay.

6.10. - PARENTAL LEAVE

6.10.1 Definitions

In this clause:

- (a) "Employee" includes full time, part time, permanent and fixed term contract employees.
- (b) "Primary Care Giver" is the employee who will assume the principal role for the care and attention of a child/children. The Employer may require confirmation of primary care giver status.
- (c) "Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.
- (d) "Partner" means a person who is a spouse or de facto partner.
- (e) "Public sector" means an employing authority as defined in s5 of the Public Sector Management Act 1994.

6.10.2 Entitlement to Parental and Partner Leave

- (a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:
 - (i) birth of a child to the employee or the employee's partner; or

- (ii) adoption of a child who is not the natural child or the stepchild of the employee or the employee's partner; is under the age of five (5); and has not lived continuously with the employee for six (6) months or longer.
- (b) An employee identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to six (6) weeks paid parental leave from the date of certification of this Agreement, 7 weeks from 1 January 2005 and 8 weeks from 1 January 2006. Paid parental leave will form part of the 52 weeks entitlement provided in 16.6.2 (a).
- (c) A pregnant employee can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.
- (d) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed six (6) weeks, or 7 weeks from 1 January 2005 and 8 weeks from 1 January 2006.
- (e) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.
- (f) Parental leave may not be taken concurrently by an employee and his or her partner except under special circumstances and with the approval of the Employer.
- (g) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.
- (h) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.
- (i) An employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.

6.10.3 Partner Leave

An employee who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.

6.10.4 Birth of a child

- (a) An employee shall provide the Employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner confirming the pregnancy and the estimated date of birth.
- (b) If the pregnancy results in other than a live child or the child dies in the six weeks immediately after the birth, the entitlement to paid parental leave remains intact.

6.10.5 Adoption of a child

- (a) An employee seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement in lieu of this leave.
- (b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.

6.10.6 Other leave entitlements

- (a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.
- (b) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years. The Employer's approval is required for such an extension.
- (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 partners work for the Employer the total combined period of leave without pay following parental leave will not exceed two (2) years.
- (d) An employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in 10.3.(a) and 10.3.(e).
- (e) Should the birth or adoption result in other than the arrival of a living child, 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. Such paid sick leave cannot be taken concurrently with paid parental leave.
- (f) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

6.10.7 Notice and Variation

- (a) The employee shall give not less than four (4) weeks notice in writing to the Employer of the date the employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.
- (b) An employee seeking to adopt a child shall not be in breach of subclause 10.4.(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.
- (c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.

6.10.8 Transfer to a Safe Job

Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the pregnant employee make it inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position at the same classification level until the commencement of parental leave.

6.10.9 Replacement Employee

Prior to engaging a replacement employee the Employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

6.10.10 Return to Work

(a) An employee shall confirm the intention to return to work by notice in writing to the Employer not less than four (4) weeks prior to the expiration of parental leave.

(b) Where an Employer has made a definite decision to introduce major changes that are likely to have a significant effect on the employee's position the Employer shall notify the employee while they are on parental leave.

(c) An employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.

(d) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with the part time provisions of the relevant award and Agreement.

(e) Subject to the Employer's approval an employee who has returned on a part time basis may revert to full time work at the same classification level within two (2) years of the recommencement of work.

6.10.14 Effect of Parental Leave on the Contract of Employment

(a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(b) Paid parental leave will count as qualifying service for all purposes under the relevant award and Agreement. Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose under the relevant award and Agreement.

(c) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the relevant award and Agreement.

(d) An Employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on parental leave but otherwise the rights of the Employer in respect of termination of employment are not affected.

6.11. - LONG SERVICE LEAVE

6.11.1 An employee shall be entitled to thirteen weeks paid long service leave on the completion of ten years continuous service and an additional thirteen weeks paid long service leave for each subsequent period of seven years of continuous service completed by the employee.

6.11.2 Where a public holiday falls within an employee's period of long service leave such day shall be deemed to be a portion of the long service leave and no other payment or benefit shall apply.

6.11.3 Long service leave may be taken in periods of 4 weeks or more.

6.11.4 Long service leave shall be paid at the employee's rate of pay as prescribed in the wages clause or as specified in the Schedules for rostered employees.

6.11.5 An employee will be entitled to pro rata long service leave only if employment is terminated:

(a) by the Employer for other than disciplinary reasons;

(b) due to the retirement of the employee on the grounds of ill health;

(c) due to the death of the employee, in which case the payment would be made to the employee's estate;

(d) due to employee's retirement at the age of 55 years or over, provided 12 months continuous service has been completed prior to the day from which the retirement takes effect;

(e) for the purpose of entering an In Vitro Fertilisation Program, provided the employee has completed three years service and produces written confirmation from an appropriate medical authority of the dates of involvement in the program;

(f) due to employee's resignation for pregnancy, provided the employee has completed three years and produces certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner.

6.11.6 For the purposes of determining an employee's long service leave entitlement, the expression "continuous service" includes any period during which the employee is absent on paid leave but does not include any period exceeding two continuous weeks during which the employee is absent on parental leave or leave without pay.

6.11.7 Continuity of service shall not be broken by the absence of the employee on any form of approved paid leave or by the standing down of an employee under the terms of this Agreement.

6.11.8 The Employer may direct an employee to take a long service entitlement that has been accrued for more than 3 years.

6.11.9 Where an employee is directed to take a long service leave entitlement, it will be taken within 12 months of the direction, at a time agreed between the Employer and the employee.

6.11.10 Where a time cannot be agreed within the 12 month period, the Employer will determine the date on which the employee will be required to start long service leave provided that the Employer shall give at least 3 months notice to the employee of the day on which the long service leave is to commence.

6.11.11 Where an employee has previously contracted out of their Award long service leave entitlement, the provisions of such arrangements shall be applied on a proportional basis to the Award provisions for the period of employment they were in force. Any long service leave taken or benefit in lieu of any such long service leave gained during the period of the aforementioned arrangements applied, shall be deducted from any long service leave to which the employee may become

entitled to under the Award provisions. The balance of the long service leave entitlement shall be calculated in accordance with the Award provisions from the date the employee reverted to Award long service leave provisions.

6.12. - TRAINING

6.12.1. Training and Skills Acquisition

- (a) Establishment of Skill Level
- (i) The parties to this award shall determine the appropriate range of skills applicable to each classification level contained in the relevant wages clause of the award.
 - (ii) Each employee shall be paid the wage rate specified for a classification level defined in accordance with subparagraph (a) (i).
 - (iii) Where the employee is required to apply skills which in total or in part correspond to the skills required of a higher classification than that to which they are appointed, the employee shall receive the rate of pay corresponding to that higher classification, in accordance with the higher duties clause of this award.
 - (iv) The level of skills possessed by each employee shall be determined by relevant training packages, certification and experience in accordance with paragraphs (b) and (c) below.
 - (v) Experience for the purposes of this clause, means skills gained in any industry or occupation or away from work and which are recognized within the classification structure.
- (b) Competency Standards
- (i) Where training packages have been developed by industry, those training packages shall be adopted in respect of matters relating to training the industry and callings covered by this award.
 - (ii) Training standards shall include but not be limited to the following; standards and competencies of skills required for each calling; curricula development; training courses; articulation and accreditation requirements for both on and off the job training; on the job training guidelines

6.12.2 Traineeships

- (a) Definitions
- Part time trainee means a trainee who is employed for a minimum of 20 hours per week, except in the case of school based traineeships, and has regular and stable hours of work each week, to allow training to occur. Wages and entitlements accrue on a pro rata basis.
- Traineeship means a full time or part time structured employment based training arrangement approved by the WA Department of Education and Training where the trainee gains work experience and has the opportunity to learn new skills in a work environment. On successful completion of the traineeship, the trainee obtains a nationally recognized qualification.
- Traineeship Training Contract means the agreement between the employer and the trainee that provides details of the traineeship and obligations of the employer and trainee and is registered with the WA Department of Education and Training.
- Training Program Outline (TPO) means the plan that outlines what training and assessment will be conducted off the job and what will be conducted on the job and how the registered training organization will assist in ensuring the integrity of both aspects of the training and assessment process.
- (b) Traineeships
- (i) Trainees are to be additional to the normal workforce of the employer so that trainees shall not replace paid employees or volunteers or reduce the hours worked by existing employees.
 - (ii) Training Conditions: the arrangements between the employer and trainee in relation to training as specified in the Traineeship Training Agreement, as administered by the Department of Education and Training.
 - (iii) Employment Conditions

The initial period of employment for trainees is the nominal training period endorsed at the time the particular traineeship is established.

Completion of the traineeship scheme will not guarantee the trainee future employment in the public sector, but the employer will cooperate to assist the trainee to be placed in suitable employment should a position arise.

Trainees are permitted to be absent from work without loss of continuity of employment to attend off the job training in accordance with the training plan. However, except for absences provided for under the relevant award, failure to attend for work or training without an acceptable cause will result in loss of pay for the period of the absence.

Overtime and shiftwork shall not be worked by trainees except to enable the requirements of training to be effected. When overtime and shiftwork are worked, the relevant allowances and penalties of the award based on the training wage stated in the award, shall apply. No trainee shall work overtime or shiftwork on their own.
- (c) Wages
- The wages applicable to trainees shall be as prescribed in the National Training Wage Award 2000 for employees up to and including 20 years of age. Adult trainees will be paid the rate prescribed under the Minimum Conditions of Employment Act 1993 for the minimum weekly rate of pay for employees 21 years or older.
- (d) Where it is agreed by the employer that additional training should be undertaken by an employee, training may be undertaken either on or off the job. All time involved with training shall be paid at ordinary rates of pay. Travelling time may be reimbursed where the employee incurs additional costs.

6.12.3 Competency based training and assessment.

The parties to this award recognize that training and assessment is fundamental to the competency based classification structure and requires an ongoing commitment to training and assessment processes by employees, the PTA and the unions party to this award. Therefore:

Training modules consistent with the Transport and Distribution training package and the Electrotechnology package are being developed in line with agreed nationally accredited industry training packages. The PTA will offer assessment and gap training to employees after competency profiles are constructed for their workplaces, to assist the employees affected to obtain recognition for skills they have already developed through work experience and to develop new skills required in specific occupations.

PTA employees may nominate and if accepted, become eligible for paid leave to train to become Workplace Assessors, enabling employees to participate directly in implementing competency based classifications in their own workplace. Workplace Assessors may be able to assist in competency assessments under the guidance and supervision of a Registered Training Provider and the relevant PTA managers.

6.13. - LEAVE TO ATTEND UNION BUSINESS

- 6.13.1 The employer shall grant paid leave during ordinary working hours to an employee.
- (i) required to give evidence before any Industrial Tribunal.
 - (ii) union nominated representative of the employees is required to attend negotiations and/or conferences between the union and employer.
 - (iii) when prior agreement between the union and employer has been reached, for the employee to attend official union meetings preliminary to negotiations or industrial hearings.
 - (iv) who as a union nominated representative of the employees, is required to attend joint union/management consultative committees or working parties.
- 6.13.2 The granting of leave pursuant to paragraph (a) of this subclause shall only be approved.
- (i) Where an application for leave has been submitted by an employee a reasonable time in advance.
 - (ii) For the minimum period necessary to enable the union business to be conducted or evidence to be given.
 - (iii) For those employees whose attendance is essential.
 - (iv) When the operation of the organisation is not unduly affected and the convenience of the employer is not impaired.
- 6.13.3 Leave of absence will be granted at the ordinary rate of pay. The employer shall not be liable for any expenses associated with an employee attending to union business. Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.
- 6.13.4 Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for union business. An employee shall not be entitled to paid leave to attend union business other than as prescribed by this clause.
- 6.13.5 The provisions of this clause shall not apply to special arrangements made between the parties which provide for unpaid leave for employees to conduct union business.
- 6.13.6 The provisions of this clause shall not apply when an employee is absent from work without the approval of the employer.
- 6.13.7 The employer shall grant leave without pay for a continuous period to the secretary of each applicant union (should such secretary be employed by the employer) to enable the secretary to attend exclusively to union work

PART 7. - DISPUTE RESOLUTION PROCEDURE

7. - DISPUTE SETTLEMENT PROCEDURE

- 7.1.1 Questions, disputes or difficulties arising under this Award, or in the course of the employment of employees covered by this Award, shall be dealt with in accordance with this clause.
- 7.1.2 The matter shall first be discussed directly between the employee and the immediate supervisor or other appropriate employee of the Public Transport Authority, within three working days of the issue arising.
- 7.1.3 If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant supervisor's manager and an attempt made to find a satisfactory solution, within a further five working days. A Union Representative may accompany an employee.
- 7.1.4 If the dispute is still not resolved, it may be referred by the employee or employees or the Union representative to the Chief Executive Officer or his or her nominee.
- 7.1.5 Where the dispute cannot be resolved within five working days of the employee or employees or the Union Representatives referral of the dispute to the Chief Executive Officer or his or her nominee, either party may refer the matter to the WAIRC.
- 7.1.6 The period for resolving a dispute may be extended by Award between the parties.
- 7.1.7 The parties covered by this Award will maintain and will not disrupt the provision of services to the public while disputes are being dealt with under this procedure.

PART 8. - SUPERANNUATION

The Employer will make contributions on the employee's behalf, as provided by the Superannuation Guarantee (Administration) Act 1992 into a complying Superannuation fund or scheme.

PART 9. - NAMED PARTIES TO THE AWARD

The named parties to this award are-

The Australian, Rail, Tram and Bus Industry Union of Employees, Western Australian Branch

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Employees Union of Australia, Engineering and Electrical Division Western Australian Branch.

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Employees – Western Australian Branch

Public Transport Authority or its successor.

PART 10. - REGISTERED ORGANISATION MATTERS**10.1. - FACILITIES FOR WORKPLACE DELEGATES**

- 10.1.1 The employer recognises the rights of the Unions to organise and represent their members.
- 10.1.2 Union delegates have a legitimate role and function in assisting the unions in the tasks of recruitment, organising, communication and representing their members' interest in PTA and union electorate.
- 10.1.3 The employer recognises union delegates in PTA and will allow them to carry out their role and functions.
- 10.1.4 Subject to prior approval, the employer shall provide the union delegates with the following:
- (a) Paid time off from normal duties to perform their functions as a union delegate such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the Transport Delegates committee and to attend union business.
 - (b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal PTA protocols.
 - (c) A noticeboard for the display of union materials including broadcast email facilities.
 - (d) Paid access to periods of leave for the purpose of attending union training courses. Country delegates will be provided with appropriate travel time.
 - (e) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of union membership with them.
 - (f) Access to awards, agreements, policies and procedures.
 - (g) Access to information on matters affecting employees. The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.
- 10.1.5 The employer recognises that it is paramount that union delegates in the PTA are not threatened or disadvantaged in any way as a result of their role as a union delegate.

10.2. - RIGHT OF ENTRY

- 10.2.1 Definitions
In this clause: "authorised representative" means a person who holds an authority in force under the Industrial Relations Act 1979; and "relevant employee", when used in connection with the exercise of a power by an authorized representative of the union, means an employee who is a member of the union or who is eligible to become a member of the union.
- 10.2.2 Right of entry for discussions with employees
An authorised representative of the union may, on notification to the employer, enter, during working hours, any premises where relevant employees work, for the purpose of holding discussions at the premises with any of the relevant employees who wish to participate in those discussions.
- 10.2.3 Right of entry to investigate breaches
An authorised representative of the union may, on notification to the employer, enter, during working hours, any premises where relevant employees work, for the purpose of investigating any suspected breach of an award, industrial agreement or order that applies to any such employee, or the Industrial Relations Act 1979, the Minimum Conditions of Employment Act 1993, or the Occupational Safety and Health Act 1984.
- 10.2.4 In respect of non-public access areas designated by the PTA as high security areas, the authorised representative will give the employer at least 24 hours notice of an intention to enter these areas in accordance with subclause 10.2.2 or 10.2.3.
- 10.2.5 For the purpose of investigating any such suspected breach, the authorised representative:
- (a) Subject to subclause 10.2.6, may require the employer to produce for the representative's inspection, during working hours at the employer's premises or at any mutually convenient time and place, any employment records of employees or other documents kept by the employer that are related to the suspected breach;
 - (b) shall not conduct interviews during normal working hours in the circumstances that will result in the employer's business being unduly interrupted or otherwise hampered;
 - (c) may make copies of the entries in the employment records or documents related to the suspected breach;
 - (d) shall treat with confidentiality any information obtained from employment records; and
 - (e) may, during working hours, inspect or view any work, material, machinery, or appliance that is relevant to the suspected breach.
- 10.2.6 An authorised representative is not entitled to require the production of employment records or other documents unless, before exercising the power, the authorised representative has given the employer concerned:
- (a) at least 24 hours' written notice, if the records or other documents are kept on the employer's premises; or
 - (b) at least 48 hours' written notice, if the records or other documents are kept elsewhere.
- 10.2.7 The provisions of subclause 10.2.6 do not apply where, in accordance with section 49I (7) of the Industrial Relations Act 1979, the WAIRC has waived the requirement for the authorized representative to give the employer concerned notice of an intended exercise of a power.
- 10.2.8 Where the WAIRC has waived the requirement to give the employer concerned notice of an intended exercise of a power, the authorised representative must, after entering the premises and before requiring the production of the records or documents, give the person who is apparently in charge of the premises the certificate or a copy of the certificate provided by the WAIRC under section 49I (8) of the Industrial Relations Act 1979 authorising the authorized representative's exercise of a power without notice.
- 10.2.9 If:
- (a) a person proposes to enter, or is on, premises in accordance with subclauses 10.2.2 or 10.2.3; and
 - (b) the occupier, including a person in charge of the premises, requests the person to show their authority,
- the person is not entitled to enter or remain on the premises unless they show the occupier the authority in force under the Industrial Relations Act 1979.

- 10.2.10 The occupier of premises must not refuse, or intentionally and unduly delay, entry to the premises by a person entitled to enter the premises under subclauses 10.2.2 and 10.2.3.
- 10.2.11 A person must not intentionally and unduly hinder or obstruct an authorised representative in the exercise of the powers conferred by this clause.
- 10.2.12 A person must not purport to exercise the powers of an authorised representative under this clause if the person is not the holder of a current authority issued by the Registrar under Division 2G of the Industrial Relations Act 1979.
- 10.2.13 The parties shall act consistently with the terms of Division 2G of Part II of the Industrial Relations Act 1979.

PART 11. - WHERE TO GO FOR FURTHER INFORMATION

The Australian, Rail, Tram and Bus Industry Union of Employees, West Australian Branch

Address: 2/10 Nash Street, EAST PERTH W.A. 6004
 Telephone: 9225 6722
 Facsimile: 9225 6733
 Email: general@rtbuwa.asn.au

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

Address: 121 Royal Street East Perth WA 6004
 Phone: (08) 9223 0800
 Fax: (08) 9225 4744
 Email: amwuwa@amwu.asn.au

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

Address: Unit 24, 257 Balcatta Rd, Balcatta WA 6021
 Telephone: 9440 3522
 Fax: 9440 3544
 Web Address: <http://www.cepu.org.au>

Public Transport Authority of Western Australia

Address: PO Box 8125, PERTH BUSINESS CENTRE, 6849
 Telephone: 9326 2000
 E-mail: enquire@pta.wa.gov.au
 Facsimile: 9326 2560

Western Australian Industrial Relations Commission,

Address: Level 16, 111 St. Georges Terrace, PERTH 6000
 Telephone: 9420 4444
 E-mail: webmaster@wairc.wa.gov.au
 Facsimile: 9420 4500
 Web Address: www.wairc.wa.gov.au
 Toll Free: 1800 624 263

Department of Consumer & Employment Protection, Labour Relations,

Address: 3rd Floor, Dumas House, 2 Havelock Street, WEST PERTH 6005
 Telephone: 9222 7700
 E-mail: labourrelations@docep.wa.gov.au
 Facsimile: 9222 7777
 Wageline: 1300 655 266

PART 12. - OTHER LAWS AFFECTING EMPLOYMENT

INDUSTRIAL RELATIONS ACT 1979

www.wairc.wa.gov.au

MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993

www.slp.wa.gov.au

WORKPLACE RELATIONS ACT 1996

www.airc.gov.au

SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992

www.austlii.edu.au/au/legis/cth/consol_act/sga1992430/ or link to

OCCUPATIONAL SAFETY AND HEALTH ACT 1984

www.safetyline.wa.gov.au

EQUAL OPPORTUNITY ACT 1984

www.oceo.wa.gov.au

SCHEDULE. - "A"

The Rail Tram and Bus Industry Employees Union Western Australian Branch -(formally known as the "Australian Railways Union of Employees W.A. Branch) and the Public Transport Authority recognise that on 12th November 1984 the parties entered into thirty-eight hour week arrangements, with those arrangements recorded in the document known as "Nineteen Day Month Agreement".

The parties continue to recognise the document as the arrangements entered into and will continue to recognise the document as an accurate record that clearly identified the structural changes that occurred at the time.

Attachment Two
Schedule A

MEMORANDUM

OF

AGREEMENT

WHEREBY IT IS AGREED that notwithstanding the provisions of the Railway Employees' Award Consolidated 1977, the ordinary hours of work for all wages employees in the Traffic Branch with the exception of those employed at the East Perth Workshop and Road Service garages at Kewdale and Bunbury shall be 38 per week in accordance with the following provisions:-

1. The calendar year will be divided into thirteen 4 weekly cycles. The ordinary hours worked within a 4 weekly cycle shall be 152 hours comprising 3 weeks of 40 hours and 1 week of 32 hours and shall be arranged in such manner that will allow 1 full day in the week when 32 hours are worked to be observed as the extra day off.
2. Subject to Westrail's requirements for each location the ordinary hours for the cycle will be arranged to provide for one extra day off each cycle.
 - (i) On the first or last working day of the week in conjunction with a weekend off duty; or
 - (ii) On any weekday provided that where possible the extra day off will be rostered in conjunction with the employee's rostered day off. Provided further that the rostered day off is to be accommodated in the roster prior to arranging the extra day off.

For timekeeping requirements the extra day off will be regarded as 8 hours.

- 1.1 An employee may make written application by no later than January 19 1985. for payment in cash if he considers payment by any other method will cause him undue hardship.
- 1.2 Such applications will be subject to acceptance by senior officers only.
- 1.3 Management and Union officials undertake to discuss any dispute concerning individual applications for each payment.
- 1.4 Any disputation, regarding payment in cash, which cannot be resolved by discussion between Management and Union Officials may be referred to the Western Australian Industrial Commission for determination.
- 1.5 All employees to nominate, by Procuracy order, as soon as possible and by no later than February 23 1985, the institution, and account number, to which they require their wages paid.
- 1.6 This will provide for the payment of wages into such institutions to be fully effective no later than period ending March 9 1985.
- 1.7 All new employees engaged on, and after, September 16 1984 shall have their wages paid into an account as per 1, and they shall not be eligible for consideration of cash payments.
2. Implementation of two man train crew working in the terms of the agreement contained in the Union's letter to Chief Traffic Manager dated September 28 1984 reference A/30/84/384.

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3. Where because of Westrail's requirement it is not possible for some employees to have an extra day off each cycle in accordance with the foregoing provisions, 40 hours per week will continue to be worked and one extra day off will be accrued for each cycle.
 4. Where a public holiday falls on the extra day off an alternative day off will be substituted in lieu.
 5. Where, to meet the needs of Westrail an employee is required to work on his extra day off, no overtime will be paid in respect of the first 8 hours for the shift but that employee will be granted an alternative day off. The alternative day will be another day in the cycle as agreed between management and the employee.
 6. All part time employees will be paid for hours actually worked and will not accumulate credits towards an extra day off.
 7. Where special rates or allowances are expressed as weekly amounts (calculated on the basis of a standard of forty ordinary hours), there shall be no variation to such amounts on account of the introduction of the 38 hour week.
 8. Annual Leave - Where annual leave is cleared during the year each period of four weeks annual leave will include the extra day off duty for that particular work cycle and there will be no additional pay or leave in lieu of that extra day off.
 9. Higher Capacity - Where to meet operational requirements, it is considered necessary for employees to act in another capacity while the permanent occupant is on an extra day off higher capacity payment will apply.

Further, where an employee is clearing accrued days in accordance with paragraph 3 of this agreement higher duty allowance will be paid to his relief.

10. Sick and Compassionate Leave - Where an employee is on an extra day off he will not be entitled to claim sick or compassionate leave for that day.
11. Overtime provisions will not apply until after 8 hours have been worked on each day.
12. There will be no extra day off duty applicable to employees while on long service leave nor any credit accumulated for such periods of leave i.e. there will be no additional days granted in lieu.
13. There will be no extra days off duty applicable to employees who are on leave without pay.
14. Sick leave entitlement will be debited on the basis of a rostered shift and will include an accrual towards his extra day off.
15. An employee on workers' compensation will be paid and accrue credits on the same basis as would have applied had he been at work.
16. Any annual leave, public holidays or sick leave entitlement accumulated to an employee as at September 16 1984 shall be adjusted in hours in the ratio of 38 to 40.
17. This agreement will operate from September 16 1984 and will be subject to review on June 30 1985.

TRADE OFFS

1. Payment of all employees wages into accounts, (nominated by each employee) with a Savings Bank, Trading Bank (cheque account), Building Society or Credit Union (either Railways Institute or Railway Officers).

- 1.1 An employee may make written application by no later than January 19 1985. for payment in cash if he considers payment by any other method will cause him undue hardship.
- 1.2 Such applications will be subject to acceptance by senior officers only.
- 1.3 Management and Union officials undertake to discuss any dispute concerning individual applications for each payment.
- 1.4 Any disputation, regarding payment in cash, which cannot be resolved by discussion between Management and Union Officials may be referred to the Western Australian Industrial Commission for determination.
- 1.5 All employees to nominate, by Procuration order, as soon as possible and by no later than February 23 1985, the institution, and account number, to which they require their wages paid.
- 1.6 This will provide for the payment of wages into such institutions to be fully effective no later than period ending March 9 1985.
- 1.7 All new employees engaged on, and after, September 16 1984 shall have their wages paid into an account as per 1, and they shall not be eligible for consideration of cash payments.
2. Implementation of two man train crew working in the terms of the agreement contained in the Union's letter to Chief Traffic Manager dated September 28 1984 reference A/30/84/384.

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Signed on behalf of the parties hereto this 12th day of November 1984.

SIGNED *[Signature]*
for and on behalf of the
Western Australian Government
Railways Commission

SIGNED *J. E. Nalley State Sec.*
for and on behalf of the
Australian Railways Union (WA Branch)

*Copy to
Chief Accountant
Chief Traffic Manager
etc etc*

SCHEDULE - "B"

The Rail Tram and Bus Industry Employees Union Western Australian Branch -(formally known as the "Australian Railways Union of Employees W.A. Branch) and the Public Transport Authority recognise that on 7th October 1988 the parties entered into thirty-eight hour week arrangements, specified in the Order arising out of Matter C No. 1304 of 1988 in the WAIRC and known as the "Nine Day Fortnight Agreement" (copy attached).

The parties continue to recognise the document as the arrangements entered into and will continue to recognise the document as an accurate record that clearly identified the structural changes that occurred at the time.

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9 DAY FORTNIGHT

Attachment Two
Schedule B
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WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979

s.44

Western Australian Government Railways
Commission

- and -

Electrical Trades Union of Workers of
Australia (Western Australian Branch),
Perth and Others

(No. C 1304 of 1988)

Railway Employees Award No. 18 of 1969

railways employees railways

CHIEF COMMISSIONER W.S. COLEMAN

7 October 1986

ORDER

HAVING heard Mr O. Wood on behalf of the Electrical Trades
Union of Workers of Australia (West Australian Branch), Perth,
Australasian Society of Engineers, Moulders and Foundry Workers
Industrial Union of Workers, Western Australian Branch,
Amalgamated Metal Workers and Shipwrights Union of Western
Australia, and Mr R.C. Wells on behalf of the Australian
Railways Union of Workers West Australian Branch and
Mr R. Horton on behalf of the Western Australian Government
Railways Commission and being satisfied that the parties have
reached agreement on the implementation of an arrangement for a
'seventy six hour nine day fortnight' in terms of the
requirements to meet cost neutrality and to be subject to on
going productivity measuring in each work area, and by consent,
hereby orders -

THAT notwithstanding the provisions of the Railway
Employees' Award No. 18 of 1969 the ordinary hours of
work for all wages grade employees engaged in the

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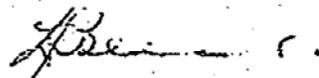
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2.

Agreement entered into between the named unions and the Western Australian Government Railways Commission shall be 38 hours a week and shall be arranged to provide nine working days exclusive of Saturday and Sundays totalling 76 hours in each fortnight under conditions specified in the following Seventy Six Hour Nine Day Fortnight Agreement.


CHIEF COMMISSIONER

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SEVENTY SIX HOUR NINE DAY FORTNIGHT AGREEMENT

This agreement made in pursuance of the Western Australian Industrial Relations Act, 1979, this Seventh day of October, 1988, between the Western Australian Government Railways Commission of one part and the Australian Railways Union of Workers (WA Branch), Electrical Trades Union of Australia, WA Branch, Australasian Society of Engineers, Moulders and Foundry Workers Industrial Union of Workers, WA Branch, and the Amalgamated Metal Workers' and Shipwrights' Union of Western Australia of the other part, witnesseth that the parties hereto mutually covenant and agree to one with the other as follows:

Whereby it is agreed that notwithstanding the provisions of the Railway Employees' Award ^{No. 15 of} 1969 the ordinary hours of work for all wages grade employees employed in the locations specified in Schedules A, B and C to this Agreement shall be 38 hours a week and shall be arranged to provide nine working days exclusive of Saturdays and Sundays totalling 76 hours in each fortnight under the following conditions:

(1) HOURS OF DUTY

The ordinary hours of work for all employees shall be 38 hours a week and shall be arranged to provide nine working days exclusive of Saturdays and Sundays totalling 76 hours in each fortnight under the following conditions.

- (a) 8.5 hours shall constitute the ordinary working hours on any eight days of the the fortnight.
- (b) Subject to paragraph (4) (b) (i), 8 hours shall constitute the ordinary working hours on the ninth or remaining working day in the fortnight.

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(c) Where any part of the establishment subject to clause 38 (2). - Shift and/or Night Work of the Award is required to work shifts, the ordinary hours of duty in accordance with clause 39(2) (d). - Hours of Duty of the Award for day shift in that part of the establishment shall be as specified in Schedules A, B and C to this Agreement.

(2) HOURS OF ATTENDANCE

For workers other than shift workers and those whose duties require an earlier or later start time the usual working hours at the place of work will be as specified in Schedules A, B and C to this Agreement.

The times specified in Schedules A, B and C to this Agreement may be varied by agreement between the employer and the employees concerned.

(3) ROSTERED DAY OFF

A rostered day off shall be arranged each fortnight and this shall, where practicable, be a Friday or a Monday, except as where otherwise provided for in Schedule C.

As necessary, an employee having the ability and as necessary the appropriate training to carry out the task will be nominated by the employer to undertake the work of other employees absent on a rostered day off and no ban or limitation will be imposed on this requirement while nine day fortnight working remains in place.

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(4) WORK ON ROSTERED DAY OFF

(a) Work on locomotives, rollingstock, track and signals and other work etc., to meet traffic, operational and maintenance needs etc.

System.

- (i) Systematic working will not take place on the rostered day off.
- (ii) Where circumstances allow employees required to work on the rostered day off will be selected from volunteers in accordance with ability to carry out the task. In the event that no suitable volunteers are available, employees will be nominated by the employer, taking into account any reason advanced for not being available on that day.
- (iii) Any disagreement that the work must be carried out on the rostered day off will be determined by a Board of Reference
- (iv) Where there is insufficient time to convene the Board of Reference before the day or shift concerned then the work shall proceed as determined by the employer, and the Board shall be authorised to determine that overtime rates shall apply in lieu of an alternative day

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off if, in its opinion, the work could have reasonably been undertaken during normal working times without holding up normal production.

- (v) Employees who with prior notice (see para (6) for "Call outs"), work on the rostered day off will take their alternative rostered day off on the following Monday or Friday or any other day within the same nine day fortnight as mutually agreed by the employer and employee. Where the scheduled rostered day off is the last Friday of the working fortnight then the alternative rostered day off shall be taken on the Monday or Friday of the ensuing working fortnight or any other day in that ensuing fortnight as mutually agreed by the employee and employer. The day will not be accumulated: Provided further that in respect to employees provided for in Schedule A, in particular Caretaker gangs, that when extremes of climactic conditions may prevail (eg. heat waves, floods etc) then arrangements may be made to clear the rostered day off in ensuing periods.

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(b) General

- (i) For employees required to work on the rostered day off, the length of the shift worked and hours of attendance will be 8.5 hours to provide for an alternative 8.5 hours rostered day off. Where the alternative day off falls on a day when only 8 hours is worked the extra half hour will be paid at ordinary rates.
- (ii) Subject to paragraph (9)(a) there shall be no extra payment for work on a rostered day off except as determined by the Board of Reference.
- (iii) Subject to paragraph (iv) hereunder, an employee required to work during the usual meal time on the rostered day off shall be paid in accordance with Clause 40(2)(i).- Overtime, Saturday and Sunday Time, of the Award.
- (iv) In the case of an employee in the Civil Engineering or Communications and Signals Branches, where the operational requirements warrants, the usual meal break for all employees may be commenced between the fourth and fifth and a quarter hours from usual commencing time

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without incurring overtime penalties and may be varied to comprehend the changes to Hours of Attendance times as provided for in Schedules A and B.

(5) OVERTIME

Overtime provisions will not apply until after the ordinary hours of 8.5 or 8 hours as provided in paragraph (1) have been worked on each day.

(6) CALL OUT

(a) An employee "called out" for an emergency on the rostered day off, shall be paid in accordance with the normal Award provisions (Clause 40. - Overtime, Saturday or Sunday time) for working on a day normally rostered off duty.

(b) Another day off duty is not granted in lieu.

(7) PAYMENT OF ALLOWANCES

(a) Weekly allowances as prescribed in the Award shall not be reduced as a consequence of the introduction of a nine day fortnight.

(b) No higher duty allowances will be paid to employees covered by this agreement when required to act in another capacity (wages or salaries) while the permanent occupant is on a rostered day off duty: Provided that where a worker is rostered in a higher position as Trackmaster or Foreman Claisebrook Railcar Depot.

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(8) LEAVE AND PUBLIC HOLIDAYS

- (a) An employee on a rostered day off will not be entitled to claim either sick leave or compassionate leave for that day.
- (b) Where a public holiday falls on a rostered day off, the preceding or following working day as determined by the employer shall be observed in lieu of the rostered day off.
- (c) A paid holiday or a day cleared in lieu of work on such day shall be the usual rostered hours of 8.5 or 8 as provided in paragraph (1).
- (d) Public holiday penalty at time and one half will apply on the first 8 or 8.5 hours as provided in paragraph (1).
- (e) For the purpose of Clause 35(3)(b). - Annual Leave and Holidays of the Award 8 hours means 8 hours at the 40 hour hourly rate or 7.6 hours at the 38 hour hourly rate.
- (f) For the purpose of Clause 35(1)(a)(i). - Annual Leave and Holidays of the Award four weeks annual leave shall mean 152 hours.
- (g) For the purpose of long service leave as prescribed in the General Order for Long Service Leave Conditions, State Government Wages Employees, 13 weeks leave shall mean the usual rostered hours falling during the period of

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(b) In taking annual or long service leave, if an employee's entitlement expires part way through a day, the employee shall have the option of resuming duty for that full day or take the balance of the day as approved leave without pay.

(i) An employee's sick leave entitlement will be debited on the basis of the ordinary hours usually worked.

(9) SHIFT WORK

(a) Week day shift work penalties shall apply to employees required to work on the rostered day off.

(b) The sequence of shifts shall not be regarded as broken by virtue of the rostered day off.

(10) APPRENTICES

To meet their schooling requirements, apprentices may have their rostered day off changed at short notice.

(11) WORK AWAY FROM HOME DEPOT/STATION

(a) Employees required to work at other locations for relief purposes will be required to attend for work under the conditions in force at the temporary location.

(b) Entitlement to a rostered day off on a nine day fortnight basis or on a 19 day month basis will be determined according to the period of relief and the number of hours accrued in the working fortnight.

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(c) Where because of the operation of paragraph (11) (b) an employee has accumulated extra time toward a nine day fortnight that is not subsequently taken because of the change in location the excess credit time above 76 hours a fortnight or 152 hours a four weekly cycle will be paid for at ordinary rates.

(d) Where an employee is required to work away from the home depot/station, selection will be on a voluntary basis in accordance with ability to carry out the tasks. In the event that no suitable volunteers are available employees will be nominated by the employer to work away after taking into account any extenuating circumstances.

(12) PRODUCTIVITY

Employees subject to this Agreement shall participate in programmes of measuring and monitoring systems and supervision techniques established by the employer and which have the objective of eliminating or reducing significantly losses related to productivity and communications. No ban or limitations shall be placed by employees on participation in such systems and/or techniques while nine day fortnight working remains in place.

(13) TRADE OFFS

The following trade offs agreed to on introduction of the 38 hour week will continue to apply under this 9 day fortnight agreement:

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- (a) Payment of all employees wages into accounts, (nominated by the employee) with a Savings Bank, Trading Bank (cheque account), Building Society or Credit Union (Westbond or Railway Officers').
- (b) Elimination of washing up time.
- (c) Elimination of afternoon tea breaks in the Civil Engineering Branch.
- (d) Agree in principle to the elimination of all stop work meetings other than for safety reasons.
- (e) Broadbanding of positions. Introduction of broadbanding is to be at management discretion but subject to consultation and agreement with Unions.
- (f) In the Civil Engineering Branch and the Motive Power Division, employees to commence washing up and/or prepare for departure after the commencement of their meal break and at close of shift. Staff may be permitted by their person-in-charge to wash up after completing particularly dirty assignments as would normally be the case.
- (g) In the Civil Engineering Branch, where operational requirements warrant, the usual meal break for all employees may be commenced between the fourth and fifth hour from commencing duty without incurring overtime penalties. However, existing conditions for "Special Teams" will continue to apply.

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- (h) In the Motive Power Division, plant maintenance at Forrestfield Diesel Depot to be carried out on the day the depot is closed in lieu of doing this work on a Saturday.
 - (i) In the Communications and Signals Branch, morning tea break to be ordinarily taken between 0930 hours and 0940 hours throughout the branch where practicable and preparation for morning tea, lunch break and knock-off not to be in working time.

(14) OPERATIVE DATE

This agreement will commence to operate from 10 October 1988: Provided that at the conclusion of six months from the date of commencement of the nine day fortnight where provided for in this agreement, the parties may take the opportunity to review the operation of the agreement.

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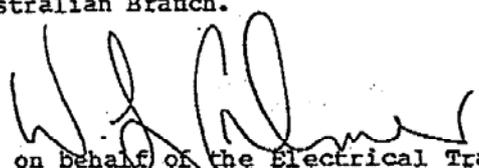
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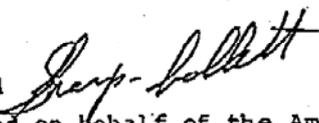
Signed on behalf of the parties hereto
this day of
1988.

Signed 
For and on behalf of the Western
Australian Government Railways
Commission.

Signed 
For and on behalf of the Australian
Railways Union of Workers
West Australian Branch.

Signed 
For and on behalf of the Electrical Trades
Union of Australia, Western
Australian Branch.

Signed 
For and on behalf of the Australasian
Society of Engineers, Moulders and Foundry
Workers Industrial Union of Workers, WA
Branch.

Signed 
For and on behalf of the Amalgamated Metal
Workers' and Shipwrights' Union of Workers
of Western Australia.

SCHEDULE A

This Schedule shall apply to workers employed in the Civil Engineering Branch, but shall not apply to Length Runners and those who are engaged on "Special Teams Conditions" either on a permanent or temporary basis except that the Hours of Duty provisions in this Schedule shall also apply to those on "Special Teams Conditions".

HOURS OF DUTY

The ordinary hours of duty in accordance with paragraph (1). - Hours of Duty; sub paragraph (c) of the Agreement shall be between the hours of ~~0600 hours and 1700 hours Monday to Friday~~ inclusive for the duration of the working of shifts and these hours shall also apply to employees working under "Special Teams Conditions".

HOURS OF ATTENDANCE

- o Structures Staff, including Metropolitan Gardening Gang and Road Approaches Gang.
- o Mobile Gangs

On an 8.5 hour shift 0715 hours to 1615 hours.

On an 8 hour shift 0715 hours to 1545 hours

Lunch 1200 hours to 1230 hours

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o Caretaker Gangs

On an 8.5 hour shift 0730 hours to 1630
hours

On an 8 hour shift 0730 hours to 1600
hours

Lunch 1200 hours to 1230
hours

Provided that between the months of November, to March inclusive, by prior arrangement between the employer and employees, the time of commencing duty may be varied to commence no earlier than 0600 hours and no later than 0800 hours with a consequential adjustment to the time of ceasing duty to comprehend an 8.5 hour or 8 hour shift as the case may be: Provided further that the commencement of duty after 0730 hours shall only occur in circumstances where the forecasted or existing weather is such that 'heat wave' conditions may prevail. In these circumstances the later commencing time cannot begin until 24 hours notice has been given and shall remain in force for the remainder of the week if commenced part way through a week or in discrete periods of one week. As soon as the 'heat wave' conditions cease to prevail, the commencing duty time shall revert to that previously applying.

o Flashbutt Welding Depot

On an 8.5 hour shift 0700 hours to 1600
hours

On an 8 hour shift 0700 hours to 1530
hours

-15-

- o Miscellaneous Staff (eg. Staff engaged on Thermit Welding activities).

Other employees of the Branch not attached to the locations/groups specified in the foregoing will have their hours of attendance - subject to paragraph 1. - Hours of Duty of the Agreement - arranged in accordance with the location at which they are working.

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15 MAR 2006

File no:

2006 WAIRC 03973

SCHOOL EMPLOYEES (INDEPENDENT DAY & BOARDING SCHOOLS) AWARD 1980 (NO R7 OF 1979)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESAUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION OF
WESTERN AUSTRALIAN BRANCH**APPLICANT**

-v-

GUILDFORD GRAMMAR SCHOOL AND OTHERS

RESPONDENT**CORAM** COMMISSIONER J L HARRISON**DATE** FRIDAY, 17 MARCH 2006**FILE NO/S** APPL 1592 OF 2002**CITATION NO.** 2006 WAIRC 03973**Result** Varied*Order*

HAVING heard Ms A Waldon on behalf of the applicant, Ms K Wroughton on behalf of the Catholic Education Commission of Western Australia and Dr I Fraser on behalf of the Association of Independent Schools of Western Australia (Inc), the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the School Employees (Independent Day & Boarding Schools) Award 1980 (No R7 of 1979) 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 17 March 2006.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SCHEDULE
1. Clause 2 – Arrangement: Delete this clause and insert the following in lieu thereof:

1. Title
- 1B. Minimum Adult Award Wage
2. Arrangement
3. Term
4. Area
5. Scope
6. Contract of Employment
- 6A. Definitions
7. Hours
8. Rosters
9. Meals
10. Overtime
11. Meal Money
12. Mixed Functions
13. Under-Rate Workers
14. Part-Time Employees
15. Casual Workers
16. Annual Leave
17. Public Holidays
18. Sick Leave
19. Long Service Leave
20. Bereavement Leave
21. Maternity Leave
22. Payment of Wages
23. Right of Entry
24. Board and Lodging
25. Uniforms
26. Time and Wages Records
27. Junior Worker's Certificate

- 28. Notices
- 29. Weekend Work
- 30. Protective Clothing
- 31. Location Allowances
- 32. Wages
- 33. Fares and Motor Vehicle Allowances
- 34. Superannuation
- 35. Consultative Provisions
- 36. Redundancy
- 37. Introduction of Change

Appendix – Resolution of Disputes Requirements

Schedule A – Parties to the Award

Schedule B – Respondents

Schedule C – Liberty to Apply

Appendix – S.49B – Inspection of Records Requirements

2. Clause 6. – Contract of Employment:

A. Delete subclause (3) of this clause and insert the following in lieu thereof:

- (3) Except for subclause (8) and subject to paragraph (c) of subclause (9), this clause shall not apply to casual employees.

B. Immediately following subclause (7) of this clause insert new subclauses as per the following:

- (8) Statement of Employment

An employer shall, in the event of termination of employment, provide upon request to the employee who has been terminated a written statement specifying the period of employment and the classification or type of work performed by the employee.

- (9) Job Search Entitlement

- (a) 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.
- (b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, 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.
- (c) This subclause shall not apply to casual employees who have not completed more than 4 weeks' continuous service.

3. Clause 35. – Consultative Provisions: Immediately following this clause insert new numbers, titles and clauses as per the following:

36. - REDUNDANCY

- (1) Definitions

The following definitions shall apply for the purposes of this clause:

- (a) **Business** includes trade, process, business or occupation and includes part of any such business.
- (b) **Redundancy** occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.
- (c) **Transmission** includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.
- (d) **Weeks' pay** means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:
 - (i) overtime;
 - (ii) penalty rates;
 - (iii) disability allowances;
 - (iv) shift allowances;
 - (v) special rates;
 - (vi) fares and travelling time allowances;
 - (vii) bonuses; and
 - (viii) any other ancillary payments of a like nature.

- (2) Consultation Before Terminations

- (a) Where an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer shall consult the employee directly affected and if an employee nominates a union to represent him or her, the union nominated by the employee.

- (b) The consultation shall take place as soon as is practicable after the employer has made a decision to which subclause 2(a) of this clause applies and shall cover the reasons for the proposed terminations, measures to avoid or minimise the terminations and/or their adverse affects on the employees concerned.
- (c) For the purpose of the consultation the employer shall, as soon as practicable, provide in writing to the employees concerned and if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that an employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.
- (3) Transfer to lower paid duties
- (a) Where an employee is transferred to lower paid duties by reason of redundancy the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if the employee's employment had been terminated.
- (b) The employer may, at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.
- (c) The amounts must be worked out on the basis of:
- (i) the ordinary working hours to be worked by the employee;
 - (ii) the amounts payable to the employee for the hours including for example, allowances, loading and penalties; and
 - (iii) any other amounts payable under the employee's contract of employment.
- (4) Severance Pay
- (a) In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service, provided that the entitlement of any employee whose employment terminates on or before 1 February 2006 shall not exceed 8 weeks' pay:
- | Period of continuous service | Severance pay |
|-------------------------------------|----------------------|
| Less than 1 year | Nil |
| 1 year and less than 2 years | 4 weeks' pay |
| 2 years and less than 3 years | 6 weeks' pay |
| 3 years and less than 4 years | 7 weeks' pay |
| 4 years and less than 5 years | 8 weeks' pay |
| 5 years and less than 6 years | 10 weeks' pay |
| 6 years and less than 7 years | 11 weeks' pay |
| 7 years and less than 8 years | 13 weeks' pay |
| 8 years and less than 9 years | 14 weeks' pay |
| 9 years and less than 10 years | 16 weeks' pay |
| 10 years and over | 12 weeks' pay |
- (b) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.
- (c) For the purpose of this clause, continuity of service shall not be broken on account of -
- (i) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding the obligations of this clause in respect of leave of absence;
 - (ii) any absence from work on account of leave granted by the employer; or
 - (iii) any absence with reasonable cause, proof whereof shall be upon the employee;
- Provided that in the calculation of continuous service any time in respect of which any employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.
- 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) or (4) of the Long Service Leave Provisions published in Part 1 (January) of each volume of the Western Australian Industrial Gazette shall also constitute continuous service for the purpose of this clause.
- (5) Employee leaving during notice period
- An employee whose employment is terminated by reason of redundancy may terminate his/her employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.
- (6) Alternative employment
- (a) An employer, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied if the employer obtains acceptable alternative employment for an employee.
- (b) This subclause does not apply in circumstances involving transmission of business as set out in subclause (7) of this clause.

- (7) Transmission of business
- (a) The provisions of Clause 36 are not applicable where a business is before or after 1 June 2005, transmitted from an employer (in this subclause called “the transmitter”) to another employer (in this subclause called “the transmittee”), in any of the following circumstances:
- (i) Where the employee accepts employment with the transmittee which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service of the employee with the transmittee; or
- (ii) Where the employee rejects an offer of employment with the transmittee:
- (aa) in which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmitter; and
- (bb) which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service with the transmittee.
- (b) The Commission may vary subclause (7)(a)(ii) of this clause if it is satisfied that this provision would operate unfairly in a particular case.
- (8) Notice to Centrelink
- Where a decision has been made to terminate employees in the circumstances outlined in subclause (2) of this clause, the employer shall notify Centrelink as soon as possible giving all relevant information about the proposed terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.
- (9) Employees exempted
- This clause does not apply:
- (a) where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice;
- (b) except for subclause (2) of this clause, to employees with less than one year’s service;
- (c) except for subclause (2) of this clause, to probationary employees;
- (d) to apprentices;
- (e) to trainees;
- (f) except for subclause (2) of this clause, to employees engaged for a specific period of time or for a specified task or tasks; or
- (g) to casual employees.
- (10) Employers Exempted
- Subject to an order of the Commission, in a particular redundancy case, subclause (4) shall not apply to employers who employ less than 15 employees.
- (11) Incapacity to pay
- An employer or a group of employers, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied on the basis of the employer’s incapacity to pay.

37. – INTRODUCTION OF CHANGE

- (1) Employer’s Duty to Notify
- (a) Where an employer decides to introduce changes in production, program, organisation, structure or technology, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and, if an employee nominates a union to represent him or her, the union nominated by the employee.
- (b) “Significant effects” includes termination of employment, major changes in the composition, operation or size of the employer’s workforce or in the skills required; the elimination or diminution of a job opportunity, a promotion opportunity or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.
- (2) Employer’s Duty to Consult over Change
- (a) The employer shall consult the employees affected and, if an employees nominates a union to represent him or her, the union nominated by the employee, about the introduction of changes, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or period over which, the employer intends to carry out the dismissals), and the ways to avoid or minimise the effects of the changes (e.g. by finding alternate employment).
- (b) The consultation shall commence as soon as practicable after making the decision referred to in subclause (1) of this clause.
- (c) For the purpose of such consultation the employer shall provide in writing to the employees concerned and, if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees, and any other matters likely to affect employees, provided that any employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer’s interests.

2006 WAIRC 03972

TEACHERS' AIDES' (INDEPENDENT SCHOOLS) AWARD 1988 (NO A27 OF 1987)

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION OF WESTERN AUSTRALIAN BRANCH	APPLICANT
	-v-	
	CATHOLIC EDUCATION COMMISSION OF WA AND OTHERS	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 17 MARCH 2006	
FILE NO/S	APPL 1591 OF 2002	
CITATION NO.	2006 WAIRC 03972	

Result	Varied
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Order

HAVING heard Ms A Waldon on behalf of the applicant, Ms K Wroughton on behalf of the Catholic Education Commission of Western Australia and Dr I Fraser on behalf of the Association of Independent Schools of Western Australia (Inc), the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Teachers' Aides' (Independent Schools) Award 1988 (No A27 of 1987) 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 17 March 2006.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

SCHEDULE
1. Clause 2 – Arrangement: Delete this clause and insert the following in lieu thereof:

1. Title
- 1B. Minimum Adult Award Wage
2. Arrangement
3. Area
4. Scope
5. Term
6. Hours
7. Holidays
8. Annual Leave Loading
9. Sick Leave
10. Contract of Employment
11. Part Time Employees
12. Long Service Leave
13. Payment of Wages
14. Wages
15. Rest Pauses and Meal Breaks
16. Special Leave
17. Location Allowance
18. Definitions
19. Maternity Leave
20. Liberty to Apply
21. Superannuation
22. Consultative Provisions
23. Dispute Settling Procedure
24. Redundancy
25. Introduction of Change

Appendix – Resolution of Dispute Requirements

Schedule A – Parties to the Award

Schedule B – Respondents

2. Clause 10. – Contract of Employment: Immediately following subclause (3) of this clause insert a new subclause as per the following:

(4) Statement of Employment

An employer shall, in the event of termination of employment, provide upon request to the employee who has been terminated a written statement specifying the period of employment and the classification or type of work performed by the employee.

(5) Job Search Entitlement

(a) 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.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, 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.

3. Clause 23. – Dispute Settling Procedure: Immediately following this clause insert new numbers, titles and clauses as per the following:

24. - REDUNDANCY

(1) Definitions

The following definitions shall apply for the purposes of this clause:

(a) **Business** includes trade, process, business or occupation and includes part of any such business.

(b) **Redundancy** occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.

(c) **Transmission** includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

(d) **Weeks' pay** means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:

- (i) overtime;
- (ii) penalty rates;
- (iii) disability allowances;
- (iv) shift allowances;
- (v) special rates;
- (vi) fares and travelling time allowances;
- (vii) bonuses; and
- (viii) any other ancillary payments of a like nature.

(2) Consultation Before Terminations

(a) Where an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer shall consult the employee directly affected and if an employee nominates a union to represent him or her, the union nominated by the employee.

(b) The consultation shall take place as soon as is practicable after the employer has made a decision to which subclause 2(a) of this clause applies and shall cover the reasons for the proposed terminations, measures to avoid or minimise the terminations and/or their adverse affects on the employees concerned.

(c) For the purpose of the consultation the employer shall, as soon as practicable, provide in writing to the employees concerned and if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that an employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

(3) Transfer to lower paid duties

(a) Where an employee is transferred to lower paid duties by reason of redundancy the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if the employee's employment had been terminated.

(b) The employer may, at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.

(c) The amounts must be worked out on the basis of:

- (i) the ordinary working hours to be worked by the employee; and
- (ii) the amounts payable to the employee for the hours including for example, allowances, loading and penalties; and
- (iii) any other amounts payable under the employee's contract of employment.

(4) Severance Pay

(a) In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service, provided that the entitlement of any employee whose employment terminates on or before 1 February 2006 shall not exceed 8 weeks' pay:

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

- (b) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.
- (c) For the purpose of this clause continuity of service shall not be broken on account of -
- (i) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding the obligations of this clause in respect of leave of absence;
 - (ii) any absence from work on account of leave granted by the employer; or
 - (iii) any absence with reasonable cause, proof whereof shall be upon the employee;
- Provided that in the calculation of continuous service any time in respect of which any employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.
- 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) or (4) of the Long Service Leave Provisions published in Part 1 (January) of each volume of the Western Australian Industrial Gazette shall also constitute continuous service for the purpose of this clause.
- (5) **Employee leaving during notice period**
An employee whose employment is terminated by reason of redundancy may terminate his/her employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.
- (6) **Alternative employment**
- (a) An employer, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied if the employer obtains acceptable alternative employment for an employee.
 - (b) This subclause does not apply in circumstances involving transmission of business as set out in subclause (7) of this clause.
- (7) **Transmission of business**
- (a) The provisions of Clause 24 are not applicable where a business is before or after 1 June 2005, transmitted from an employer (in this subclause called "the transmittor") to another employer (in this subclause called "the transmittee"), in any of the following circumstances:
 - (i) Where the employee accepts employment with the transmittee which recognises the period of continuous service which the employee had with the transmittor and any prior transmittor to be continuous service of the employee with the transmittee; or
 - (ii) Where the employee rejects an offer of employment with the transmittee:
 - (aa) in which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmittor; and
 - (bb) which recognises the period of continuous service which the employee had with the transmittor and any prior transmittor to be continuous service with the transmittee.
 - (b) The Commission may vary subclause (7)(a)(ii) if it is satisfied that this provision would operate unfairly in a particular case.
- (8) **Notice to Centrelink**
Where a decision has been made to terminate employees in the circumstances outlined in subclause (2) of this clause, the employer shall notify Centrelink as soon as possible giving all relevant information about the proposed terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.
- (9) **Employees exempted**
This clause does not apply:
- (a) where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice;
 - (b) except for subclause (2) of this clause, to employees with less than one year's service;
 - (c) except for subclause (2) of this clause, to probationary employees;
 - (d) to apprentices;
 - (e) to trainees;
 - (f) except for subclause (2) of this clause, to employees engaged for a specific period of time or for a specified task or tasks; or

(g) to casual employees.
 (10) Employers Exempted
 Subject to an order of the Commission, in a particular redundancy case, subclause (4) of this clause shall not apply to employers who employ less than 15 employees.

(11) Incapacity to pay
 An employer or a group of employers, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied on the basis of the employer's incapacity to pay.

25. - INTRODUCTION OF CHANGE

(1) Employer's Duty to Notify
 (a) Where an employer decides to introduce changes in production, program, organisation, structure or technology, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and, if an employee nominates a union to represent him or her, the union nominated by the employee.

(b) "Significant effects" includes termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of a job opportunity, a promotion opportunity or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.

(2) Employer's Duty to Consult over Change

(a) The employer shall consult the employees affected and, if an employee nominates a union to represent him or her, the union nominated by the employee, about the introduction of changes, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or period over which, the employer intends to carry out the dismissals), and the ways to avoid or minimise the effects of the changes (e.g. by finding alternate employment).

(b) The consultation shall commence as soon as practicable after making the decision referred to in subclause (1) of this clause.

(c) For the purpose of such consultation the employer shall provide in writing to the employees concerned and, if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees, and any other matters likely to affect employees, provided that any employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

2006 WAIRC 03965

TRANSPORT WORKERS' (GENERAL) AWARD NO. 10 OF 1961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
 WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

WILLIAM BARKER & CO AND OTHERS

RESPONDENTS

CORAM COMMISSIONER J H SMITH
DATE THURSDAY, 16 MARCH 2006
FILE NO/S APPL 947 OF 2005
CITATION NO. 2006 WAIRC 03965

Result Award varied
Representation
Applicant Mr N J Hodgson
Respondents Mr J Uphill (as agent for whom warrants have been filed)

Order

Having heard Mr Hodgson on behalf of the Applicant and Mr Uphill as agent on behalf of the Respondents for whom warrants have been filed, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Transport Workers' (General) Award No. 10 of 1961 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 15 March 2006.

[L.S.]

(Sgd.) J H SMITH,
 Commissioner.

SCHEDULE

- 1. Subclause 1.2 – ARRANGEMENT: Insert the following subclauses after "5.18 AIR CONDITIONING":**
- 5.19 DANGEROUS GOODS LICENCE
- 5.20 ARTICLES OF CLOTHING
- 5.21 FIRST AID ALLOWANCE
- 5.22 MEDICAL CHECKS.
- 2. Subclause 2.1 – CONTRACT OF SERVICE: Delete subparagraph 2.1.1.5 and insert the following in lieu thereof:**
- 2.1.1.5 Summary Dismissal
- The employer has the right to dismiss any employee without notice for serious misconduct and in such cases any entitlements under this Award are to be paid up to the time of dismissal only. The period of notice in this clause shall not apply in the case of dismissal for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, (in which case the wages shall be paid up to the time of dismissal only).
- 3. Subclause 4.3 – CLASSIFICATIONS: Delete paragraph 4.3.1 and insert the following in lieu thereof:**
- 4.3.1 Grade 1
- Motor Driver's Assistant
- Washers (except can and night washers)
- Driver of mechanical horse with or without trailer
- Loaders
- Yardsperson
- 4. Subclause 5.2 – LEADING HAND ALLOWANCE: Delete subparagraphs 5.2.1.1, 5.2.1.2 and 5.2.1.3 and insert the following in lieu thereof:**
- 5.2.1.1 Not less than three and not more than ten other employees shall be paid \$23.96 per week extra.
- 5.2.1.2 More than ten and not more than twenty other employees shall be paid \$35.73
- 5.2.1.3 More than twenty other employees shall be paid \$45.38 per week extra.
- 5. Subclause 5.3 – INDUSTRY ALLOWANCE: Delete the subclause and insert the following in lieu thereof:**
- In addition to the rates prescribed in this clause an amount of \$19.95 per week shall be paid to employees engaged under this Award in rock quarries and sand pits to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities. Provided that employees in limestone quarries of Cockburn Cement limited shall be paid an amount of \$0.51 cents per hour in lieu of the \$19.95 per week referred to in this sub clause.
- 6. Subclause 5.4 – READY MIXED CONCRETE INDUSTRY: Delete the subclause and insert the following in lieu thereof:**
- In addition to the rates prescribed in this clause an amount of \$11.79 per week shall be paid to drivers and/or operators of ready mixed concrete trucks.
- 7. Subclause 5.5 – DANGEROUS GOODS ALLOWANCE: Delete paragraphs 5.5.1 and 5.5.2 and insert the following in lieu thereof:**
- 5.5.1 A driver engaged in the transport of bulk dangerous goods or carting explosives in conformity with the Australian explosives code by public road shall receive an allowance of \$12.84 per day. Bulk Dangerous Goods are those goods defined as such in the Australian Dangerous Goods Code as amended from time to time.
- 5.5.2 A driver engaged in the transport of packaged dangerous goods which requires placarding by public road shall receive an allowance of \$5.35 per day. Packaged goods which require placarding are those goods defined as such in the Australian Dangerous Goods Code as amended from time to time.
- 8. Subclause 5.6 – MEALS: Delete paragraphs 5.6.1 and 5.6.2 and insert the following in lieu thereof:**
- 5.6.1 An employee required to work overtime for two hours or more shall be supplied with a reasonable meal by the employer or paid \$7.64 for a meal.
- 5.6.2 If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall provide such meals or pay an amount of \$5.23 for each second or subsequent meal.
- 9. Subclause 5.7 – VAN DRIVER – SALES EMPLOYEE: Delete the subclause and insert the following in lieu thereof:**
- Van Driver - Sales employee (as defined) shall be paid \$9.24 per week extra.
- 10. Subclause 5.8 – EXTRA RATES: Delete the paragraph 5.8.1 and insert the following in lieu thereof:**
- 5.8.1 An employee who is required to cart tar (other than in sealed containers) for immediate spreading upon streets, tar in unsealed containers, or tarred material for spreading upon streets; and/or who spreads either of them upon streets - an extra \$1.89 per week.
- 11. Subclause 5.9 – OFFENSIVE MATERIALS: Delete the first sentence in this subclause and insert the following in lieu thereof:**
- Employees carting any of the following offensive materials shall be paid - an extra \$1.53 per week.

12. Subclause 5.10 – DIRTY MATERIALS: Delete the first sentence in this subclause and insert the following in lieu thereof:

Employees carting any of the following dirty materials shall be paid an extra \$0.29 cents per hour.

13 Subclause 5.11 – HANDLING CASH: Delete paragraph 5.11.2 and insert the following in lieu thereof:

5.11.2

For any amount handled up to \$20	\$0.98 per week
Over \$20 but not exceeding \$200	\$1.89 per week
Over \$200 but not exceeding \$600	\$3.39 per week
Over \$600 but not exceeding \$1000	\$4.74 per week
Over \$1000 but not exceeding \$1200	\$6.83 per week
Over \$1200 but not exceeding \$1600	\$9.77 per week
Over \$1600 but not exceeding \$2000	\$11.44 per week
Over \$2000	\$13.04 per week

14. Subclause 5.12 – OTHER ALLOWANCES: Delete paragraphs 5.12.1, 5.12.2, 5.12.3, 5.12.4, 5.12.5, 5.12.6 and 5.12.7 in this subclause and insert the following in lieu thereof:

5.12.1 Employees carting, loading and/or unloading carbon black except in sealed metal containers - an extra \$1.21 per day or part thereof.

5.12.2 An employee, who is a recognised furniture carter engaged in removing and/or delivering furniture, shall be paid an extra \$12.58 per week.

5.12.3 An employee who is a recognised livestock carter carrying livestock shall be paid an extra \$12.58 per week.

5.12.4 Driver required to act as sales employee of goods in their vehicle shall be paid an extra \$2.00 per week.

5.12.5 An employee who, in the course of their employment, drives a vehicle with self loading equipment which requires the possession of a certificate of competency shall be paid an extra \$12.05 per week.

5.12.6 Any employee required to drive a motor vehicle in excess of 3.5m in width, or transport a load in excess of that width shall receive an additional \$2.00 per day or part thereof.

5.12.7 An employee required to work in a van or a chamber with a temperature of less than zero degrees Celsius shall receive an additional \$0.50 cents per hour, or part thereof, for all time so worked.

15. Subclause 5.17 – DISTANT WORK, BOARD AND LODGING: Delete paragraph 5.17.3 and insert the following in lieu thereof:

5.17.3 An employee engaged on work which requires them to sleep in or about their truck whilst in the course of travelling from one point to another, or in the absence of suitable accommodation is obliged to live in a tent or hut shall in addition to the application of 5.17.2 in respect of food, be paid an allowance in lieu of accommodation of \$14.31 per night.

16. After subclause 5.18 – AIR CONDITIONING and before clause 6. LEAVE: Insert the following new subclauses:

5.19 - DANGEROUS GOODS LICENSES

5.19.1 Where a weekly employee is required to possess a license to operate a vehicle carrying dangerous goods (as defined in the Australian code for the transport of dangerous goods by road or rail), training and medical costs shall be reimbursed by the employer.

5.20 - ARTICLES OF CLOTHING

5.20.1 Where the employer requires an employee to wear any special clothing such as any special uniform, cap, overall or other article, the employer must reimburse the employee for the cost of purchasing such special clothing. The provisions of this clause do not apply where the special clothing is provided for by the employer.

5.20.2 Where an employee is required by the employer to work continuously in conditions in which, because of their nature, the clothing would otherwise become saturated, the employer must reimburse the employee for the cost of purchasing protective clothing. The provisions of this clause do not apply where the protective clothing is provided for by the employer.

5.20.3 Where an employee is employed in the classification of Greaser and Cleaner, or is normally required to service vehicles, the employer must reimburse the employee for the cost of purchasing overalls. The provisions of this clause do not apply where the overalls are provided for by the employer.

5.20.4 Provided that this clause shall not apply to employees who are required as an adjunct to their normal duties to check such things as vehicles, oil, water and tyres.

5.20.5 Provided further that such protective clothing shall remain the property of the employer, and that the employee shall be liable for the cost of replacement of any article of protective clothing which is lost, destroyed or damaged through the negligence of the employee.

5.21. FIRST AID ALLOWANCE

5.21.1 An employee holding a current first aid qualification from St. John Ambulance or similar body and appointed by the employer to perform first-aid duty shall be paid \$8.23 in addition to wages for any week so appointed. The employer will reimburse the cost of fees for any courses necessary for any employee covered by this clause to obtain, and maintain current, the appropriate first aid qualification.

5.22. MEDICAL CHECKS

- 5.22.1 An employer requiring employees to undertake medical checks during a term of employment or requiring persons seeking employment to undertake a medical check as part of an interview process, shall reimburse all medical costs not recoverable from a Health Fund by the employee or persons seeking employment.

2006 WAIRC 03953

TRANSPORT WORKERS' (NORTH WEST PASSENGER VEHICLES) AWARD, 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESTRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH**APPLICANT**

-v-

FORTESQUE BUS SERVICE PTY LTD AND OTHERS

RESPONDENTS**CORAM**

COMMISSIONER J H SMITH

DATE

WEDNESDAY, 15 MARCH 2006

FILE NO/S

APPL 12 OF 2006

CITATION NO.

2006 WAIRC 03953

Result Varied
Representation
Applicant Mr N J Hodgson
Respondents No appearance

Order

Having heard Mr Hodgson on behalf of the Applicant and no appearance on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Transport Workers' (North West Passenger Vehicles) Award, 1988 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 15 March 2006.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

SCHEDULE

1. **Clause 6. – Wages: Delete subclause (2) and insert the following in lieu thereof:**
- (2) A leading hand shall be paid a rate exceeding the highest rate of the workers he/she supervises by an amount of \$24.20 per week.
2. **Clause 21. – Service Grants: Delete clause 21 and insert the following in lieu thereof:**

21. – SERVICE GRANTS

A full time employee who has been in the continuous service of an employer, successor, assignee or transmittee of such employer shall be paid the following amounts in addition to his or her weekly wage as prescribed in Clause 6. – Wages, of this Award.

<u>Years of Service</u>	<u>Per Week</u>
	\$
After one year of service	\$8.92
After two years of service	\$17.72
After three years of service	\$26.45
After four years of service	\$35.12
After five years of service	\$44.06

A part-time employee shall receive a pro-rata entitlement to service pay in the same proportion as the number of ordinary hours worked per week bears to thirty-eight.

3. **Clause 22. – Meal Allowances: Delete subclauses (1), (2), (3) and (3) and insert the following in lieu thereof:**
- (1) An employee required to work without being notified on the previous day, overtime for two hours or more shall be supplied with a reasonable meal by the employer or paid \$7.84 for a meal.
- (2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall provide such meals or pay an amount of \$5.36 for each such second or subsequent meal.

- (3) No such payments need to be made to an employee living in the same locality as his place of work who can reasonably return home for such meals.
- (4) Every employee shall be allowed each day a meal break of not less than 30 minutes nor more than one hour, to commence at any time between the end of the third and end of the fifth hour of the day's employment.

4. Clause 23. – Annual Leave Travel Assistance: Delete subclauses (1), (2) and (4) and insert the following in lieu thereof:

- (1) A travel allowance of \$279.70 shall be paid to a full-time employee on the commencement of annual leave.
- (2) Part time employees shall receive a pro-rata entitlement to annual leave travel assistance in the same proportion as the number of ordinary hours worked per week bears to thirty-eight.
- (3) This allowance shall only be payable in respect of those employees whose usual place of residence is North of the 26th parallel of South Latitude.

5. Clause 29. - Split Shift Allowance: Delete this subclause and insert the following in lieu thereof:

Any employee who is rostered to work any two shifts in any one day that are broken by more than one hour or any employee who is rostered in such a way that there is more than one break in the working day and the break or breaks are more than one hour in duration shall be paid a split shift allowance of \$7.15.

2006 WAIRC 03954

TRANSPORT WORKERS' (PASSENGER VEHICLES) AWARD NO. R 47 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

SOUTHWEST COACH LINES (DB & LB ADAMS) AND OTHERS

RESPONDENTS

CORAM

COMMISSIONER J H SMITH

DATE

WEDNESDAY, 15 MARCH 2006

FILE NO/S

APPL 13 OF 2006

CITATION NO.

2006 WAIRC 03954

Result

Varied

Representation

Applicant

Mr N J Hodgson

Respondents

Mr J N Uphill (as agent on behalf of the Respondents for whom warrants have been filed)

Order

Having heard Mr Hodgson on behalf of the Applicant and Mr Uphill (as agent on behalf of the Respondents for whom warrants have been filed), and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Transport Workers' (Passenger Vehicles) Award No. R 47 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 15 March 2006.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 10 – Wages: Delete subclause (2) and insert the following in lieu thereof:

- (2) A leading hand shall be paid a rate exceeding the highest rate of the workers he/she supervises by an amount of \$23.84 per week.

AGREEMENTS—Industrial—Retirements from—**2006 WAIRC 04151**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 42 and 43 of 2006

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Civil Service Association of Western Australia Inc will cease to be a party to the Department of Environment, Water and Catchment Protection Agency Specific Agreement 2003 PSAAG 13 of 2003 on and from the 1st day of May 2006.DATED at Perth this 7th day of April 2006.J.A. SPURLING,
Registrar.**2006 WAIRC 04163**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 46 of 2006

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Water Corporation will cease to be a party to the Water Corporation Enterprise Agreement 2004 AG 94 of 2004 on and from the 1st day of May 2006.DATED at Perth this 10th day of April 2006.J.A. SPURLING,
Registrar.**CANCELLATION OF—Awards/Agreements/Respondents—****2006 WAIRC 03476****CLERKS (PUBLIC AUTHORITIES) AWARD 1987**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

(COMMISSION'S OWN MOTION)

PARTIES**APPLICANT****-v-**

WESTERN AUSTRALIAN COASTAL SHIPPING COMMISSION, WESTERN AUSTRALIAN EGG MARKETING BOARD, FREMANTLE PORT AUTHORITY, HON. MINISTER FOR WORKS, HON. MINISTER FOR TRANSPORT, WATER AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT**CORAM** CHIEF COMMISSIONER A R BEECH**DATE** MONDAY, 16 JANUARY 2006**FILE NO/S** APPL 2 OF 2006**CITATION NO.** 2006 WAIRC 03476**Result** Award cancelled*Order*

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 14th day of November, 2005 of an intention to make an Order cancelling the award;

AND WHEREAS at the 9th day of January, 2006 there were no objections to the making of such an order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by s.47 of the Act, do hereby order that the following award be cancelled:

CLERKS (PUBLIC AUTHORITIES) AWARD 1987 NO. PSA A 7A OF 1987

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2006 WAIRC 04052

**PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006
AND PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST
AUSTRALIAN BRANCH **APPLICANT**

-v-
PUBLIC TRANSPORT AUTHORITY **RESPONDENT**

-and-

PARTIES PUBLIC TRANSPORT AUTHORITY **APPLICANT**

-v-
THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST
AUSTRALIAN BRANCH **RESPONDENT**

CORAM COMMISSIONER J H SMITH
DATE FRIDAY, 24 MARCH 2006
FILE NO/S A1 OF 2006, A2 OF 2006
CITATION NO. 2006 WAIRC 04052

Result Award cancelled
Representation Mr G W Ferguson on behalf of The Australian Rail, Tram and Bus Industry Union of Employees,
West Australian Branch
Mr S Majeks on behalf of the Public Transport Authority

Order

Having heard Mr Ferguson on behalf of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch and Mr Majeks on behalf of the Public Transport Authority, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

ORDERS that the Government Railways Locomotive Enginemens' Award 1973-1990 No. 13 of 1973 be and is hereby cancelled.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.**INDUSTRIAL MAGISTRATE—Complaints before—**

2006 WAIRC 04145

PARTIES WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT
DANIEL THOMAS KILLIAN **CLAIMANT**

-v-
ALCOA OF AUSTRALIA LIMITED **RESPONDENT**

CORAM INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD WEDNESDAY, 3 AUGUST 2005, WEDNESDAY, 26 OCTOBER 2005, WEDNESDAY, 1
FEBRUARY 2006, THURSDAY, 16 FEBRUARY 2006, WEDNESDAY, 22 FEBRUARY 2006
DELIVERED WEDNESDAY, 22 FEBRUARY 2006
CLAIM NO. M 45 OF 2005
CITATION NO. 2006 WAIRC 04145

Catchwords	Extended sick leave; Total and Permanent Disablement
Cases referred to in decision	<p><i>John James Reynolds v Swift & Moore Pty Ltd 74 WAIG 861</i></p> <p><i>Australian Workers Union, Western Australian Branch, Industrial Union of Workers v Argyle Diamond Mines Pty Ltd 74 WAIG 3044</i></p> <p><i>Byrne & Frew v Australian Airlines Ltd (1975) 131 ALR 472</i></p>
Legislation	<p><i>Workplace Relations Act 1996.</i></p> <p><i>Alcoa World Alumina Australia, WA Operations – AWU Agreement 2003</i></p> <p><i>Workers’ Compensation and Rehabilitation Act 1981</i></p>
Result	Breach not found
Representation	
Claimant	Mr R W Clohessy appeared as agent.
Respondent	Mr R Collinson (of Counsel) instructed by <i>Hedan & Co, Industrial Relations and Management.</i>

Reasons for Decision

Background

1. The Claimant was born on 25 January 1950. From 5 May 1980 until 20 May 2004, the Respondent employed him. In the latter stages of his employment with the Respondent his work conditions and entitlements were governed by the *Alcoa World Alumina Australia, WA Operations – AWU Agreement 2003* (the Agreement) certified by the Australian Industrial Relations Commission on 2 July 2003. Prior to the termination of his employment he worked for the Respondent at its Western Australian operations in the classification *Job Grade 11* as referred to in clause 9 of the Agreement. The Claimant was at the material times a member of the Australian Workers’ Union.
2. On 16 April 2003 the Claimant’s General Practitioner, Dr Moira Somers, issued a First Medical Certificate pursuant to the *Workers’ Compensation and Rehabilitation Act 1981* certifying the Claimant to be unfit for work on account of his exposure to chemicals within his work environment. On 23 April 2003 the Claimant made his claim for worker’s compensation payments. In his claim he alleged that he had been subject to long term exposure to fumes and chemical substances.
3. Mr Killian reported to his general practitioner that he had become progressively unwell since 1998 because of his exposure to chemicals in the workplace. He reported lethargy, fatigue, headaches, clouded mental function, sleep disturbance, poor memory, poor concentration, lack of motivation, myalgia, arthralgia, sore throats, nausea and balance disturbance with vertigo. The symptoms worsened with exposure and reduced with avoidance. As a result of his circumstances of ill health he became depressed for which he was treated with antidepressant medication. In addition to the symptoms arising from his exposure to chemicals the Claimant continued to experience neck and back pain from a separate work related injury sustained whilst working for the Respondent.
4. The Claimant remained unfit for work for an extended period. He utilised his sick leave entitlement until the same ran out in about July 2003, at which time he utilised the extended sick leave entitlements provided for in Appendix 2 of the Agreement. It suffices to say for my purposes that the Claimant applied for and was granted extended paid sick leave. The period of extended paid sick leave was to be limited to a maximum of 104 weeks and was subject to discontinuance in certain circumstances as provided for in Clause 4 of Appendix 2. I set out that provision.

4. Discontinuance of Extended Paid Sick Leave

Where medical evidence is obtained by the company appointed medical practitioner that confirms that the sick or injured employee is unable to return to his/her pre-injury duties on a permanent basis and no alternative positions are available for permanent employment within the company then a period of notice of not less than 6 weeks will be provided to the employee re the discontinuance of the extended paid sick leave. A claim for Ill Health or Total and Permanent Disablement will be discussed with the sick or injured employee upon confirmation that the individual is unable to return to his/her pre injury duties on a permanent basis.

Failure on the part of the sick or injured employee to meet the terms and conditions of this policy, including the participation in rehabilitation, will result in the immediate discontinuance of the extended paid sick leave.

Where discontinuance of extended paid sick leave is instigated and subsequently this action is contested a formal process of appeal can be instigated at the request of the sick or injured employee with his or her immediate supervisor. The supervisor on receipt of the appeal will convene a review team consisting of the employee, his/her nominated representative the Line Manager (or his/her nominated representative), a representative of the HR group and the company’s appointed health professional.

In cases of personal injury or illness where the issue of the discontinuance of extended paid sick leave remains unresolved after the review team has met, the matter will be referred by the WA Ops HR Manager for consideration.

5. Whilst on sick leave the Claimant participated in rehabilitation programmes. Initially his general practitioner envisaged a return to work on a graduated return to work programme being completed in November of 2003 (see exhibit 7). Later she revised the time frame for completion to be May 2004 (see exhibits 8, 9 and 10). Eventually March 2004 was accepted as being the target month for completion of the programme.
6. In or about June 2003 the Respondent referred the Claimant to “Coachroad” for the provision of rehabilitation services on behalf of the Respondent. On 11 June 2003 Jessie Lamond from Coachroad met with the Claimant and his independent external rehabilitation providers, namely, Lynne and Ron Kington (trading as Work Dynamics) in order to create a strategy for rehabilitation. It suffices to say that the approach taken by all parties was co-operative and that the intended actions with respect to rehabilitation were agreed. Furthermore medical practitioners were consulted prior to the

implementation of any course of action aimed at rehabilitation in order to ensure that the proposed programme in each instance was both appropriate and feasible. From June 2003 until February 2004 a number of meetings were held concerning the Claimant's progress in rehabilitation. The meetings were chaired by Ms Lamond. The Claimant attended each of those meetings, as did Ron Kington. Other interested persons attended some of the meetings including John Saunders, the Claimant's union representative.

7. The Claimant commenced a graduated return to work programme on 4 August 2003. The programme, which required him to perform administrative duties at the Respondent's Residue Operations area, had been designed by Mr Kington in consultation with the Claimant's general practitioner. The programme envisaged an incremental increase in working hours culminating in a full time return to work by about the end of March 2004. The Claimant, however, was unable to meet the objective. His best effort resulted in him working a total of 29.5 hours worked in one particular week.
8. In view of the Claimant's lack of progress, Ms Lamond, on 10 March 2004, sent a draft report to the Respondent recommending a cessation of the Claimant's rehabilitation. Following receipt of the draft report it was made available to Mr Saunders who discussed its contents with Mr Nairn, the Respondent's then Human Resources Officer. Mr Saunders then spoke to the Claimant concerning the draft report and the likely outcomes. Mr Saunders told the Claimant that a possible outcome was the cessation of paid extended sick leave and the termination of his employment. I accept that such discussion took place well before the meeting to take place on 25 March 2004. There can be no doubt that the Claimant was advised prior to 25 March 2004 that the employer had reached the view that the end of the line had been reached with respect to rehabilitation and that, given that a return to full-time work was not possible, termination might well result. The Claimant well knew by the time that he attended the meeting that that outcome would facilitate an application for a total and permanent disability benefit. The draft report was formalised and signed on 23 March 2004. On 25 March 2004 the meeting was held to discuss the Claimant's rehabilitation during which the report prepared by Ms Lamond was presented and discussed. Those present at the meeting included the Respondent's representatives, the Claimant and his representatives including Mr Kington. As a consequence of the matters discussed it was agreed that no further rehabilitation intervention was possible. Consequently Mr Kington and Ms Lamond excused themselves from the meeting. Following their departure the Claimant was given a letter of termination indicating that his services were to be terminated as of 20 May 2004. A claim for total and permanent disablement was then discussed. The closure report to the Claimant's general practitioner prepared by Mr Kington on 25 March 2004 reflects what transpired at that meeting. It is appropriate that I set out the relevant parts of his report.

A meeting was held today, at the Kwinana Refinery Residue Facility, to review Mr Killian's progress on his rehabilitation programme. This meeting marked the end of the current programme, which had a goal of Mr Killian returning to full time hours. The focus of the meeting was the consideration of a Rehabilitation Progress Report by Ms Jessie Lamond. The conclusion of the report was that Mr Killian's rehabilitation should cease, as it was considered that he was unable to demonstrate his capacity to consistently work full time in an office environment. It was also recognised, as we had previously discussed, that a return to the Refinery environment is not anticipated to be a viable option.

Mr Killian raised a few issues, in relation to some of the content of the report, which was openly discussed at the meeting. He did, however, agree with the general thrust of the report, that is, that during the programme, he was not able to demonstrate a reliable capacity to attend for full-time hours and undertake productive work duties. Thus, the programme did not provide a platform for the consideration of Mr Killian's return to any available position within Alcoa.

At the conclusion of this discussion, it was agreed that no further rehabilitation intervention was possible and Ms Lamond and I excused ourselves from the meeting. I understand the meeting went on to discuss future arrangements for Mr Killian. Mr Killian later provided me with a copy of a letter from the Refinery Manager, Mr Tom Adams, indicating Mr Killian's employment would be terminated as of 20 May 2004. I understand this will provide him with time to discuss the level of his entitlements, in relation to his separation from Alcoa.

9. The Claimant accepted the conclusion reached by Ms Lamond that he had not been able to demonstrate that he had a reliable capacity to attend for full time hours and undertake productive work duties. His acceptance of the proposition is evidenced by a number of indicators including the fact that he failed to challenge the same as he was entitled to do. Perhaps more importantly his acceptance of Ms Lamond's conclusion is demonstrated by the fact that on 26 April 2004 he made an application to the Trustees of the Alcoa Superannuation Board for the provision of a Total and Permanent Disablement benefit. The Claimant's application was supported by his general medical practitioner who in her report dated 26 April 2004 concluded:

I have taken a comprehensive history, examined Mr Killian and performed standard and specialised medical tests and, as well I have referred him to independent specialists for opinion. In addition he has had reasonable attempts at rehabilitation and has been unable to continue in sustainable employment.

As a result of that process I have come to the conclusion that Mr Killian is totally and permanently disabled and he is unable to work in his trade at Alcoa or at any other site and he will find great difficulty establishing himself in any form of sustainable employment outside Alcoa.

There I conclude that he fulfils the Alcoa definition of Total and Permanent Disablement and that he is unlikely ever to engage or work for reward in any occupation or work for which he is reasonably suited by his education, training or experience.

10. The Claimant's application for a Total and Permanent Disablement benefit was rejected. On 17 December 2004 the Claimant lodged a complaint with the Superannuation Complaints Tribunal (the Tribunal) complaining that the decision of the Trustees was unfair or unreasonable and that his claim had not been treated on its merits given that he satisfied the "Fund TPD definition". On 21 December 2005 the Tribunal determined to set aside the decision of the Trustees. I set out the relevant parts of the Tribunal's determination:

In accordance with the requirements of ss37(3), (4) and (5) of the Complaints Act, the Tribunal determines to set aside the decision under review and remit the matter to the Trustee to reconsider the Complainant's application after obtaining relevant reports regarding the Complainant's cognitive impairments and the effect of the Complainant's neck and back conditions. These reports must consider the Complainant's ability to undertake full-time work for which he is qualified as well as the likely permanence of these conditions on his

work capacity. If at the end of that process the Complainant is dissatisfied with the Trustee's decision he may again approach the Tribunal.

11. I am informed that the Trustees are due to deliver their reconsidered decision in March of this year.

The Claim

12. The Claimant alleges that on or about 23 March 2004 the Respondent purported to terminate the Claimant's contract of employment with effect from 20 May 2004. He asserts that the termination was null and void and of no effect because:
- The Claimant was, at termination, on extended paid sick leave.
 - Clause 4 of Appendix 2 of the Agreement provided the only circumstances in which the Claimant could be terminated whilst on extended paid sick leave.
 - The Claimant was participating in rehabilitation at the time and there was no basis upon which the Respondent could determine that the Claimant could not return to his pre-injury duties on a permanent basis.
 - The Respondent did not have the required medical evidence under clause 4 of Appendix 2 to effect termination.
 - The Respondent had failed to first agree on a Total and Permanent Disablement benefit to the Claimant which on a proper construction of clause 4 of Appendix 2 of the Agreement it was required to do before proceeding to termination of the Claimant's employment.
13. The Claimant asserts that the Respondent wrongfully, and in breach of clause 4(iii) of the Agreement and clause 2 of Appendix 2 thereto, ceased making payments with respect to extended sick leave entitlements and did not discharge its duty to continue to make such payments.
14. The Claimant contends that given that he continues to be incapacitated, he is entitled to be paid sick leave for a maximum period of 104 weeks. He therefore seeks to recover sixty weeks unpaid sick leave for the period 21 May 2004 until 20 July 2005 at the rate of \$1,286.31 per week, totalling \$77,178.60. Interest is sought thereon. Finally the imposition of penalties is sought for the alleged breaches of the Agreement. The Claimant also sought the payment of superannuation contributions for the relevant period however he abandoned the same during the course of submissions.

The Response

15. The Respondent says that the purpose behind the payment of extended paid sick leave as stated in Appendix 2 is to provide protection for employees against the effects of medium and long-term sickness or injury which may prevent them from earning and/or maintaining their normal level of income. The policy aims to create financial security so as to assist injured or ill employees to focus on rehabilitation and an early return to work. The policy complements other entitlements. The policy is aimed at conferring a benefit if there is a clear prospect of a return to work through rehabilitation.
16. The Respondent asserts that the terms and conditions of the entitlements are contained in the administrative guide in Appendix 2 which can be distilled as follows:
- a) Continued employment;
 - b) An ability to return to pre-accident employment or suitable employment in the future; and
 - c) Participation in rehabilitation in satisfaction of b) above.
17. Extended paid sick leave is not open ended and is limited to a maximum of 104 weeks subject to compliance with the aforementioned terms and conditions. The benefit may be discontinued if:
- a) an employee ceases to claim extended paid sick leave;
 - b) medical evidence is obtained by the Respondent's appointed medical practitioner that confirms that the sick or injured employee is unable to return to his/her pre-injury duties on a permanent basis and no alternative positions are available for permanent employment with the Respondent; or
 - c) there is a failure on the part of the sick or injured employee to meet the terms and conditions of the policy, including participation in rehabilitation.
18. If extended paid sick leave is discontinued because medical advice confirms an inability to return to pre-injury duties on a permanent basis and no alternative positions are available, then the Respondent must provide six week's notice of the discontinuance and proceed to discuss a claim for Ill Health or Total and Permanent Disablement benefit available under the applicable superannuation scheme.
19. The Respondent says that the Claimant ceased to be entitled to extended paid sick leave because:
- 1) He failed to make an application for extended paid sick leave for the claimed period.
 - 2) There was evidence from the Claimant's treating general practitioner to the effect that the Claimant was unable to return to his pre-injury duties and the Respondent's rehabilitation provider's opinion was that no alternative positions were available.
 - 3) The rehabilitation of the Claimant had objectively failed notwithstanding it being fair, transparent and reasonable with a clearly stated and agreed goal which was unable to be met.
20. The Respondent argues that the lack of continued employment during the relevant period precludes the claim. Employment is a precondition to entitlement. In that regard it is submitted that this Court is without jurisdiction to determine the matter because the Claimant was not, for the period of the claim, an employee of the Respondent. The Claimant's employment is a necessary requirement to enliven the Court's jurisdiction.
21. Furthermore the Respondent says that any contention of unfair dismissal, which is denied in any event, is irrelevant. Whilst there may be avenues open to the Claimant arising from his claimed incapacity they do not and cannot arise from the Agreement.

22. This claim is inconsistent with the Agreement. The Claimant fails to meet the conditions necessary for extended paid sick leave under the Agreement. It follows that the Respondent denies any breach of the Agreement as alleged or at all.

Conclusion

23. This claim is predicated on the Claimant's view that his employment was unlawfully terminated and therefore that the purported termination was null and void and of no effect. Accordingly he argues that he was at all material times an "employee" entitled to bring this claim. The Respondent contests such assertion and says that the Claimant was not, for the period claimed, an employee bound by the Agreement. The Respondent says that the Claimant's termination was lawful in any event.
24. The Claimant relies on two decisions of the Western Australian Industrial Relations Commission to advance his argument. Those decisions are *John James Reynolds v Swift & Moore Pty Ltd* 74 WAIG 861 (Swift) and *Australian Workers Union, Western Australian Branch, Industrial Union of Workers v Argyle Diamond Mines Pty Ltd* 74 WAIG 3044 (Argyle). Each of those matters dealt with claims alleging unfair dismissal. In *Swift* the termination occurred whilst the employee was receiving payment of accrued sick leave entitlements. The Full Bench held in that matter that the employer had no right to interfere with the employee's entitlement so as to deprive the employee of his sick leave entitlement. In *Argyle*, Commissioner Gregor (as he then was) said at page 3048:

When a person is absent and they are not on sick leave, or sick leave is exhausted and that person is being paid an entitlement which falls due to them by virtue of their membership of the Argyle Diamond Mine Sickness and Accident Scheme, they are not on sick leave. Before Clause g) of the insurance certificate was amended, the right to payment was coterminous with termination of the employment. That would not be allowable in the case of termination if an employee was on genuine sick leave under an award and there was still sick leave available to them. The doctrine in the Multicom Case (supra) would prohibit that. The amended clause recognises that if there is a disability admitted and the person is dismissed, the income will not be reduced. What a medical certificate does is authorise payment of entitlements where payments under the policy are not coterminous with the end of the employment contract.

25. The Respondent argues that *Swift* is distinguishable because the entitlement received was an accrued entitlement, whereas the Claimant in this matter had exhausted his accrued entitlement to paid sick leave. Indeed the Claimant's position in this matter is more akin to the employee's position in the *Argyle* matter. The Respondent points out that the High Court of Australia in *Byrne & Frew v Australian Airlines Ltd* (1975) 131 ALR 472 held that a breach of a clause in an award that provides that an employee not be unfairly dismissed did not render the termination of employment invalid. A distinction was drawn between a contract of employment (which may be kept on foot if breached) and the employment relationship, which terminates on dismissal. The fact that a claim may be for breach of contract (or an award or agreement) does not render the termination of employment, even if in breach of its terms, a nullity.
26. In this matter it appears that clause 3 of the Agreement refers to employment and not to a contract of employment. Once the Claimant's termination took effect there was no employment. That is a matter of fact. Appendix 2 of the Agreement makes no reference to termination of employment and does not prohibit or restrict the Respondent from otherwise lawfully terminating the employment of the Claimant, and it seems on the face of it that the Respondent was entitled to terminate the Claimant's employment as it did. The authorities cited by the Claimant in support of his claim are distinguishable both legally and factually. The Claimant in this matter exhausted all his sick leave entitlements before the termination of his employment occurred. It follows that the termination of his employment did not have the effect of defeating his entitlements. The payment of extended sick leave was entirely contingent upon the Claimant's continued progress in rehabilitation and was determinable if rehabilitation did or could not succeed. I proceed therefore on the basis that the termination that occurred was not unlawful. In those circumstances the Claimant was not for the material period an employee. Given that his Claim is entirely predicated upon employment his Claim cannot succeed.
27. Even if the Claimant could be said to be entitled to claim extended sick leave benefits, it is the case that he did not make any application for such benefits for the claimed period in accordance with clause 3 of Appendix 2 of the Agreement. The payment of such benefits is contingent upon an application being made. Given that no application has been made with respect to the claimed period, any entitlement to such benefit cannot arise.
28. Furthermore it is quite apparent that the discontinuance of payments to the Claimant of extended sick leave benefits as from 20 May 2004 was achieved in accordance with clause 4 of Appendix 2 of the Agreement because he could not meet the terms and conditions of the policy with respect to his participation in rehabilitation. In that regard it was the case that by March 2004 attempts at rehabilitation had objectively failed. The rehabilitation programme was fair, transparent and reasonable with a clearly stated and agreed goal, which the Claimant was unable to meet. Notwithstanding his endeavour, the Claimant was not able to achieve rehabilitation within the agreed time frame. He was therefore unable to return to his pre-injury duties and the Respondent's rehabilitation provider had determined that no alternative positions were available. The Claimant agreed with the rehabilitation outcome as is evidenced by Mr Kington's closure report and his subsequent application for Total and Permanent Disability benefit. It appears that all concerned, including the Claimant and his general medical practitioner, had reached the view by about March 2004 that the Claimant had reached the end of the line with respect to rehabilitation. The reality was that he could not work on a full-time basis and hence his application for Total and Permanent Disability benefit. The medical evidence available to the Respondent was indicative of the same. In the circumstances the Respondent was quite entitled to discontinue payment of extended sick leave. Initially the Claimant took no issue with what had occurred because, it would appear, he agreed with the course of action taken which facilitated his application for a Total and Permanent Disability benefit. It was only after the Trustees on 11 August 2004 rejected his claim for a Total and Permanent Disability benefit that this claim was made.
29. I find that the Respondent has not failed to comply with the Agreement.

G Cicchini
Industrial Magistrate

2006 WAIRC 04146

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH	CLAIMANT
	-v-	
	THE MINISTER FOR EDUCATION AND TRAINING, CHIEF EXECUTIVE OFFICER, DEPARTMENT OF EDUCATION AND TRAINING	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR	
HEARD	WEDNESDAY, 14 DECEMBER 2005, WEDNESDAY, 18 JANUARY 2006, THURSDAY, 19 JANUARY 2006, WEDNESDAY, 15 FEBRUARY 2006	
DELIVERED	WEDNESDAY, 19 APRIL 2006	
CLAIM NO.	M 72 OF 2005	
CITATION NO.	2006 WAIRC 04146	

CatchWords	Interpretation of agreement; intention of the parties
Legislation	Industrial Relations Act 1979 & Education Assistants General Agreement No. AG 108 of 2004
Cases referred to in decision	<i>Norwest Beef Industries Limited v West Australian Branch, Australasian Meat Industry Employees Union 64 WAIG 2124</i>
Result	Interpretation given
Representation	
Claimant	Mr M Swinbourn appeared as agent for the Claimant
Respondent	Mr S Murphy (of Counsel) of the <i>State Solicitor's Office</i> appeared for the Respondent

Reasons for Decision

(Outcome advised to the parties at the conclusion of the hearing, written reasons to be provided by His Honour)

- 1 The Claimant herein is an organisation of employees registered pursuant to Part II Division 4 of the Industrial Relations Act 1979 (the Act).
- 2 The Respondent is the employer of the employees the subject of the claim.
- 3 Both parties are the named parties to the Education Assistants General Agreement 2004 No AG 108 of 2004 (the Agreement)
- 4 It is the Claimant's claim that the Respondent breached the Agreement in relation to the progression through the classification structure provisions as they relate to Education Assistants. In particular the requirements provided for in clauses 21.7 and 21.18 of the Agreement.
- 5 The parties have been engaged in discussions and have filed in the Court a Statement of Agreed Facts and Issue for Determination.
- 6 The issue for determination is as follows:

“Given that the assessment as per subclause 21.12 of the Agreement was not carried out by 9 July 2004 in respect of the named employees, because the respondent believed that the named employees were ineligible to apply, was the respondent subsequently in breach of subclause 21.16 of the Agreement because it did not automatically recognise the named employees as Level 3?”
- 7 The claim is on behalf of a group of named employees and it is agreed that:
 - Each of the named persons applied for their position to be re-assessed by a District Office Committee by completing a Request for Level 3 Recognition Form and forwarding it to the relevant District Office Committee by 9 July 2004 or line managers over the telephone.
 - The named persons were all employed as Education Assistants at the material time. At the material time, none of the named employees were formally appointed to a (sic) Education Assistant (Special Needs) position. At the material time, the majority of the named persons were formally appointed to Education Assistants (Primary, Pre-Primary, Rural Integration Program, Ethnic) positions.
 - On the basis of the respondent's determination that the named persons were not employed as an Education Assistant (Special Needs), the respondent considered that the named persons were not eligible to apply for reassessment and so the respondent did not assess the applications in respect of the named persons as per subclause 21.12 of the Agreement.
 - The respondent did not automatically recognise the named persons as Level 3 as contemplated by subclause 21.16 of the Agreement.
- 8 The Agreement in Part 5 provides for Progression Through the Classification Structure. That part contains six clauses, the first five of which make provisions for the classification by way of a Level and Step within that level for specified employees as follows:

- Clause 20. – Education Assistants (Primary, Pre-primary, Rural Integration program, Home Economics Assistant, Ethnic).
- Clause 21. – Education Assistants (Special Needs) in Education Support Units and Working with Individual Students in Mainstream Schools.
- Clause 22. – Education Assistants (Special Needs) in Education Support Schools and Centres.
- Clause 23. – Education Assistants (Special Needs) in SPER Centres.
- Clause 24. – Aboriginal and Islander Education Officers.

9 It is necessary to set out clause 21 of the Agreement with all its subclauses for the purpose of these reasons. The clause reads as follows:

- 21 EDUCATION ASSISTANTS (SPECIAL NEEDS) IN EDUCATION SUPPORT UNITS AND WORKING WITH INDIVIDUAL STUDENTS IN MAINSTREAM SCHOOLS
- 21.1 Prior to the selection or employment of Education Assistants (Special Needs) in Education Support Units or working with individual students in mainstream schools, the position will be assessed as Level 2 or Level 3 and advertised as such.
- 21.2 Employees employed in positions classified at Level 2 shall commence on Level 2 step 1 and progress by annual increments through Level 2 and Level 3 of the classification structure.
- 21.3 An employee will progress from Level 2 to Level 3, unless the relevant school principal indicates prior to an employee's increment date that an employee's work performance is not satisfactory and the employee is not capable of exercising the responsibilities and carrying out the duties of a Level 3 Education Assistant. The school principal must be able to demonstrate to the employer that performance issues are genuine and have been raised with the employee.
- 21.4 Education Assistants who progress to Level 3 will carry out the functions and duties as prescribed by the relevant Level 3 Education Assistant Job Description Form (JDF).
- 21.5 Notwithstanding subclause 21.2 an employee in a Level 2 position who believes they should be recognised as a Level 3 may apply for their position to be re-assessed by the District Office Committee in accordance with the procedure outlined in subclauses 21.9 to 21.16.
- 21.6 All new employees will have an increment date in accordance with their anniversary date.

Transitional arrangements for existing employees.

- 21.7 The parties have agreed that the employees named in Employer Exhibit "1" of the WAIRC proceeding to register this Agreement shall be recognised as Level 3 employees.
- 21.8 All other employees except those referred to in Employer Exhibit "1" and subclause 21.19 will progress from Level 2 to Level 3, unless the relevant school principal indicates prior to an employee's increment date that an employee's work performance is not satisfactory and the employee is not capable of exercising the responsibilities and carrying out the duties of a Level 3 Education Assistant. The school principal must be able to demonstrate to the employer that performance issues are genuine and have been raised with the employee.
- 21.9 An existing employee not identified in subclause 21.7 shall continue at their current classification and progress through Level 2 and Level 3 of the classification structure by annual increments provided that an employee who believes their position should be recognised as Level 3 may apply for their position to be re-assessed by the District Office Committee
- 21.10 An employee applying for re-assessment shall complete the Request for Level 3 Recognition Form, Schedule 3. The employee shall forward the form to the relevant District Office Committee for consideration. The form may be signed by the school principal and/or classroom teacher.
- 21.11 Upon receipt of the form, the District Office Committee will forward a receipt of acknowledgement to the Education Assistant.
- 21.12 The District Office Committee will assess each submission based on the special needs requirements of students in consideration of the Individual Education Plan and the role requirements provided in the relevant Level 3 Education Assistant JDF.
- 21.13 If the District Office Committee confirms that the position is that of a Level 3 Education Assistant, the employee shall be classified as Level 3.
- 21.14 If the District Office Committee determines that the position does not warrant Level 3 classification, the employee shall continue at their current classification.
- 21.15 An Education Assistant may appeal the decision of the District Office Committee by utilising the Dispute Settlement Procedure in this Agreement.
- 21.16 Where the assessment process as outlined above is not completed by 9 July 2004, the Education Assistant will automatically be recognised as Level 3.
- 21.17 An employee named in Exhibit 1 or who is recognised as a Level 3 through the process outlined in subclauses 21.9 to 21.16 and who has been continuously employed prior to 22 July 2001 will:
- (a) be classified as Level 3, Step 1 from 22 July 2002 and progress to Step 2 and Step 3 on 22 July 2003 and 22 July 2004 respectively; and
 - (b) receive appropriate arrears payment by 9 July 2004.
- 21.18 An employee named in Exhibit 1 or who is recognised as a Level 3 through the process outlined in subclauses 21.9 to 21.16 and who has not been continuously employed prior to 22 July 2001 will move to Level 3.1 from 1 January 2004 and shall progress through Level 3 of the classification structure by annual increments.

- 21.19 Notwithstanding the other provisions of this clause an employee solely employed to attend to a student to address exposure to a specific medical condition:
- (a) anaphylactic reactions;
 - (b) epilepsy;
 - (c) diabetes; or
 - (d) any other conditions as agreed by the parties;
- will begin employment at Level 1. These employees shall progress through Levels 1 and 2 in annual increments.
- 21.20 Where an agreement cannot be reached in relation to a particular medical condition the dispute shall be dealt with under the Dispute Settlement Procedure of this Agreement.
- 10 It has been agreed that the named persons were all employed as Education Assistants and not appointed to an Education Assistant (Special Needs) position.
- 11 The Claimant argues however that the provisions of clause 21, in particular the “Transitional arrangements for existing employees”, should apply not only to the Education Assistants (Special Needs) but to the named persons. It is argued that the provisions of clause 21.9 allow them to “apply for their position to be re-assessed by the District Office Committee” and where, as provided in clause 21.16 “the assessment process is not completed by 9 July 2004 the Education Assistant will automatically be recognised as Level 3”.
- 12 In support of that argument I have been referred to the definition of “employees” in clause 3 which reads:
- “Employees” means all employees working in the Department of Education and Training as Education Assistants, Aboriginal and Islander Officers, Ethnic Assistants, and Home Economics Assistants.
- 13 I have been asked to interpret clauses 21.9 and 21.16 together with the other relevant subclauses of the Agreement as applying to all employees as defined.
- 14 The Western Australian Industrial Appeal Court, in *Norwest Beef Industries Limited v West Australian Branch, Australasian Meat Industry Employees Union* 64 WAIG 2124, dealt with the issue of the interpretation of awards and agreements. In the reasons of Brinsden J, His Honour set out the following
- “If it be the case that the correct approach to the interpretation of an industrial award is to read the document itself and give to the words used their ordinary commonsense English meaning (see Jackson J in *United Furniture Trades Industrial Union v Dale Manufacturing Co Pty Ltd*, 30 WAIG 539, at p. 540) then the first task in every case will be to determine whether the words used are capable in their ordinary sense of having an unambiguous meaning. If that question is answered in the affirmative then the further consideration of the expressed or supposed intention of the award making tribunal does not fall to be considered. The majority of the Full Bench in this case took that view when they said:
- ‘It is now trite law that when the meaning of language read in its ordinary and natural sense is obtained it is not necessary or indeed permissible to look to the intention of the parties.’
- In my opinion the majority of the Full Bench has correctly stated the basic principle to be applied in the interpretation of industrial awards. Any other conclusion would lead to industrial anarchy. If the contrary were 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 intention of the tribunal whilst the award itself would be rendered meaningless.”
- 15 I believe the Claimant would have liked to call evidence as to the intention of the parties but it is my view there is no ambiguity in the relevant clauses of Part 5 of the Agreement.
- 16 Given the ordinary commonsense English meaning of the wording of the Agreement, it is my view that it must follow that the subclauses of each clause in Part 5 relate to the employees mentioned in the clause heading. It could not be the case, as suggested, that clauses 21.7 to 21.20 have application to the employees mentioned in clauses 20, 22, 23 or 24. Those clauses stand alone and any reference to “employee” in them must be a reference to the employee referred to in the clause title.
- 17 For example, clause 20 provides for Education Assistants (Primary, Pre-primary, Rural Integration program, Home Economics Assistant, Ethnic) – and I assume from submissions that the named employees come within that category – and as such they are initially employed at Level 1 Step 1 of the classification structure and may progress through to Level 2. There is no provision for them to go beyond Level 2 in that classification. Clause 22, 23 and 24 provide for the employees in the classifications to which each clause applies to be either employed at Level 3 or to progress to a Level 3.
- 18 As I have mentioned the intention of the parties to the Agreement is only relevant to the extent of what the Agreement provides on the face of it. The parties had an opportunity if it was their intention to add a clause which clearly applied to all classifications in relation to transitional arrangements for existing employees.
- 19 It is my view that the only interpretation that can be concluded from the way Part 5 has been engrossed is that the subclauses of each clause relate to the employee referred to in the heading of the clause and the Claimant’s interpretation cannot be sustained.
- 20 I find that the Respondent was justified in concluding that the named employees did not qualify for consideration under clause 21.

W G Tarr
Industrial Magistrate

2006 WAIRC 04158

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT	
PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH	CLAIMANT
	-v-	
	SOILAND PTY LTD (1 & 2) 2004 - 2005	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI	
HEARD	THURSDAY, 16 MARCH 2006, WEDNESDAY, 29 MARCH 2006	
DELIVERED	WEDNESDAY, 29 MARCH 2006	
CLAIM NO.	M 42 OF 2005	
CITATION NO.	2006 WAIRC 04158	

CatchWords	Enforcement of award; Meal Allowance; Payment of higher rate as "all purpose rate", Set-off
Legislation	Industrial Relations Act 1979 and Transport Workers (General) Award No. 10 of 1961
Cases referred to in decision	<i>James Turner Roofing Pty Ltd -v- Christopher Lawrence Peters 83 WAIG 427</i>
Result	Claim proved
Representation	
Claimant	Mr N J Hodgson appeared for the Claimant
Respondent	Mr A R Beer appeared for the Respondent

Reasons for Decision

Background

1 Between 31 May 2003 and 24 March 2005 the Respondent employed the Claimant's member, namely Gary Dover. Mr Dover was employed as a truck driver and his conditions of employment were at all material times governed by the provisions of the *Transport Workers (General) Award No 10 of 1961* (the Award). There is no dispute between the parties that the Award had application to Mr Dover and the Respondent in their employment relationship.

The Issue

- 2 Clause 5.6 of the Award provides that a meal allowance is to be paid where an employee is required to work two or more hours of overtime. The Claimant alleges that Mr Dover was regularly required to work more than two hours overtime each weekday and on Saturday but was never paid a meal allowance. The Claimant contends therefore that the Respondent has breached clause 5.6 of the Award. It accordingly seeks the imposition of a penalty for the breach of the Award, the recovery of \$3,014.80 allegedly underpaid, interest thereon and costs.
- 3 The Respondent admits that meal allowances were not paid but says that there was an agreement between the Respondent and all truck drivers that they would be paid at the next higher rate than that applicable to the vehicle configuration that they drove as an "all purpose rate" to cover allowances. The Respondent contends that in paying the higher grade rate as an "all purpose rate" the Respondent has overpaid Mr Dover \$727.80 compared to that which he would have been paid had he been paid at his correct rate plus meal allowance.
- 4 The Respondent says that it has met all its obligations pursuant to the Award and that Mr Dover has not been financially disadvantaged. It relies on the principle enunciated in *James Turner Roofing Pty Ltd v Christopher Lawrence Peters 83 WAIG 427* as support for its position that the overpayment should be set off against the amount claimed.

Mr Dover's Evidence

- 5 Mr Dover testified that he commenced working for the Respondent's predecessor some eleven years ago. During that period the entity of his employer changed from time to time but his physical employment circumstances remained unaltered. Despite the several changes in the identity of his employer he continued to work for "the same company, and the same people. It was the same job. Nothing changed."
- 6 He testified that in early 2003 the Respondent's predecessor became bankrupt which resulted in the Respondent taking over the business. His claim is restricted to the period commencing when the Respondent took over the business until the cessation of his employment with the Respondent.
- 7 Mr Dover told the Court that when he was initially engaged by one of the Respondent's predecessors that there was no discussion about his conditions of employment. He simply had an expectation that he would be paid award rates. When the Respondent took over the business there was no discussion about his conditions of employment and his situation remained unaltered. There was never any discussion about any particular award entitlement.
- 8 During the period of his employment with the Respondent, Mr Dover drove semi-trailers, truck and dog trailer combinations and pocket road trains in the transport of soils and other base products. He was expected to work a ten hour day Monday to Friday inclusive and an eight hour day on Saturdays, however, in reality his hours of work varied from day to day and he generally worked longer hours. The hours worked, as set out in exhibit 3, are said by him to reflect the hours he worked during the material period. Indeed the Respondent does not take issue with that.
- 9 Mr Dover said that he was required to drive to the South West region of Western Australia and for that purpose would drive either an eight wheel truck and dog trailer or a pocket road train. When in the metropolitan area he would drive either one of those combinations or a semi-trailer, being an articulated vehicle consisting of a prime mover and trailer. He said that the truck with dog trailer and pocket road train combinations were classified in the Award as being within "Grade 8" and the semi-trailer as being within "Grade 7".

- 10 Mr Dover testified that during the entire period of his employment with the Respondent and its predecessors he was never paid a meal allowance.
- 11 When cross-examined he conceded that he never questioned the fact that he was not paid a meal allowance. He said that no one was paid a meal allowance. It was his view that it was a waste of time asking for it, given the attitude of his employer. The Respondent looked unfavourably at union involvement and he was on one occasion penalised for attending a union meeting. He eventually resigned because of the way he had been treated by his employer.
- 12 Mr Dover also said under cross-examination that there was never any agreement reached concerning the meal allowance or any other allowance for that matter.

The Evidence of Colin Nicholas Constantine

- 13 Colin Nicholas Constantine started working for one of the Respondent's predecessors in November 1999. He was initially engaged as a truck driver but was on
- 14 18 December 2003 appointed as the Respondent's Transport Manager, a position that he held until he resigned in February 2005. He said that when he was appointed as a truck driver there was no discussion about allowances or any other payment. There was simply an expectation on his part that he would be paid the Award rate. When he became the Transport Manager it was part of his function to hire truck drivers. In so doing there was never any discussion about allowances. He knew that the Respondents did not pay meal allowances and indeed none were paid.
- 15 Mr Constantine testified that, during his period with the Respondent, the Respondent had only one Grade 6 vehicle, being a six wheeler tip truck. That was allocated to another employee and not to Mr Dover. The other vehicles used by the Respondent were either within Grade 7 or 8. He said that Mr Dover generally drove vehicles within the Grade 8 category, sometimes those within Grade 7 and, only rarely, those within Grade 6.
- 16 Mr Constantine reaffirmed under cross-examination that the drivers knew that they would not be paid a meal allowance.

Evidence of Arthur Raymond Beer

- 17 Mr Beer is the Respondent's Human Resources Manager and he gave evidence for the purpose of introducing into evidence two documents that he prepared for the purpose of these proceedings, being exhibits 4 and 5. Exhibit 4 details, with respect to Mr Dover's work during the material period, the date, day of the week, starting time, the finish time, the meal breaks taken, the grade of vehicle driven on any particular day and the grade paid for that vehicle driven on the particular day. The document was compiled from the daily time sheets filled in by Mr Dover which contained all relevant details as to times and which identified the truck driven and any trailer attached thereto. Mr Beer did not produce the source records that gave rise to his document. Further, he said that he has no knowledge of the trucks used by the Respondent or their award classification. Accordingly he used the services of an experienced truck driver, namely Arthur Naylor, who has subsequently died, to assist him in allocating a grade to the configuration used by Mr Dover each day for the purposes of the preparation of exhibit 4.
- 18 When cross-examined Mr Beer readily conceded that he knew nothing about the identification codes relating to the trucks. He could not tell from the codes the combination mass of the vehicles detailed in exhibit 4.
- 19 Mr Beer also produced exhibit 5 in which he detailed the gross pay received by Mr Dover, the gross pay he should have received and the variance between the two calculated on a weekly basis. He calculated therein that Mr Dover was overpaid \$727.80.
- 20 When cross-examined about exhibit 5 Mr Beer was taken to comment upon the calculation made for 30 June 2003 when on the Respondent's record it shows in reference to exhibit 4 that Mr Dover, on that day, drove a Grade 8 vehicle, was paid a Grade 8 rate, but was not paid a meal allowance for that day. Mr Beer said in response that the calculations could not be looked at on a day by day basis but rather in totality and when that was done the document he prepared (exhibit 5) demonstrates an overpayment.
- 21 The Respondent did not call other witnesses.

Conclusion

- 22 The Claimant bears the onus of proving its claim on the balance of probabilities. As indicated earlier, there is no dispute that Mr Dover was an employee of the Respondent for the material period and that the conditions of his employment were governed by the Award. The Claimant contends that for the major and substantial period of Mr Dover's employment he drove Grade 8 configurations. That importantly is supported by the evidence of Mr Constantine. Mr Constantine was the Respondent's Transport Manager for a significant portion of the period with respect to which the claim relates. Given his position, he was in the best position to know what Mr Dover was driving during that time. His evidence contradicts the assertion contained in exhibit 4 relating to the grade of vehicle driven by Mr Dover. Indeed I find exhibit 4 to be of little or no value. It is a secondary document prepared from source documents which have not been produced. Moreover, and perhaps more importantly, the allocated grade of the vehicle as contained in the document is based on another person's view. The qualification of that other person has not been able to be tested, nor has there been any ability on the part of the Claimant to test the accuracy of the same. In reality exhibit 4 represents a self-serving document which the Claimant has not been able to test.
- 23 The Respondent's contention is almost entirely based on the accuracy of the information contained in exhibit 4 relating to the classification of the vehicle driven each day, however, there is nothing to support the accuracy of the same. Accordingly it follows that where there is a contest between the sworn evidence of Mr Dover and Mr Constantine on the one hand and what is found in exhibit 4 on the other, that the sworn testimony is far preferable.
- 24 I find that Mr Dover, as his major and substantial duties, drove vehicles within the Grade 8 classification. I reject the Respondent's contention that Mr Dover drove vehicles within the Grade 6 classification for a major and substantial period of his employment. Furthermore, I find there was no agreement with respect to meal allowance or any other allowances for that matter. Indeed there was no discussion between Mr Dover and the Respondent's representatives concerning pay. There is no evidence before the Court which supports the Respondent's contention that there was agreement between Mr Dover and his employer that he would be paid at the next higher rate as an "*all purpose rate*". I find that there was no such agreement. Furthermore I reject the Respondent's submission that the agreement in that regard is reflected by Mr Dover's failure to complain about the non-payment of a meal allowance. The failure to complain does not, of itself, reflect agreement.
- 25 The evidence establishes that Mr Dover carried out the functions of a Grade 8 employee and that he was paid as such, save that he was not paid the meal allowance to which he was entitled. Given that the Respondent concedes that it did not pay the meal

allowance during the period of the claim, it follows, in the light of the findings that I have made, that the Respondent has breached the Award as alleged. I find, in accepting the calculations contained in exhibit 3, that Mr Dover was underpaid \$3,014.80 as a consequence of the breach. He is entitled to that sum together with interest thereon. The facts in this matter exclude the application of the principles in *James Turner Roofing* (supra).

G. Cicchini
Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2006 WAIRC 03962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
EDWARD MATTHEW TRAVERS BLACKLEY

PARTIES

APPLICANT

-v-

ADVANCED ENERGY SYSTEMS LTD (ACN 066 908 530), POWERSEARCH LIMITED (ACN 009 216 924) AND PRIME POWER SYSTEMS PTY LTD (ACN 066 124 909)

RESPONDENTS

CORAM COMMISSIONER J H SMITH
HEARD THURSDAY, 2 FEBRUARY 2006
DELIVERED FRIDAY, 17 MARCH 2006
FILE NO. B 151 OF 2005 and U 151 OF 2005
CITATION NO. 2006 WAIRC 03962

CatchWords Termination of employment - Harsh, oppressive and unfair dismissal - Applicant unfairly dismissed - No order made for compensation - Contractual benefits claim upheld - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) and (ii)
Result Declaration and orders made
Representation
Applicant In person
Respondents No appearance

Reasons for Decision

- 1 Edward Matthew Travers Blackley ("the Applicant") claims he was harshly, oppressively and unfairly dismissed on 30 September 2005 by Advanced Energy Systems Ltd (ACN 066 908 530) (subject to a deed of company), Powersearch Limited (ACN 009 216 924) (subject to a deed of company) and Prime Power Systems Pty Ltd (ACN 066 124 909) (subject to a deed of company administration) ("the Respondents") each of 121 Ewing Street, Welshpool, Western Australia.
- 2 The Applicant makes a claim under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The Applicant also claims pursuant to s 29(1)(b)(ii) of the Act that he was denied the following contractual benefits, and not being benefits under an award or an industrial agreement:
 - (a) \$5,750.00 for wages for the month of September 2005;
 - (b) \$7,187.00 for five weeks' accrued annual leave;
 - (c) \$5,750.00 for four weeks' notice of termination;
 - (d) \$1,437.50 for redundancy payment for one week's wages; and
 - (e) \$5,175.00 for superannuation contributions for the period between 1 December 2004 and 30 September 2005.
- 3 The Respondents were served with the applications and notices of hearing. No notices of answer and counter proposal in respect of the applications have been filed on behalf of any of the Respondents. Further, no representative of any of the Respondents attended a conference in respect of these matters on 12 December 2005. The notices of hearing were served by ordinary post on 15 December 2005. The notices of hearing were sent to the Respondents' address at 121 Ewing Street, Welshpool and were also sent to PO Box 1149, Bentley DC, WA 6983. No notices of hearing were returned to the Commission and none of the Respondents appeared at the hearing to defend the applications. Having regard to the foregoing the Commission was satisfied that the Respondents had been served with the notice of hearing and satisfied that each of the Respondents had been served with a copy of the application. Consequently this matter was heard in their absence.

The Applicant's Evidence

- 4 The Applicant was employed by one or more of the Respondents from 1 September 2003 until 30 September 2005. During the Applicant's evidence the issue arose as to whether the Applicant was employed by Advanced Energy Systems Ltd alone or whether he was employed by all of the Respondents. The Applicant tendered into evidence a copy of his employment contract ("the contract") made on 2 September 2003 (*Exhibit 1*), which is titled Advanced Energy Systems Ltd, however, the express terms of the agreement state that the agreement is made between the Applicant and Advanced Energy Systems Ltd (ACN 066 908 530), Powersearch Limited (ACN 009 216 924) and Prime Power Systems Pty Ltd (ACN 066 124 909). Those three organisations are collectively named in the agreement as "the company". Under clause 2.1 of the employment contract it is stated that the company employs the employee and the employee shall serve the company consistent with the company policies and employee shall carry out such other additional or substituted duties from time to time as may be mutually agreed

between the company and the employee. The employee named in the agreement is the Applicant. The agreement was executed by the Applicant and by Advanced Energy Systems Ltd (ACN 066 908 530) by the affixing of the common seal by a director/secretary of Advanced Energy Systems Ltd.

- 5 Since the Respondents became subject to a deed of company administration it appears that the Applicant was solely paid by Advanced Energy Systems Ltd. The Applicant's PAYG payment summary indicates that the Applicant was paid salary by that company from 1 December 2004 until 30 June 2005. The Applicant was provided with payslips from Advanced Energy Systems Ltd from 15 June 2005 until 15 August 2005. However it appears that the Applicant was paid by Prime Power Systems Pty Ltd for a short period prior to the period of administration from 1 July 2004 until 31 August 2004 (*Exhibit 7* - the PAYG Payment Summary for that period).
- 6 The Applicant says that whilst employed by the Respondents he was paid a salary of \$69,000 per annum. He was first employed by the Respondents on 1 September 2003, as a marketing executive but in December 2004 he became a business development manager. The Applicant says that the Respondents went into external administration on 30 August 2004 but he continued to be employed by Advanced Energy Systems Ltd if not by all three Respondents. The Applicant's claim for contractual benefits only runs from the date the Respondents became subject to deeds of company arrangement.
- 7 The Applicant's employment came to an end in late September 2005 after Advanced Energy Systems Ltd failed to pay the Applicant his salary for September 2005. The Applicant testified he was paid monthly on 15th of each month, for the entire month. On 14 September 2005 the Applicant received an email from John Price, the Chief Executive Officer of each of the three Respondents, stating that there would be a delay of three to seven days for the payroll as they were bringing funds from the USA to cover the current shortfall. On 15 September 2005 the Applicant was not paid his monthly salary. On 26 September 2005 the Applicant, along with other staff members, was sent a further email about salary from Mr Price. Mr Price stated in that email that he had not received funds from the USA and that he had local alternatives and would focus on those options. Mr Price also expressed his regret and apologised for the inconvenience and stated that he would keep the Applicant and the other staff members fully informed.
- 8 Monday, 26 September 2005 was a Public Holiday. On the following day the Applicant went to work at 8.00am but decided to leave work at midday and go home because he had not been paid. Shortly before he left work he telephoned his immediate superior, Mike Dymond who was the Vice President of Renewable Power Research and Development. Mr Dymond was at a board meeting in Melbourne. The Applicant told Mr Dymond he was not going to work that day because he had not been paid. The Applicant says Mr Dymond told him that he understood the position that they were all in and that he would communicate the Applicant's action to the Board and to Mr Price. The Applicant says that he was not the only employee to leave the Respondents' premises on that day. On Wednesday, 28 September 2005, the Applicant returned to work to carry out some important work for customers and to discuss a course of action with other employees. On Thursday, 29 September 2005, he worked until 3.00pm and then went home. On Thursday, 29 September 2005, Mr Price telephoned the Applicant at his home and told him that he was disappointed with the Applicant's action but made a commitment that the Applicant's wages would be paid on the following Monday if the Applicant agreed to return to work on Friday, 30 September 2005. The Applicant said that he went to work on 30 September 2005, however, he was unable to commence work because the landlord had taken possession of the building the day before and changed the locks so none of the employees could enter the premises. The Applicant received an email from Mr Price on Saturday, 1 October 2005. The email was dated 30 September 2005 and was sent by Mr Price to the Applicant. The email states as follows:

"I have reviewed the walk out situation with the Directors and our lawyers.

I regret to inform you that we have decided to accept the walk out as your resignation, effective 28 September 2005. Ed, I am surprised with your action as it has been very damaging to AES.

I believe you have made an important contribution to AES in the past and have good product and application knowledge. You have had a good working relationship with your colleagues and I have believed that you will rise to the occasion when the AES restructuring is finalized.

Unfortunately, I can't accept your decision to walk without consultation with myself.

Should you decide that you wish to adopt a different approach and apply for a new position at AES, we would be happy to review this in a positive manner."

(*Exhibit 6*)

- 9 The Applicant says that he has not had any communication with the Respondents since he received that email from Mr Price and he has not communicated with the Respondents other than to make this application.
- 10 In relation to the Applicant's claims for contractual benefits the Applicant says that he was not paid for the entire month of September 2005. He also testified that the entire period he worked for the Respondents he only took three weeks' leave which was taken prior to the Respondents' entering into deeds of company arrangement. The Applicant also claims that he was entitled to be paid five weeks' accrued annual leave on the termination of his employment and that he was also entitled to be paid as an express contractual benefit four weeks' pay in lieu of notice. In respect of the Applicant's claim for pay in lieu of notice the Applicant relies upon clause 9.1 of the contract.
- 11 In relation to the Applicant's claim that he has a contractual entitlement to superannuation contributions from 1 December 2004 to 30 September 2005 the Applicant says this contractual entitlement arises from clause 4.3(c) of the contract which provides that monthly contributions are to be made by the Company to a complying superannuation fund of which he is a member. The Applicant tendered into evidence a record of his transaction history from his superannuation fund, BT Financial Group, which indicates that the last contribution made by the Respondents was made on 17 November 2003. However, the Applicant does not make any claim in relation to superannuation contributions which were required to be made pursuant to his contract of employment prior to the Respondents entering into deeds of company arrangement.
- 12 After the Applicant's employment was terminated he was unemployed for approximately two weeks. He commenced work as a Technical Sales Representative on 15 October 2005 for a new employer and he now earns \$63,000 per annum which is \$6,000 per annum less than his salary when he was employed by the Respondents.
- 13 The Applicant claims in relation to his unfair dismissal claim that he should be awarded compensation for the period he was unemployed and for his ongoing loss of \$6,000 per annum.

Conclusion

- 14 The Applicant's claim that he was unfairly dismissed and his claim for four weeks' pay in lieu of notice and one week's redundancy payment, all turn on the question of whether he resigned or whether his employment was terminated by Mr Price on behalf of Advanced Energy Systems Ltd or the other Respondents.

Legal Principles – Was there a breach of contract

- 15 In this matter there is no evidence before me that the Applicant resigned. However, could his conduct in refusing to attend work be said to be a repudiatory breach of contract. Alternatively, was the failure of the employer to pay the Applicant a repudiatory breach of contract. A repudiation will exist either when there is a breach of a condition of employment going to the essence of the contract or when one of the parties to the contract has evinced an intention through her or his conduct, either expressly or by implication, no longer to be bound by the contract (see Macken, O'Grady, Sappideen and Warburton, *Law of Employment* (5th, 2002) at page 221). A refusal to perform contractual obligations if sufficiently serious will amount to a repudiatory breach (*Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698). Strike action by an employee or a lock-out by an employer will usually constitute a repudiation of the contract (see *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482 at 502 per Lord Denning MR). More recently however, it has been recognised that not every withdrawal of labour can be a breach of contract. In *Robe River Iron Associates v The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch and Others* Unreported, WAIRC, Full Bench, No. 1030 of 1993, 17 December 1993) the Full Bench observed:

“It is our opinion, in this day and age conceivable that a proper term to be implied into a contract enables an employee, who is inequitably treated, to withdraw his/her labour in certain circumstances until or to enable the remedying of the inequity.”

- 16 In this matter clause 4.1 and 4.2(a) and (b) of the Applicant's contract of employment provides:

“4.1 The Company shall pay to the Employee for his services under this Agreement a salary as agreed for the relevant position.

4.2 The salary payable to the Employee under clause 4.1 shall:

(a) accrue from week to week and;

(b) be paid by equal fortnightly or monthly instalments;”

(Exhibit 1)

- 17 The Applicant was paid monthly instalments on the 15th day of each month. On 14 September 2004 the Applicant was informed there would be a delay in payment of salary due on 15 September 2005 and that the delay would be three to seven days as the funds were coming from the USA. Twelve days later on 26 September 2005, the Applicant was informed funds were not forthcoming from the USA and that local funds were being sought. The employer was not in breach of the contractual obligation to pay the Applicant by monthly instalments on 26 September 2005 because whilst the Applicant was usually paid on the 15th of each month for the whole of that month, pursuant to clause 4.2(a) and (b) of the contract the time for performance of the obligation to pay the salary was not due until 30 September 2005 or alternatively 1 October 2005. However the email sent to the Applicant on 26 September 2005 made it plain to the Applicant that payment was late and may not be forthcoming. Whilst an anticipatory breach of contract at law by the employer has not been made out as the employer did not indicate that they would not pay the Applicant the instalment of salary, the Applicant's conduct in leaving work early on Tuesday, 27 September 2005 and on Thursday, 29 September 2005 was not unreasonable as the Applicant was usually paid on the 15th of each month and it appeared that he may not be paid. Consequently I am of the opinion that the Applicant's failure to work did not constitute a serious breach of contract so as to amount to a repudiatory breach of contract. Even if I am wrong and the Applicant's refusal to work could be said to be a repudiatory breach, the contract did not come to an end. The effect of a repudiatory breach of contract was considered by Anderson J in *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193 in which His Honour observed at [38]:

“A party to a contract who repudiates it does not bring the contract to an end. The repudiation gives rise to a right of rescission in the innocent party. The innocent party can decline to accept the repudiation and remain ready himself to perform and so keep the contract on foot. On the other hand, he may elect to accept the repudiation, and if he does so, it is that election which rescinds the contract. These principles are of general application and apply to employment contracts. In the case of employment contracts, a wrongful dismissal is a repudiation by the employer, which does not of itself rescind the contract.”

- 18 On 29 September 2005, Mr Price reached an agreement with the Applicant that the Applicant would return to work on Friday, 30 September 2005, and the Applicant would be paid on Monday, 3 October 2005. By doing so Mr Price's action binds the Respondents, the repudiation is declined and the contract remains on foot. Further, at that time, the employer through Mr Price was indicating that it was not able to comply with its obligation to pay the Applicant his monthly pay in accordance with clause 4.2(a) and (b) of the contract and would be in breach. Such a statement at law could be said to constitute an anticipatory breach. However, the Applicant accepted the breach and agreed to keep the contract on foot.
- 19 Notwithstanding this agreement between the parties the Applicant was unable to work on 30 September 2005 through the actions of the Respondents' landlord and the employer sought to treat the Applicant's action to leave work as a resignation. Clearly the Applicant did not resign and the employer's action on 30 September 2005 constituted a summary dismissal.
- 20 I am not satisfied that at the material time the Applicant was employed by Powersearch Limited or by Prime Power Systems Pty Ltd as the employment contract was not executed by either of those companies. I am however satisfied that the Applicant was employed by Advanced Energy Systems Ltd (ACN 066 908 530) (hereinafter referred to as “the employer”).
- 21 The onus is on the Applicant to prove that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove in a case of summary dismissal that the dismissal is justified (see *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).
- 22 Clause 9.0 of the contract provides:

“9.1 Immediate termination of employment under this Agreement can be effected by the Company subject to the provisions of 9.3 below or otherwise by either party providing a minimum of 20 working days notice in writing.

9.2 A redundancy arrangement of one weeks [sic] pay after two years of completed successive service and then one week pay for each successive completed year of service.

- 9.3 The Company may also in accordance with law and by immediate notice in writing terminate this Agreement if the Employee:
- (a) commits a serious or persistent breach of the provisions of the Agreement;
 - (b) is guilty of any misconduct, including but not limited to theft, deception, dishonesty or any other behaviour, which in the reasonable opinion of the Company injures or might tend to injure the reputation or the business of the Company or any Related Body Corporate;
 - (c) refuses or neglects to comply with any lawful and reasonable direction given to him by the Company to give such order or direction or is convicted of any indictable offence.
- 9.4 The Company may issue notice in writing by providing a minimum notice of twenty (20) days in the case where the Company has insufficient work to maintain the Employee in work.”
- 23 Although the email from Mr Price on 30 September 2005 describes that Applicant’s action in walking out as “very damaging to AES” in the absence of any evidence about that I am not satisfied that was the case or that the Respondents’ evidential onus has been met. For these reasons I am satisfied the Applicant was unfairly dismissed. Pursuant to clause 9.1 and 9.2 of the contract the employer was required to give the Applicant 20 days’ notice and one week’s pay. The Respondents failed to do so. Although the Applicant is not contractually entitled to pay in lieu of notice he is entitled to 20 days’ pay as damages for that breach of contract (see *Matthews v Cool or Cosy Pty Ltd* (2004) 84 WAIG 2152 at [48] – [49] per Pullin J). The same principle can be applied to the Applicant’s claim for five weeks’ pay for accrued annual leave. Pursuant to clause 6.2 and 6.3 of the contract the Applicant was entitled to four weeks’ annual leave each year and annual leave could be accrued to six weeks’ leave without written approval of the Respondents. Further, pursuant to s 24 of the *Minimum Conditions of Employment Act 1993* (“the MCE Act”) which is implied into the Applicant’s contract of employment by s 5 of the MCE Act, an employer is required to pay an employee for untaken accrued annual leave when an employee lawfully leaves his or her employment or when the employment is terminated by the employer through no fault of the employee. Consequently I am satisfied the Applicant’s claim for five weeks’ pay for five weeks’ accrued annual leave is made out.
- 24 In relation to the Applicant’s claim for superannuation payments, clause 4.3(c) of the contract provides:
- “In addition to the payment of the salary referred to in clauses 4.1 and 4.2 whilst the Employee is employed by the Company, the Employee shall be entitled to:
- (c) monthly contributions to be made by the Company to a complying superannuation fund of which the Employee is a member at the rate required by law.”
- The Applicant says the employer failed to make monthly contributions of superannuation to the Applicant employee’s superannuation fund and seeks an order that the Respondent pay an amount of \$5,175 to BT Financial Group which is a complying superannuation fund of which he is a member. I am satisfied that clause 4.3(c) has not been complied with and the order sought by the Applicant should be granted.
- 25 In relation to the Applicant’s claim that he was unfairly dismissed, I am satisfied that the Applicant has proved that the dismissal was unfair and will make a declaration to that effect. However I do not intend to make an order that the employer pay the Applicant compensation because the Applicant’s loss is limited. The Applicant was not paid for one month and was unemployed for two weeks, which is a loss of \$8,625. He also had an ongoing loss of \$6,000 per annum. As I intend to make orders that the employer pay the Applicant \$20,124.50 for the contractual benefits of wages, five weeks’ accrued annual leave, one week redundancy pay and four weeks’ pay in lieu of notice I am not satisfied that an award of compensation should be made and the applications will be otherwise dismissed.

2006 WAIRC 04010

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	EDWARD MATTHEW TRAVERS BLACKLEY	APPLICANT
	-v-	
	ADVANCED ENERGY SYSTEMS LTD (ACN 066 908 530), POWERSEARCH LIMITED (ACN 009 216 924), PRIME POWER SYSTEMS PTY LTD (ACN 066 124 909)	RESPONDENTS
CORAM	COMMISSIONER J H SMITH	
DATE	THURSDAY, 23 MARCH 2006	
FILE NO/S	B 151 OF 2005	
CITATION NO.	2006 WAIRC 04010	
Result	Declaration and order issued	
Representation		
Applicant	In person	
Respondents	No appearance	

Order

HAVING heard the Applicant and no appearance on behalf of the Respondents the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

- (1) DECLARES that Advanced Energy Systems Ltd (ACN 066 908 530) owes the Applicant contractual benefits;

- (2) ORDERS that Advanced Energy Systems Ltd (ACN 066 908 530) pay the Applicant the sum of \$20,124.50 within seven (7) days of the date of this Order;
- (3) ORDERS that Advanced Energy Systems Ltd (ACN 066 908 530) pay BT Financial Group, Investor Number C05961919, \$5,175 as superannuation contributions within seven (7) days of the date of this Order; and
- (4) ORDERS that the application be and is hereby otherwise dismissed.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.**2006 WAIRC 03963**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
EDWARD MATTHEW TRAVERS BLACKLEY**PARTIES****APPLICANT****-v-**

ADVANCED ENERGY SYSTEMS LTD (ACN 066 908 530), POWERSEARCH LIMITED (ACN 009 216 924), PRIME POWER SYSTEMS PTY LTD (ACN 066 124 909)

RESPONDENTS

CORAM COMMISSIONER J H SMITH
DATE FRIDAY, 17 MARCH 2006
FILE NO/S U 151 OF 2005
CITATION NO. 2006 WAIRC 03963

Result Dismissed
Representation
Applicant In person
Respondents No appearance

*Order*HAVING heard the Applicant and no appearance on behalf of the Respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

- (1) DECLARES that the Applicant was harshly, oppressively and unfairly dismissed by Advanced Energy Systems Ltd (ACN 066 908 530); and
- (2) ORDERS that the application be and is hereby otherwise dismissed.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.**2006 WAIRC 04040**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JOSEPHINE CELENZA**PARTIES****APPLICANT****-v-**

ALLHOURS ENTERPRISES PTY LTD T/A FAST EDDY'S MORLEY

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE FRIDAY, 24 MARCH 2006
FILE NO APPL 533 OF 2005
CITATION NO. 2006 WAIRC 04040

Result Order issued
Representation
Applicant Mr T. Solomon (as agent)
Respondent Mr A. Brain

*Order*WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*; and WHEREAS on 7 December 2005 the Commission conducted conciliation proceedings between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in respect of the application; and
 WHEREAS on 8 December 2005 the Commission advised the parties in writing of the outcome of the settlement in respect of the application; and

WHEREAS on 6 January 2006 the Commission re-confirmed with the parties in writing of the outcome of the settlement;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

- (1) THAT the respondent pay the applicant Josephine Celenza, within seven days of the date of this order, the amount of \$795.85 in full and final settlement of all claims; and
- (2) THAT otherwise the application is discontinued by leave.

(Sgd.) S M MAYMAN,
 Commissioner.

[L.S.]

2006 WAIRC 04130

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MARNA EMILIA COIA

APPLICANT

-v-

FIRST WESTERN - POLIWKA GROUP PTY LTD

RESPONDENT

CORAM

COMMISSIONER J H SMITH

HEARD

TUESDAY, 14 FEBRUARY 2006, TUESDAY, 14 MARCH 2006

DELIVERED

FRIDAY, 7 APRIL 2006

FILE NO.

U 274 OF 2005

CITATION NO.

2006 WAIRC 04130

CatchWords	Harsh, oppressive and unfair dismissal - The Applicant required to show cause why application should not be dismissed - <i>Industrial Relations Act 1979</i> (WA) s 27(1), s 29(1)(b)(i)&(3)
Result	Dismissed
Representation	
Applicant	In person
Respondent	No appearance

Reasons for Decision

- 1 Marna Emila Coia (“the Applicant”) filed an application on 30 November 2005, in which she claims that she was harshly, oppressively or unfairly dismissed by First Western – Poliwka Group Pty Ltd (“the Respondent”) on 1 November 2005.
- 2 The application was filed out of time as it was filed more than 28 days after the Applicant alleged her employment with the Respondent came to an end. Consequently, the Applicant made an application for an extension in time for bringing an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (“the Act”). Pursuant to s 29(3) of the Act, the application for an extension of time was listed for hearing on 14 February 2006. The notice of hearing was sent to the Applicant on 20 January 2006, together with a copy of a decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education Western Australian* (2004) WAIG 683 which sets out the relevant principles to be applied by the Commission when deciding whether to exercise its discretion to grant an extension in time under s 29(3) of the Act.
- 3 On 14 February 2006, the Respondent appeared before the Commission but the Applicant failed to appear. As a result of the non attendance of the Applicant, the matter was listed for hearing on 14 March 2006 for the Applicant to show cause as to why the matter should not be dismissed pursuant to s 27(1) of the Act. The Respondent was sent a copy of the notice of hearing for the Applicant to show cause which stated there was no compulsion on the Respondent to attend that hearing.
- 4 On 14 March 2006, the Applicant appeared before the Commission at the hearing requiring her to show cause. At the hearing she asked that the Commission not dismiss her claim. The Applicant informed the Commission that she had received the notice of hearing stating that the application to extend time was listed to be heard on 14 February 2006 and when she received the notice of hearing with the attached copy of the Industrial Appeal Court decision, she did not understand what was required, so she telephoned Commissioner Smith’s chambers. She says the person she spoke to explained that the hearing would be formal and not a “round table” informal proceeding. The Applicant says that when she was told this she thought that it was too much for her to do by herself and because she was late in filing her application she thought that her claim would be dismissed. Consequently, she decided not to appear. She did not, however, advise the Commission or the Respondent that she did not intend to appear.
- 5 When asked why she had filed her claim late, the Applicant informed the Commission that when she contacted the Commission about filing an application for unfair dismissal, she was told she had to file the claim within 28 or 30 days from when she received an application form. The Applicant, however, admits that when she received the blank Form 1, she read the form. She agrees that the Form 1 states that an application for unfair dismissal must be filed within 28 days of the date of termination of employment.
- 6 The Applicant maintains that despite her non attendance on 14 February 2006 she has a strong case that she was unfairly dismissed. The Applicant says that prior to commencing work for the Respondent; she attended the Respondent’s premises for an orientation day on 26 October 2005. The Applicant says that during that day it was made clear to her by Ms Beverley

Ridgeway, a representative of the Respondent that she (the Applicant) was to commence work as a property manager on 1 November 2005. The Applicant says that she only stayed at the Respondent's office for half a day because the property manager asked whether she (the Applicant) was staying the afternoon and indicated that she (the property manager) needed to get some work done. The Applicant says that she knew the real estate program and had obtained all the notes so left the Respondent's office after leaving a message for Ms Ridgeway. Sometime in the evening on the same day, Ms Ridgeway telephoned the Applicant and told her that she was not right for the job, she was too highly qualified and she might get bored. The Applicant says that she spoke to Ms Ridgeway twice on that evening and at the conclusion of the second conversation Ms Ridgeway made it plain to her (the Applicant) that the Respondent did not want her to commence work on 1 November 2005. At that time, the Applicant was working as a property manager for a couple of days a week for another business but had resigned from that position on 26 October 2005. The Applicant was unemployed for one to two and a half weeks before she obtained another position. The Applicant does not seek reinstatement but seeks an order for compensation for loss and injury.

- 7 The Respondent in its notice of answer and counter-proposal filed on 9 January 2006, states that an offer of employment was not made by the Respondent nor accepted by the Applicant. The Respondent says that the Applicant attended an interview for the position of property manager on 19 October 2005 in which the position of property manager was discussed. The Respondent says that it was agreed at that interview that the Applicant would come into the office for a day to meet the current property manager to familiarise herself with the office environment and her suitability for the position. The Respondent says that the Applicant left the office after two hours without discussing possible future employment. The Respondent maintains that at all material times no offer of employment was made to the Applicant.
- 8 Having heard the submissions made on behalf of the Applicant, I am not satisfied that the Applicant has shown cause to persuade me not to dismiss her application. The Applicant intentionally and contumeliously chose not to attend the hearing on 14 February 2006. The Respondent has complied with all of the Commission's processes and filed a notice of answer and counter-proposal within time and a representative of the Respondent attended the hearing on 14 February 2006 ready to defend the Applicant's application for an extension of time. Whilst I have taken into account the prejudice to the Applicant if the application is dismissed, I have also taken into account that the Applicant may not be successful in obtaining an order to extend time for bringing an application under s 29(1)(b)(i) of the Act, as she admits that she read the application form which clearly states the 28 day time limit for filing an application under s 29(1)(b)(i) of the Act runs from the date of termination of employment. Further, I am not satisfied that it is in the public interest that this matter should proceed. Even in the event that the Applicant is able to show that she had in fact been offered and accepted employment with the Respondent, she had not commenced employment. Further, it is clear that she was only out of work for a very short period of time. Even if a finding was made that she was unfairly dismissed, such a finding may only result in a small amount of compensation being awarded to the Applicant. For these reasons I will issue and order under s 27(1) of the Act to dismiss the application.

2006 WAIRC 04131

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARNA EMILIA COIA	APPLICANT
	-v-	
	FIRST WESTERN - POLIWKA GROUP PTY LTD	RESPONDENT
CORAM	COMMISSIONER J H SMITH	
DATE	FRIDAY, 7 APRIL 2006	
FILE NO/S	U 274 OF 2005	
CITATION NO.	2006 WAIRC 04131	

Result	Dismissed
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the Applicant and 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 s 29(1)(b)(i) application be and is hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2006 WAIRC 03976

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	RUSSELL ANCURIN DEWSON-JONES	APPLICANT
	-v-	
	THE WALK CAFE	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR	
HEARD	MONDAY, 13 FEBRUARY 2006	
DELIVERED	MONDAY, 20 MARCH 2006	
FILE NO.	APPL 619 OF 2005	
CITATION NO.	2006 WAIRC 03976	

CatchWords	Termination of employment – unfair dismissal – summary termination – onus to establish fact of termination not established by Respondent – dismissal unfair – reinstated – <i>Industrial Relations Act, 1979 s,29</i>
Result	Applicant reinstated
Representation	
Applicant	Mr R.A. Dewson-Jones appeared on his own behalf
Respondent	Mr R. Introvigne appeared on behalf of the Respondent

Reasons for Decision

- 1 On 16th June 2005 Russell Dewson-Jones (the Applicant) applied to the Commission for an order in respect of a claim for harsh and oppressive dismissal said to have occurred when on 19th May 2005 he received a text message from Roberto Introvigne, the Principal of The Walk Caf  (the Respondent) that his services were no longer required due to a downturn in business.
- 2 The Applicant says that he commenced work on or around September 2004 working one to two days a week. That pattern of employment continued until January 2005 when he went to five days a week. The employment relationship ended on 19th May 2005. He was employed as a wait person and received a payment of \$20 an hour.
- 3 In his evidence he said that he received a text message on 19th May 2005 from Roberto Introvigne in the following terms:

“Business going downhill and we cannot afford you for the moment. Will see you in 2 or 3 weeks. If you want to come in on Tuesday to pick up your pay. Thank you for everything. No need to come in tomorrow. Roberto, Walk Caf .”
- 4 The Applicant says this message surprised him because the previous day he had a discussion with Mr Introvigne who is the proprietor about his future employment. He had attended the meeting at the invitation of Mr Introvigne, who during a conversation had told him of his assumption that the Applicant was not happy doing the job. Some discussion took place about the Applicant’s relationship to other people employed in the business including Mr Introvigne’s wife. The Applicant thought that the conversation ended on a reasonable note. This was just one day before he received the text message.
- 5 He says the circumstances were that he was working in another business and a female worker from The Walk Caf  approached him upset and told him that she had been dismissed and he, as a joke, said he would check his text messages. When he did he found a message that has been recited above. The Applicant says he was annoyed and angry because he wasted time on his day off to go and see Mr Introvigne and not 24 hours later he received a text saying the business was going downhill. Soon after that he found out that the Respondent was recruiting wait staff and had placed an advertisement for this purpose in a local newspaper. The Applicant felt betrayed and alienated because he had a long term association working in the Subiaco area. He said he felt like a “complete klutz” in front of the person who gave him this information because he was trying to save face for the employer. He felt in all of the circumstances he had been harshly and unfairly dealt with.
- 6 He gave further evidence about a meeting with the Respondent’s lawyers where there were some discussions about resuming work at The Walk Caf . The next thing he knew was he received the Respondent’s Answer and Counter Proposal which accused him of various acts of misconduct which he completely denied. All of the issues raised in the Answer were a total surprise and these were injected into the case against him solely to create a justification for his dismissal.
- 7 In his evidence he dealt with each of the issues raised. He denied that he used goods to the value of \$1200.00 and said there was a list of food in the kitchen which could be consumed by staff. He did consume that food but that was in accordance with the agreed arrangements. He did not pay for the food he consumed but that was because the only meals he did consume were those on the list of staff meals. He said that the arrangement was that the staff could in their break in a seven hour shift have something to eat off the list and if they chose something that was not on the list they paid for it less 20%.
- 8 The Applicant could not specifically remember referring to Mr Introvigne as ‘a fat lazy pig’ but conceded something like that may have come up in conversations between workers. It certainly was not an issue that Mr Introvigne raised with him.
- 9 The Applicant was not cross examined to any extent at all by Mr Introvigne who represented the Respondent and the vast majority of his evidence was unchallenged in cross examination.
- 10 Mr Introvigne gave evidence and he told the Commission he is the owner and director of The Walk Caf . He conceded that the Applicant was a very good employee but there were lots of problems in terms of bitching and arguments between the employees. There were a lot of people resigning and the business was losing customers because of discontent between the staff and ‘changing faces’. There were only two stable employees, one was the Applicant. Mr Introvigne said that the Respondent tried to solve the problems by having meetings with staff. He conceded in cross examination that the issues of staff were never addressed to the Applicant on an individual basis. The information that he had been insulted by the Applicant was not through first hand knowledge and it was conceded by Mr Introvigne that his understanding of the insults was they

occurred when the Applicant was leading a discussion and all the other staff were just adding comments. This made him very upset especially because he felt his wife had been insulted.

- 11 Even though Mr Introvigne became upset he still said the Applicant was a very good employee and they had a very good relationship before that. At least he thought so. Because of that relationship he decided to tell the Applicant he was a good employee and he would not dismiss him for the things about which he now complained and would just tell him that work was not available. This was done because it would cause less harm to his reputation. The reason he sent the text, which was a very friendly text message, was saying that in two or three weeks when everything calmed down perhaps they could have a talk. But the unfair dismissal application intervened.
- 12 Mr Introvigne led some evidence about the Applicant's work in the Atlantic Café as alleging he was the Assistant Manager. During his cross examination by the Applicant he did not disclose he had any direct knowledge of being insulted. He conceded to the Applicant that his entire defence regarding not having enough hours and business going downhill was a fabrication and he decided on hearsay without further consultation with the Applicant that the alleged insults actually occurred. Mr Introvigne agreed that was the basis of the decision to terminate.
- 13 There were two witnesses called by the Respondent. One was Mr Prior who was a kitchen hand. His evidence does not contribute materially to the information before the Commission and need not be summarised. It is very limited in any event. The other evidence came from Anne Stanton who was at the time a cook in the service of the employer. She seemed to indicate that in her opinion the Applicant led insults on Mr Introvigne and his wife. Those allegations did not stand well in cross examination. It seemed that the witness was saying that there were general conversations in which these things were said.
- 14 The Respondent says in its Answer filed on 5th July 2005 that the Applicant was a casual, being paid \$20.00 an hour to work hours agreed in advance each week. He was to submit to Mr Introvigne a summary of hours worked to be paid cash in reference to the schedule of hours provided by him and that he did not provide the Respondent a tax file number. He was therefore a casual worker. It is asserted in the Answer that because of that status there was no cause of action against the Respondent and the Applicant has no standing in these proceedings. This last of course is wrong at law, the Applicant does have standing under s.29(1)(b)(i) of the *Industrial Relations Act, 1979* (the Act) as long as he was an employee and was dismissed. Both of those conditions precedent are met in this case so it is hard to understand why the Answer alleges there was no standing to bring the matter.
- 15 The Answer also asserts that the basis for the dismissal related to the staffing requirements of the business and the decrease in trading volume.
- 16 Paragraph seven of the Answer then sets forth allegations about the consumption of food, the tarnishing of professional reputation of the business by insulting Mr Introvigne and not punctually keeping all working hours paid for.
- 17 The evidence in the matter needs to be examined. In so far as credibility is concerned I have no doubt that the Applicant should be regarded as a truthful witness. In so far as Mr Introvigne is concerned there was no difficulty with the truth of what he did say to the Commission. What he did not say is a problem.
- 18 The evidence does not support almost all of the contentions set out in the Answer or by Mr Introvigne during the case. There is no evidence that the hours each week were to be agreed in advance nor that there was to be written summary of hours submitted. Nor that the Applicant would be paid cash with reference to the hours worked by him on each Friday.
- 19 What is established by the evidence is that when the Applicant commenced with the Respondent he worked a few days a week in a type of arrangement typical of the hospitality industry, but later towards the end he was working a regular four to five days a week in accordance with a roster. He may or may not have been a casual employee during that latter time but it is unnecessary for the Commission to make a determination about that. He still has the standing to bring the application as I have mentioned before.
- 20 I find the serious allegations about the use of credit without authorisation have no substance. There is no evidence to support the contentions; in fact the Applicant's story is far more believable than the Respondent's in that respect. I reject the allegation that the Applicant illegally consumed food and beverages to the value of \$1200.00. There is not a scintilla of evidence to support that allegation which is serious and should not be made without proper support.
- 21 It may well be that the Applicant did insult Mr Introvigne, there is an admission by him that he may have used those words in general conversation with workmates.
- 22 Significantly though the Applicant was not dismissed for any of these matters relating to conduct. The admission from Mr Introvigne is that the Applicant was a good employee, and because he was a good employee he did not wish to label him because of his conduct and in effect dismissed him on the basis of a lie. The lie being that the business was in a situation where it had to reduce its staff. Sadly that untruth is continued in the Answer filed in the Commission and that is cause for concern. Particularly when the evidence from Mr Introvigne repudiates the Answer.
- 23 This is a clear case where the Applicant has been unfairly dismissed. It is true and it could well be justifiable that Mr Introvigne was upset with the Applicant's conduct, but he should have confronted him about that and if the Applicant's conduct was so gross it went to the root of his contract of employment he could have dismissed him for that conduct. However he did not, it might be because the sins of the Applicant were unprovable by Mr Introvigne and his only source of the Applicant's conduct was through rumours. If that be the case too he was wrong to dismiss him without at least talking to him about his conduct and how to remediate the conduct was not so gross as it went to the root of the contract of service. This is a summary dismissal and the onus of proof to establish the evidentiary facts is on the Respondent. That onus has not been discharged. For that reason the Applicant must have been unfairly dismissed.
- 24 On a test to be applied as set out in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385 there has not been a fair go all round. The Applicant has been dismissed when he should not have been dismissed because there was insufficient information regarding any misconduct of his to justify his dismissal. In any event he was never given the opportunity to remediate his behaviour even if it could have been established that his behaviour was contrary to the interests of the Respondent. The so called misconduct which was supposed to have been discovered post termination is not sustainable on any of the evidence before the Commission. The Commission has no hesitation finding the Applicant was unfairly dismissed.
- 25 The evidence though shows that even though the parties have gone through this trauma of the dismissal that the text message itself talked about re-establishing the relationship after two or three weeks and the approach by the Respondent's Counsel indicates that there is a very good potential that the relationship could be re-established.

- 26 The first remedy the Commission must consider in matters like this is reinstatement. This is a case where on the facts before it the Commission should apply that first remedy and I intend to order that the Applicant be re-employed from a date fourteen days after the date of the issue of this Decision. The Applicant made no submissions concerning loss and it seems to me that from the evidence before the Commission there is not sufficient on which the Commission could base an ancillary order and none will be made. Orders will now issue that the Applicant will be reinstated within 14 days of the date of the Order on the same terms and conditions which existed at the date of dismissal.

2006 WAIRC 04043

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION RUSSELL ANCURIN DEWSON-JONES	APPLICANT
	-v-	
	THE WALK CAFE	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR	
DATE	FRIDAY, 24 MARCH 2006	
FILE NO	APPL 619 OF 2005	
CITATION NO.	2006 WAIRC 04043	

Result	Reinstated
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Order

HAVING heard Mr R.A. Dewson-Jones appeared on his own behalf and Mr R. Introvigne appeared 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 Applicant was unfairly dismissed.
- (2) THAT the Applicant be reinstated in employment at The Walk Café no later than fourteen (14) days from the date hereof.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 04039

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MIRKA DI SALVIO	APPLICANT
	-v-	
	ALLHOURS ENTERPRISES PTY LTD T/A FAST EDDY'S MORLEY	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	FRIDAY, 24 MARCH 2006	
FILE NO	APPL 532 OF 2005	
CITATION NO.	2006 WAIRC 04039	

Result	Order issued
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Representation

Applicant	Mr T. Solomon (as agent)
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Respondent	Mr A. Brain
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Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on 7 December 2005 the Commission conducted conciliation proceedings between the parties; and
 WHEREAS at the conclusion of that conference the parties reached an agreement in respect of the application; and
 WHEREAS on 8 December 2005 the Commission advised the parties in writing of the outcome of the settlement in respect of the application; and
 WHEREAS on 6 January 2006 the Commission re-confirmed with the parties in writing of the outcome of the settlement;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

- (1) THAT the respondent pay the applicant Mirka Di Salvio, within seven days of the date of this order, the amount of \$800.42 in full and final settlement of all claims; and
- (2) THAT otherwise the application is discontinued by leave.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.**2006 WAIRC 03993**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GARY MICHAEL EVANS;
JOHN JOSEPH POWER
APPLICANT

-v-
RCR MAINTENANCE PTY LTD AND PILBARA MANGANESE PTY LTD
RESPONDENTS

CORAM SENIOR COMMISSIONER J F GREGOR
HEARD THURSDAY, 2 MARCH 2006
DELIVERED TUESDAY, 21 MARCH 2006
FILE NO. APPL 578 OF 2005, APPL 581 OF 2005
CITATION NO. 2006 WAIRC 03993

Catch Words Termination of employment – unfair dismissal dual employment – application to strike out one respondent – granted – *Industrial Relations Act, 1979 s.29, s.27*

Result Granted

Representation

Applicant Ms J. Boots, of Counsel, appeared on behalf of the Applicants

Respondent Ms N. Tatasciore, of Counsel, appeared on behalf of Pilbara Manganese Pty Ltd
Mr N. Ellery, of Counsel, appeared on behalf of RCR Maintenance Pty Ltd

*Reasons for Decision**(Ex tempore – as edited by the Commission)*

- 1 This is an application by Pilbara Manganese Pty Ltd, to be struck out as a Respondent to proceedings which were initiated in two applications before the Commission. Those applications are unfair dismissal applications relating to the employment of John Joseph Power and Gary Michael Evans. Another application has been filed but was adjourned on 2nd March 2006, application No. 580 of 2005, between Pilbara Manganese Pty Ltd, RCR Maintenance Pty Ltd and Richard James Neave. That application was adjourned by consent.
- 2 I will make a very abbreviated decision today and I will publish in writing my reasons in full later. The overwhelming evidence before the Commission is that employment contracts were entered into between each of the employees, the subject of the proceedings today, that is, Gary Michael Evans and John Joseph Powers, with RCR Maintenance Pty Ltd. Exhibits T1 and T2, show in respect of both of them, quite an extensive relationship, one from the beginning of 2001 through to 2005, the other beginning in 2003 through to 2005.
- 3 Also before the Commission in Exhibit T4 is a maintenance labour services agreement that sets out the relationship between RCR Maintenance Pty Ltd and Pilbara Manganese Pty Ltd. That provides for RCR Maintenance Pty Ltd to provide labour and other services to the Pilbara Manganese Pty Ltd, in this case, for work at Woodie Woodie. Both of the employees in attending inductions signed agreements which they accept show that their employer was RCR Maintenance Pty Ltd. Separation certificate, Exhibit 10, in respect of Mr Evans, again shows that company as the employer.
- 4 There is a continuity in those documentary exhibits which shows that the employment relationship of each of these employees was with RCR Maintenance Pty Ltd and not with Pilbara Manganese Pty Ltd. There are some indicators that insofar as supervision is concerned, that there was some by Pilbara Manganese Pty Ltd, and I accept the evidence from the two witnesses in that respect. However, that does not outweigh the substantial evidence in the balance which indicates they were, in fact, employed by RCR Maintenance Pty Ltd and in fact is indicative of the kind of work which is embodied in this type of labour contracts.
- 5 For those reasons I intend to grant the strike-out applications. The remaining Respondent will now remain as RCR Maintenance Pty Ltd and those cases will be listed soon to be heard and determined by this Commission.

2006 WAIRC 03994

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GARY MICHAEL EVANS **APPLICANT**

-v-
PILBARA MANGANESE PTY LTD, RCR MAINTENANCE PTY LTD **RESPONDENTS**

CORAM SENIOR COMMISSIONER J F GREGOR
DATE TUESDAY, 21 MARCH 2006
FILE NO/S APPL 578 OF 2005
CITATION NO. 2006 WAIRC 03994

Result Granted

Order

HAVING heard Ms J. Boots, of Counsel, who appeared on behalf of the Applicant and Ms N. Tatasciore, of Counsel who appeared on behalf of Pilbara Manganese Pty Ltd and Mr N. Ellery, of Counsel, who appeared on behalf of RCR Maintenance Pty Ltd, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application to strike out Pilbara Manganese Pty Ltd as a respondent, be and is hereby granted.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.**2006 WAIRC 03995**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JOHN JOSEPH POWER **APPLICANT**

-v-
PILBARA MANGANESE PTY LTD, RCR MAINTENANCE PTY LTD **RESPONDENTS**

CORAM SENIOR COMMISSIONER J F GREGOR
DATE TUESDAY, 21 MARCH 2006
FILE NO/S APPL 581 OF 2005
CITATION NO. 2006 WAIRC 03995

Result Granted

Order

HAVING heard Ms J. Boots, of Counsel, who appeared on behalf of the Applicant and Ms N. Tatasciore, of Counsel who appeared on behalf of Pilbara Manganese Pty Ltd and Mr N. Ellery, of Counsel, who appeared on behalf of RCR Maintenance Pty Ltd, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application to strike out Pilbara Manganese Pty Ltd as a respondent, be and is hereby granted.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.**2006 WAIRC 03925**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LESLIE JOHN GANNAWAY **APPLICANT**

-v-
BGC (AUSTRALIA) PTY LTD T/AS BGC STEEL **RESPONDENT**

CORAM COMMISSIONER S J KENNER
HEARD FRIDAY, 3 FEBRUARY 2006
DELIVERED FRIDAY, 3 FEBRUARY 2006
FILE NO. B 5 OF 2005
CITATION NO. 2006 WAIRC 03925

Catchwords	Industrial law - Termination of employment - Contractual benefits claim - Entitlements under contract of employment - Salary entitlements - Principles applied - Application dismissed - Order issued - <i>Industrial Relations Act 1979</i> (WA) s 26(1)(a), s 29(1)(b)(ii)
Result	Order issued
Representation	
Applicant	In person
Respondent	Mr R Collinson and with him Mr M Vallenge as agents

Reasons for Decision

- 1 The applicant, Mr Gannaway, brings this application before the Commission pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") against BGC (Australia) Pty Ltd trading as BGC Steel. For these short reasons, the Commission is not persuaded that the applicant has established that a benefit under his contract, in whatever terms, has been denied.
- 2 The dispute as to the terms and conditions of the applicant's employment essentially turns on the following. The applicant says his terms and conditions of employment applicable to him at the relevant time as transport manager were those as contained in exhibit A6 applying from his commencement in or about September 2004. The respondent, on the other hand, says that the applicant's terms and conditions of employment by an oral contract were those as set out in exhibit A5, essentially the terms that had application prior to the occupation by the applicant as transport manager in the position of a transport driver. The respondent says those conditions applied up until 31 December 2004, it seems, and on and from 1 January 2005 by subsequent agreement, the terms and conditions in exhibit A6 had application.
- 3 Whichever view of the evidence the Commission accepts one issue is clear in my opinion. From the terms of exhibit R5 and the summary there attached, tendered by consent, for the period 29 September 2004 to 13 April 2005 the applicant was paid a total sum of \$25,507.02. Even if the Commission accepts the applicant's testimony in toto as to the terms of the agreement reached at the commencement of his employment as transport manager, as he says the Commission should, on the authorities as to the application of s 29(1)(b)(ii) of the Act dealing with the denied contractual benefits, it is clear in my opinion, on the evidence, that the applicant has not been denied a benefit to which he was entitled under his contract of service.
- 4 In the case of salaried employees paid annually, it is not necessarily the case that each pay period stands alone as a separate contractual entitlement. In my view, the contrary is generally the position. In any event, even if it was the case that each fortnightly period stood alone as a separate contractual entitlement, and given the applicant appears to accept that he was paid in total some \$3,000.00 greater than what his remuneration as a transport manager would have given him over the relevant period of time, then as a matter of equity and good conscience, pursuant to s 26(1)(a) of the Act, the Commission would not be minded to order the respondent to pay some \$340.00 or \$540.00, depending upon the case, in the face of the amounts that have in fact been paid in total. In my view, that would amount to effectively the respondent paying twice for the same services performed by the applicant.
- 5 The respondent no doubt could and should have, in my view, made the position clearer and this caused considerable stress to the applicant at the relevant time, but ultimately it seems to the Commission that the applicant laboured upon a misapprehension. As transport manager he was not entitled, even on the terms of exhibit A6, to be paid by the hour. His contract did not entitle him to an hourly rate, and this has no doubt led to the current dispute before the Commission, regrettably. In those circumstances the Commission will dismiss the application.

2006 WAIRC 03644

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	LESLIE JOHN GANNAWAY	APPLICANT
	-v-	
	BGC (AUSTRALIA) PTY LTD T/AS BGC STEEL	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 3 FEBRUARY 2006	
FILE NO/S	B 5 OF 2005	
CITATION NO.	2006 WAIRC 03644	

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr R Collinson and with him Mr M Vallenge as agents

Order

HAVING heard the applicant on his own behalf and Mr R Collinson and with him Mr M Vallenge as agents 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.]

2005 WAIRC 03124

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CARMELINA GRIGSON	APPLICANT
	-v-	
	THE ST CECILIA'S COLLEGE SCHOOL BOARD	RESPONDENT
CORAM	COMMISSIONER P E SCOTT	
DATE	THURSDAY, 24 NOVEMBER 2005	
FILE NO.	APPL 1555 OF 2004	
CITATION NO.	2005 WAIRC 03124	

CatchWords	Industrial Law (WA) – Claim of harsh, oppressive and unfair dismissal – Claim of denied contractual benefits – Contractual term – Unilateral variation to contract – Employment in position – Redundancy – “Suitable alternative employment” – Termination at initiative of employer – Contractual benefits denied – Manner of dismissal unfair – Reinstatement impracticable – Industrial Relations Act 1979 (WA) s.29(1)(b)(i) and s.29(1)(b)(ii) – Independent Schools’ Teachers’ Award 1976 (No. R 27 of 1976) – Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 1 of 2000 – Policies and Procedures of the Catholic Education Commission of Western Australia
Result	Dismissal found to be unfair Denied contractual benefits due
Representation	
Applicant	Mr G Stubbs (of Counsel)
Respondent	Mr P McGowan (of Counsel) and with him Mr M Jensen (of Counsel)

Reasons for Decision

The Claim

- 1 This is a claim made pursuant to s.29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 in which Carmelina Grigson claims that she has been unfairly dismissed by the respondent from her employment as Head of Primary. She seeks compensation for loss and injury. In addition, Mrs Grigson seeks an order for denied contractual benefits being loss of annual salary for what she says is the remaining 5 years of her fixed term contract of employment and other benefits not paid on termination of employment.
- 2 The Commission has heard evidence from Mrs Grigson; Anthony Michael Chinnock, the Principal of St Cecilia’s College at Port Hedland from 2001 until the end of 2004, and Philip Thomas Riley, the Co-ordinator, Employee and Community Relations Team with the Catholic Education Office from July 2003.

Background

- 3 The history of Mrs Grigson’s employment is that she graduated as a teacher and was employed by the respondent in 1993 as a primary school teacher. From January 1995 to December 1997, she was employed at St Joseph’s School in Busselton as a Year 2 teacher and music specialist.
- 4 Mrs Grigson was married in 1997. Her husband took up a position in Port Hedland late that year. Mrs Grigson wished to accompany her husband and advised St Joseph’s School that she wished to resign her employment. St Joseph’s School then offered her 12 months’ leave rather than accept her resignation. She accepted this 12 months’ leave.
- 5 In November 1997, Mrs Grigson received a telephone call from Father Walter McNamara, the parish priest of the Port Hedland parish, indicating that he had heard that she was returning to Port Hedland and he wanted to know if she was interested in a teaching position with the respondent. She indicated that she was. Mrs Grigson then received a call from the respondent’s then Principal, Mrs Annette Cope. Mrs Cope confirmed that there was a teaching position available and it was offered to Mrs Grigson (Exhibit A4), who accepted this position on a one year contract commencing 1 January 1998 (Exhibit A5).
- 6 Mrs Grigson commenced employment with the respondent as a Year 2 classroom teacher in 1998. She has given evidence that she was subsequently asked to perform additional responsibilities, which she undertook.
- 7 In 1998, Mrs Grigson was advised that the Principal wished to change the structure of the school for 1999 and this included the creation of the position of Primary School Co-ordinator. Mrs Grigson was encouraged by the Principal to apply for this position and, while initially declining to do so because her husband had completed his assignment in Port Hedland, she subsequently received a second approach encouraging her to apply for the position and did so. She was successful in that application and commenced in the position as Primary School Co-ordinator for the 1999 school year. Mrs Grigson was given an additional 12 months’ leave from St Joseph’s School in Busselton to take up the position of Primary School Co-ordinator with the respondent.
- 8 Mrs Grigson’s evidence demonstrates, and it is clear also from the evidence of Anthony Chinnock, that Mrs Grigson was offered and accepted the position of Head of Primary for the respondent for the years 2000 and 2001 with an increase in salary to take account of additional responsibilities. The parties entered into a Deed of Agreement (“the First Deed”) to cover this new arrangement. There was a Preamble to the First Deed which included the following:

“5. **The Deed of Agreement**

- 5.1 The purpose of the Deed of Agreement or contract is to define, and thereby to clarify, the agreed bases of the employer-employee relationship within the employment situation. A contract gives rise to legal rights and obligations.
- 5.2 Employment as Head of Primary takes place within this framework of both civil and canon law. The former protects and obligates the Head of Primary as a citizen of Western Australia; the latter protects and obligates the Head of Primary as a Church member with a specific ministry.”

(Exhibit A7)

9 The terms of the First Deed which are relevant to this matter are:

“3. EMPLOYMENT

- 3.1 Upon execution of this Agreement, the Head of Primary shall be conclusively deemed to have read and agreed to be bound by the conditions of employment set out herein and as set out in such external document, or documents, as appended.
- 3.2 The parties agree that the term of this Agreement shall commence on the date specified by the Employer and shall continue for a period specified in the Schedule.

...

4. DUTIES AND RESPONSIBILITIES OF THE HEAD OF PRIMARY

- 4.1 The Head of Primary agrees to devote her/himself exclusively to the duties of the Head of Primary during normal school hours and further agrees not to engage in any other employment without first obtaining the permission of the Employer.
- 4.2 The Head of Primary is responsible for:
- 4.2.1 THEOLOGICAL LEADERSHIP
- (a) providing religious leadership for the school community;
 - (b) articulating the mission of the school;
 - (c) maintaining active membership of the Catholic Church and a manner of life which gives witness to that membership;
 - (d) fulfilling such Accreditation requirements as are prescribed by the Employer;
 - (e) striving to develop a school culture of rituals and practices which reflect Catholic faith and values;
- 4.2.2 EDUCATIONAL LEADERSHIP
- (a) providing educational leadership for the school community;
 - (b) promoting a curriculum, based on an integration of faith, culture and life, that promotes the religious, intellectual, social, cultural and physical development of the children;
 - (d)(sic) fulfilling such professional and faith development requirements as are prescribed by the Employer;
 - (e)(sic) involving students as far as practicable in educational choice and decision making.
- 4.2.3 PASTORAL LEADERSHIP
- (a) striving to nurture a sense of community;
 - (b) providing for pastoral care of staff;
 - (c) providing for sound standards of pastoral care of students and for a disciplined and caring learning environment;
- 4.2.4 ADMINISTRATIVE LEADERSHIP
- (a) making provision for effective communication between all members of the school community;
 - (b) assuming those functions detailed in the Appendix to this Deed
 - (c) keeping parents regularly informed of student progress and school events.
- 4.3 The Head of Primary shall implement the policies, guidelines and instructions promulgated by the Commission (the Catholic Education Commission of Western Australia), from time to time.

5. CONTRACT OF EMPLOYMENT

- 5.1 The initial contract of Head of Primary shall be for a First Term of two (2) years.
- 5.2 Subject to the conditions set out in this clause the Employer may offer to the Head of Primary a term of contract hereof on the conditions contained herein:
- 5.2.1 At the completion of the first term of two (2) years (the “First Term”), the Head of Primary may be offered a new contract by the Employer;
- 5.2.2 The new contract period shall be for a period of four (4) years commencing on the day following the expiration of the First Term (the “Second Term”)’ (sic)
- 5.2.3 A further contract period may be offered to the Head of Primary by the Employer for a further, final period of four (4) years commencing on the day following the expiration of the Second Term (the “Third Term”) (sic)
- 5.3 The Employer shall have the sole discretion whether or not to offer a new contract Term under this Agreement, and shall in any event only offer such a contract Term in accordance with this clause:
- 5.3.1 If the Head of Primary has not during the term of this contract, then current (or any preceding contract Term) committed a serious breach of the Head of Primary’s Responsibilities;
- 5.3.2 If, in the opinion of the School Board and as a result of the review of the Head of Primary’s discharge of Responsibilities, the performance of the Head of Primary has been such as to qualify the Head of Primary for a new and separate contract of employment.
- 5.4 At the conclusion of the Third Term the position will be advertised and the Head of Primary is eligible to apply for appointment as Head of Primary at the same school or at any other school.
- 5.5 If, at the conclusion of the Third Term, the Head of Primary is unable to secure appointment as Head of Primary in a Catholic school in Western Australia, the Employer shall offer the Head of Primary a full-time teaching position at the same school.

- 5.6 If, at the end of any Term specified in clause 7.1, a new contract is not offered by the Employer to the Head of Primary the Employer shall give the head of Primary at least two term's notice of the decision not to offer a new contract.

6. REVIEW

- 6.1 The Employer shall undertake a formal review of the Head of Primary during at least the final, second (2nd) year of the First Term and in the final, fourth (4th) year of the Second Term and at such other times as the Employer elects from time to time.
- 6.2 The scope of the review shall be the content of the Responsibilities of the Head of Primary, inclusive of those functions attached in the Appendix to this Deed.
- 6.3 The review shall be conducted with reference to the principles and procedures approved by the Commission for the review of Principals in diocesan-accountable schools.
- 6.4 The review will be used as one of the factors to be considered by the Employer when determining whether to offer a new contract Term.

7. HEAD OF PRIMARY'S SALARY

- 7.1 The salary payable to the Head of Primary at the commencement date hereof is the sum described in the Appendix to the Deed, which is the amount determined for the School by the Commission, from time to time.
- 7.2 The salary payable to the Head of Primary pursuant to Clause 8.1 shall be subject to review by the Employer in accordance with the determination of the Commission provided that salary payable to the Head of Primary upon any such review shall be not less than the salary payable to the Head of Primary immediately prior to such review.
- 7.3 The Head of Primary's base salary category will be adjusted from 1 January of each year, where enrolment increases move the base salary to a higher category. Enrolment numbers will be based on those submitted at the Commonwealth School Census of the previous year.
- 7.4 Reductions in enrolments will not be taken into account during the course of any particular contract term. The Head of Primary's salary will be adjusted downwards in response to enrolment changes at the time of offer of a new contract term.
- 7.5 The Head of Primary shall be eligible to participate in the Deferred Salary Scheme in accordance with the conditions agreed by the Commission from time to time.

...

13. DEFAULT BY THE HEAD OF PRIMARY

If the Head of Primary fails persistently to discharge any part of the Head of Primary's Responsibilities which in the opinion of the Employer is of a serious or substantial nature, then the Employer may by notice to the Head of Primary terminate the employment of the Head of Primary with effect from the date of such notice. Without limiting the generality of the foregoing the Employer may so terminate the employment of the Head of Primary, if, in the opinion of the Employer, the Head of Primary has failed to maintain or conduct a manner of life in keeping with the aims of a Catholic school.

14. PRIOR TERMINATION OF AGREEMENT

The Head of Primary may terminate this agreement prior to the date of expiration by giving written notice of not less than six weeks written notice. The Head of Primary acknowledges that every endeavour shall be made to give as much notice in excess of the minimum as possible to enable the Employer to recruit and appoint another Head of Primary."

(Exhibit A7)

- 10 It is also noted that the First Deed provides many conditions of employment including superannuation, annual, sick, long service, paternity, special, bereavement and maternity leave, the last of which was unpaid. It also provided for professional development, travel allowances and dispute resolution.

- 11 There was an "Appendix to the Agreement" setting out the salary and allowances applicable. The base salary for the position of Head of Primary was \$59,303.00, with a Country Complexity Allowance of \$1,859.00 and a District Allowance of \$2,413.00. The Appendix also said:

"In addition to the above salary, the Head of Primary will be eligible to receive all allowable benefits from the Pilbara Package. For 2000, the Head of Primary will not have a class room teaching load".

- 12 Attached to the First Deed was a schedule in the following terms:

"

SCHEDULE

ITEM 1: THE HEAD OF PRIMARY

Mrs Carmelina Grigson

ITEM 2: THE SCHOOL:

St Cecilia's College Port Hedland

FIRST TERM

PERIOD OF APPOINTMENT: 1/1/2000 until 31/12/2001

THE HEAD OF PRIMARY

SIGNATURE signed DATE 24 November 1999

THE CHAIRPERSON OF THE SCHOOL BOARD

SIGNATURE signed DATE 24 - 11 - 99"

(Exhibit A7)

- 13 The First Deed sets out conditions of employment, however it makes no reference to being subject to any award or industrial agreement.
- 14 Mrs Grigson and Mr Chinnock have both given evidence that a formal review of Mrs Grigson's performance was undertaken in August 2001, in accordance with the terms of clause 6. – Review of the First Deed. Mr Chinnock undertook this review with a Mr Geoff Hendriks from the Catholic Education Office. The process for the review included gathering the views of the parish priest, community members and other staff members as to Mrs Grigson's performance. It also involved Mr Chinnock and Mr Hendriks interviewing Mrs Grigson.
- 15 There is conflicting evidence as to when Mrs Grigson was advised of the outcome of the review. However, it is clear that there was a discussion at the end of the interview between Mrs Grigson, Mr Chinnock and Mr Hendriks. Mrs Grigson says that she was advised that her future employment depended upon the successful outcome of the appraisal process and that she would be advised of the outcome within the next 4 weeks. Mr Chinnock says that during what he described as the debriefing at the end of the meeting he informed Mrs Grigson that the review had been favourable and that "we would be happy to be offering her the next segment of the - - of the deed" (transcript page 75).
- 16 Mrs Grigson was on leave during this time, from October to December 2001. She says that she did not receive advice as to the outcome of the appraisal or a new contract of employment by the end of the 2001 school year. She sent an email dated Monday 17 December 2001 addressed to Mr Hendriks (Exhibit A8) advising him that she had still not heard or received any feedback in respect of the review. She noted that there were only 4 or 5 days of school remaining, she wanted to know the outcome of the review and whether she would have a contract for the following year, and asked to be contacted that day at home. Mrs Grigson says that Mr Hendriks responded saying that the review was finalised but he did not know why she had not been advised accordingly.
- 17 Mr Chinnock says he, with administrative assistance, prepared a new contract of employment for Mrs Grigson, entitled "Deed of Agreement" ("the Second Deed") (Exhibit A10).
- 18 Mrs Grigson was on maternity leave from 1 January 2002 until 31 December 2002. She says that during this period, on 13 March 2002, Mr Chinnock attended at her home and presented her with a copy of both the written appraisal report, entitled "Review of Mrs Carmelina Grigson" ("the Review Report") (Exhibit A9), and the Second Deed (Exhibit A10). The Review Report was very positive regarding her work, performance and approach to her job. The last page of this report contained the following recommendations:
1. That Carmelina Grigson be affirmed for the contribution that she has made in fulfilling the Head of Primary role over the last two years.
 2. That Carmelina Grigson be offered the opportunity to take up the second segment of her Deed of Agreement.
 3. That discussions be held between the Principal and Mrs. Grigson as to an appropriate teaching role associated with the Head of Primary position.
 4. That attention be given to examining (sic) the day to day roles of the College Executive members including the Head of Primary."

(Exhibit A9)

- 19 The Review Report was signed by Mr Chinnock, and dated "Nov. 2001".
- 20 The Second Deed which Mrs Grigson says Mr Chinnock gave to her at her home in Port Hedland on 13 March 2002, entitled "Deed of Agreement" (Exhibit 10), contained those terms set out above, which were contained in the First Deed (Exhibit A7).
- 21 Attached to the Second Deed was an "Appendix to the Agreement" which provided a space for the salary to be specified, although no salary was specified in the Appendix. It notes that the salary included "all allowances eg Country (sic) complexity district etc." and that "In addition to the above salary, the Head of Primary will be eligible to receive all allowable benefits from the Pilbara Package". Mrs Grigson says that attached to the Second Deed given to her by Mr Chinnock on 13 March 2002 were two schedules. The first schedule contained the following:

“

SCHEDULE

ITEM 1: THE HEAD OF PRIMARY

Mrs Carmelina Grigson

ITEM 2: THE SCHOOL:

St Cecilia's College

THIRD TERM

PERIOD OF APPOINTMENT: 01/01/2006 until 31/12/2009”

(Exhibit A10)

- 22 It provided for the signatures of the Head of Primary and the Chairperson of the School Board and for the date of each of those signatures. Mrs Grigson says that when it was handed to her, the document had not been signed by the Chairperson of the School Board.
- 23 The second schedule attached to the Second Deed was in exactly the same terms as the first schedule, set out above, except that the period of appointment was specified as being "01/01/2002 until 31/12/2005".
- 24 Mrs Grigson's evidence about her being presented with the Second Deed with both schedules attached, and her signing them is of significance. In examination in chief, she gave the following evidence:
- "MR STUBBS: Okay. Now I think that you have indicated that you finally got the appraisal from Mr Tony Chinnock, is that correct?---Yes.
- And can you recall when he provided that to you?---Yes. In March of the following year, which was 2002.
- Can you have a look at this document? Is that the appraisal document that Mr Chinnock gave to you?---Yes, it is.
- Or a copy of it. I'll tender that document?---Yes. Review of Mrs Carmelina Grigson is exhibit A9.
- Now Mr Chinnock gave that to you in person, did he?---Yes. Along with my new deed of agreement.

Okay. Now were you on maternity leave at all during 2002?---Yes, for the entire year.

Okay. Now when did - - sorry, Mr Chinnock gave you that document and he also gave you a further deed of agreement. Is that correct?---Yes.

Okay. Now is that a copy of the - - the deed of agreement that Mr Chinnock gave to you?---Yes, it is.

Okay. And how did he give that to you?---He actually drove to my home, knocked on my back door and actually handed it to me in person.

Okay. And was there any conversation between you and he about the agreement?---Yes. He appraised me and congratulated me on my successful appraisal; handed me the contract in which I flicked through and saw there were two schedules at the back and I actually asked him the question, "Do I sign both of these" and he said yes.

MR STUBBS: And did he say anything about how long the school was offering you employment for?---Yes. He actually said the outcome of my appraisal was exceptional. He was very pleased with my performance, not only him but the community involving the staff as well as outer community, and as we were a difficult to staff school with extreme transient staff members, I was offered the two terms attached.

Okay. And did he - - did you sign the contract at that stage or at a later point?---No, I took the document. I wanted to peruse it, to read it and I actually returned it to him at St Cecilia's College.

And when did you return it to him?---The very next day.

And had you signed the document at that point?---Yes, I had signed the document.

And you'd signed both of the schedules - - ?---Both of the schedules.

- - as he had requested?---Yes."

(Transcript pages 13 and 14)

25 In cross examination, Mrs Grigson gave the following account:

"Mr McGOWAN: Now you say - - well, you tell us again so there's no misunderstanding. So on the one occasion Mr Chinnock gives you the review, which talks about the second segment of your deed of agreement, and he gives you this new deed of agreement. Is that right?---That is correct.

All right. And you say he said something to you at the time that he gave these documents to you?---Yes, he did.

And what do you say he said?---Mr Chinnock came to my home, knocked on my back door and said, "This is what you've been waiting for. This is written confirmation of the outcome of your review with a successful review. You have now a new deed of agreement." I flicked through the deed of agreement; I noticed there were two schedules at the back and I asked the question, "Do I sign both of them?" And his answer was, "Yes".

MR McGOWAN: All right. And that's all that was said?---He asked me how I was, how my new baby was. There was idle chitchat and I thanked him for finally getting the outcome of my review to me after 6 months and also my new deed of agreement.

All right. And you don't recall anything else that was said? Or rather, are you saying nothing else was said---I don't recall anything else being said."

(Transcript pages 63 and 64)

26 In re-examination, the issue was traversed in the following way:

"MR STUBBS: Now, my friend asked you about when Mr Chinnock came to your house with the new deed and the review, what, if anything was said about the issue of the duration of the new deed?

MR McGOWAN: Well, with respect, if you don't lead - - you don't lead in re-examination, with respect.

MR STUBBS: Was anything said?---Yes, there was.

What was it?---When I flipped through the new deed of agreement I noticed there were two schedules at the back with two different terms. I specifically and explicitly asked the question, "Do I sign both of these" and his answer was "Yes".

And if you could just look - - you were shown exhibit A10. Just go to the - - the schedules - - two schedules that you signed in March 2002. Save for the - - the signatures when you received the document, was everything else on those schedules filled out?---Yes, it was.

And during that visit, Mr Chinnock, was there any discussion about staffing at the school?---Yes, there was.

And what was that?---St Cecilia's College is extremely hard to staff school and I know that personally because every year that I spent there we would be interviewing and trying to get staff to come to our school, because there was a high level of resignations and - - and staff leaving.

MR McGOWAN: Commissioner, the question was, "What did he say".

MR STUBBS: And she's telling us.

MR McGOWAN: No, she's not. She's - -

MR STUBBS: Yes, she is. She's telling us. Would you carry on please.

SCOTT C: Well, yes, carry on.

WITNESS: With that, he said, "It's extremely hard to find, not only one, Catholics, to come to Port Hedland. People who have the manna (sic) of life, people who are trained, people who have experience. We attract - - these were his words. "We attract a high level of first year out teachers and then they leave after 1 year". He said, "You have shown commitment, dedication, you have excelled in your position - - " I remember him saying that, "You do an exceptional job", they were his words, "and the college is happy to offer you this deed of agreement."

(Transcript page 69)

27 Mrs Grigson says that when the Second Deed with the attached schedules was presented to her by Mr Chinnock, she asked him whether she was to sign both the schedules and he indicated that she was. Mrs Grigson signed both schedules on 13 March 2002 and returned the Second Deed with the two schedules to Mr Chinnock.

- 28 Mr Chinnock's evidence was that he has no clear recollection of when he met with Mrs Grigson or the circumstances under which she received the Review Report and the Second Deed. He does not recall telling her to sign both schedules. Mr Chinnock has given evidence that he recommended to the School Board that Mrs Grigson be offered the second segment of the contract by which I take him to mean the period "01/01/2002 until 31/12/2005". I understand him to say that the First and Second Deeds are part of the same agreement, that the first segment is that referred to as the "First Term" in clause 5. – Contract of Employment, at point 5.2.1 of both the First and Second Deeds. The third segment would then be the "Third Term" referred to at point 5.2.3 of both the First and Second Deeds. The Second Deed was not signed by the Chairperson of the School Board until some months later. The reasons for the delay include that there was a new Chairperson of the School Board. The two schedules to the Second Deed, having been signed by Mrs Grigson on 13 March 2002, were both signed by the Chairperson of the School Board, Jamie Cavey, on 12 June 2002. Mr Chinnock says he knew that the Chairperson of the School Board signed both schedules.
- 29 Mrs Grigson continued on maternity leave for the remainder of 2002 and returned to work as Head of Primary from January 2003. She again went on maternity leave from July 2003 until July 2004. In August 2004, Mr Chinnock was on long service leave and Mrs Grigson acted as Principal during that 6 week period. For the 2005 school year, Mr Chinnock was to take a year's leave. Expressions of interest were invited from those who wished to act as the school Principal during 2005. Mrs Grigson applied but was unsuccessful.
- 30 There has been evidence that during the course of 2003, consideration was being given by the respondent to the structure of the school and the fact that there were significantly declining enrolments in the secondary school. The intention was to close the secondary school and to consolidate the school at the primary school. As a consequence it was decided that the position of Head of Primary would be abolished. Two new positions as Assistant Principals were to be created. The structure of senior personnel was to be Principal, Assistant Principal (Administration) and Assistant Principal (Religious Education).
- 31 By letter dated 23 March 2004, Mr Chinnock advised Mrs Grigson of the anticipated new structure and that:
- "Each of the Assistant Principals would be required to teach a class with Administration Relief for one day. Your salary would be according to the appropriate scale and would attract the appropriate Assistant Principal allowance.
- If you have any questions relating to these matters please do not hesitate to contact me, and I would be happy to clarify our plans to the best of my ability."
- (Exhibit A21)
- 32 Following advice from her union to the effect that she had a deed of agreement which applied from 1 January 2002 until 31 December 2009, Mrs Grigson responded to Mr Chinnock by letter dated 18 May 2004, referring to the terms of the "Deed of Agreement, which applies from 1 January 2002 until 31 December 2009", that:
- "Whilst I am currently on maternity Leave (sic), it is my clear understanding that the terms and conditions contained in the above document continue to apply at least until 31 December 2005."
- (Exhibit A22)
- 33 The letter cites "Section 3. Employment, subsection 3.2" and then says:
- "On this basis I do not agree to the Salary and conditions as outlined in your letter. Specifically,
- the salary entitlement is as a Head of Primary;
 - the Agreements states (sic) that I am eligible to receive all allowable benefits form (sic) the Pilbara Package; and
 - my Teaching Load is not to exceed 0.4 teaching load."
- (Exhibit A22)
- 34 Mrs Grigson sought confirmation that the conditions of her employment were those contained in the Deeds of Agreement and that those conditions would continue to apply. She says that she received no reply to her letter of 18 May 2004.
- 35 According to the evidence, Philip Thomas Riley had been directed by his supervisor to travel to Port Hedland in August 2004 to meet with members of the respondent's staff to discuss the impending changes to the structure of the school and the implications for them. Mr Riley says that he had asked for the personnel files of school employees to be forwarded to him prior to his arrival in Port Hedland but they were not made available to him. He had a look at the school files when he arrived in Port Hedland. The files did not contain the documents that he needed.
- 36 Mr Riley met with Mrs Grigson on 12 August 2004. Mrs Grigson initially said in her evidence that she believed that at the meeting, she had a copy of her Deed of Agreement and the letter which she had written to Mr Chinnock dated 18 May 2004 (Exhibit A22) and gave or showed them to Mr Riley at that meeting. However, she provided him with copies of the schedules to the Deeds and the letter by facsimile transmission on 27 September 2004.
- 37 On 19 October 2004, Mr Riley responded to her by email apologising for not getting back to her earlier. He went on to say:
- "As I understand it there is still to be a formal announcement from CECWA (Catholic Education Commission of Western Australia) via the Bishop that the middle school campus will close in 2005, and I appreciate that this has been a source of frustration for you and the other staff involved.
- Nonetheless the school resources section expects this to be the case. I have discussed the implications of this with the Asst Director Terry Wilson with reference to past CEO practice.
- The view here is that your deed becomes redundant as the position HOP is effectively abolished and is also redundant. There will be no consideration of maintaining HOP salary next year, nor to paying redundancy amount for the time spent as HOP as I understand you will be offered an alternative position as asst principal in the primary structure. I appreciate this is not the news you would have hoped for."
- (Exhibit A24)
- 38 By letter dated 20 October 2004, Mrs Grigson wrote to Mr Riley expressing her concern at the way she had been treated, noting that she did not receive a reply to her letter to Mr Chinnock of 18 May 2004 and stating "I wish to again reiterate that I do not accept the unconditional changes to the terms of my Deed of Agreement, as you propose". She cited a term of the Second Deed set out in clause 3.2 and said "In my agreement the end date is December 2009". She noted, too, that she did not agree to the salaries and conditions outlined in his correspondence as the salary entitlement was not as Head of Primary. She noted her Agreement provided an entitlement to allowable benefits from the Pilbara Package and her teaching load was not to exceed 0.4 teaching load. She stated that she believed she was entitled to have the terms of the contract honoured, and that she was entitled to a redundancy package in accordance with the Western Australian Catholic Schools (Enterprise Bargaining) Agreement. Mrs Grigson sought a response by the end of the week, Friday, 22 October 2004 (Exhibit A25).

- 39 Mr Riley responded that he would not be in a position to reply by that day but hoped to do so by the close of business the following Monday (Exhibit A26).
- 40 On 25 October 2004, by email, Mr Riley advised Mrs Grigson that:
- “From discussions with the Director he is prepared to consider a form of ex-gratia payment. Once you are advised by Tony that the HOP is to be abolished and you are offered and accept the AAdmin role the payment would be calculated on the difference in salary between the two roles and pro-rated as follows:
- Difference in total package approx \$17500p.a.
5 years in the HOP role at 2 weeks pay for each year of service = 10 weeks
10/52 weeks X \$17500=\$3365 approx.”
- (Exhibit A27)
- 41 By letter dated 11 November 2004, Mr Chinnock formally notified Mrs Grigson that there was to be a new structure in place for the school from the beginning of 2005 that would be made up of the Principal together with two Assistant Principals. “The Salary and time release for the Assistant Principal positions would be based on the conditions appropriate in a single stream school” (Exhibit A29). In that letter, Mr Chinnock offered Mrs Grigson the position of Assistant Principal (Administration) beginning on 1 January 2005 and he said that he was able to make this offer “without the need for meritorious selection given that I am seeking to redeploy you as a result of your previous position of Head of Primary being declared redundant and is also in recognition of your dedicated service over many years.” Mr Chinnock asked that Mrs Grigson indicate her willingness to accept the position by 3.00pm on Friday 19 November 2004 (Exhibit A29).
- 42 A duty statement was provided to Mrs Grigson in respect of the Assistant Principal positions and a Draft Deed of Agreement was also provided for her consideration. This Draft Deed attached a schedule which referred to the salary being “as per the *Independent Schools Teachers Award* and the *Western Australian Catholic Schools EBA 2000*” (Exhibit A30).
- 43 Mrs Grigson says she asked for information as to the salary and was referred to the Administrative Assistant. The Administrative Assistant declined to provide the information indicating that it should be provided by the Principal, so Mrs Grigson returned to Mr Chinnock and requested that it be provided. She was provided with Exhibit A52 which showed that as at 1 January 2005, the Head of Primary “Total Annual Salary” would be \$88,646.36 inclusive of \$79,774.00 salary, \$3,340.00 as Country School Allowance, \$2,505.00 as Country Complexity Allowance and \$3,027.36 as Location Allowance. The Assistant Principal (Admin) was to receive the 4 year Trained Teacher salary of \$57,044.00, plus Assistant Principal’s Allowance of \$4,434.00 and Location Allowance of \$3,027.36, totalling \$64,505.36. There was no reference to the Assistant Principal receiving the Country School Allowance, the Country Complexity Allowance or the Pilbara Package.
- 44 In response to Mr Chinnock’s letter of 11 November 2004, Mrs Grigson wrote to him on 19 November 2004 saying that:
- “The position, remuneration and conditions offered are not acceptable to me. I reserve all my rights under my current contract of employment”.
- (Exhibit A32)
- 45 On 22 November 2004, Mr Chinnock replied to her letter of 19 November 2004 saying:
- “I have no real alternative at this point (but) to seek permission from the Personnel Section to advertise the Assistant Principal position, as staffing timelines are very cramped at this time of the year.
I encourage you to reconsider and I will delay contacting the Personnel Section until 9.00am Wednesday, 24th November 2004.”
- (Exhibit A33)
- 46 Mrs Grigson did not respond to this letter, and on 25 November 2004 Mr Chinnock again wrote to her, this time saying that he needed her acknowledgement that:
- The position of Head of Primary at St Cecilia’s is redundant as of the end of the 2004 School year.
 - You are rejecting the opportunity to be appointed to the Assistant Principal (Admin) position to take effect 1st January 2005 and that as a result of this the School will advertise in the near future to fill this position.”
- (Exhibit A34)
- 47 On 26 November 2004, Mrs Grigson wrote to Mr Chinnock again reiterating that the position, remuneration and conditions offered to her were not acceptable and that she reserved her rights under her current contract of employment (Exhibit A35).
- 48 In a letter of 30 November 2004, Mr Chinnock advised Mrs Grigson that he would begin the process of advertising the position of Assistant Principal (Administration). He also indicated that he had instructed the Administrative Officer, Ms Masters, to adjust Mrs Grigson’s salary as of 1 January 2005. He said that he had done this as he believed an “overpayment situation” would not be in the school’s or Mrs Grigson’s best interest, and that Ms Masters could provide her with the relevant figures. He also went on to refer to Mr Riley’s email to Mrs Grigson of 25 October 2004 and to the ex-gratia payment referred to therein. He said “I will arrange for this payment to be made to you through our Payroll Office in Perth, direct to your nominated bank account” (Exhibit A36).
- 49 There were then two memoranda from Mr Chinnock to the staff, the first calling for expressions of interest for the position of Assistant Principal (Admin), and the second announcing the changes to the structure of the organisation.
- 50 The evidence of Mrs Grigson and Mr Chinnock is that around this period, the two of them met on a regular basis to discuss day-to-day work matters and on many of those occasions Mr Chinnock prompted Mrs Grigson in respect of accepting the Assistant Principal position offered to her.
- 51 It appears that Mrs Grigson and Mr Chinnock met on 8 December 2004 and had further discussions about the situation, but Mrs Grigson did not resign from her position.
- 52 Mrs Grigson gave evidence that she contacted Grace Removals, which normally provided relocation services to Catholic Education Office schools, and arranged for the removal of her personal effects to Perth. There is no dispute that Grace Removals advised the Catholic Education Office of this arrangement. The Catholic Education Office advised Mr Chinnock and he, without conferring with Mrs Grigson, contacted Grace Removals and cancelled the uplift arranged by her. He then wrote to Mrs Grigson by letter dated 9 December 2004, in the following terms, formal parts omitted:

“In recent days you made application, as I understand it, for a relocation allowance to enable you to return from Port Hedland to the Metropolitan area.

A relocation allowance is only payable if you resign or your employment has been terminated.

It is important that I emphasise to you that your employment at the College has not been terminated. What has happened is that your position as Head of Primary has been made redundant.

Therefore, in the absence of your resignation I have instructed the Catholic Education Office to put a hold on your relocation application at this time, in line with the Remote Area Policy.

However, as set out in my letter of 11 November 2004 to you, the College is pleased to offer you the position of Assistant Principal (Administration) to enable you to continue your substantive teaching duties.

I am keen that you accept the position that has been offered to you.

I had previously sought your commitment to taking up the Assistant Principal position by 19 November 2004. However, given what transpired yesterday, I shall be pleased if you would let me know whether you will now accept the new position by 9.00 am Monday 13 December as it is important that the planning for the new school year in 2005 be completed as soon as possible.

I look forward to your early response to this letter.”

(Exhibit A39)

- 53 Also on 9 December 2004, Mr Chinnock wrote to Mrs Grigson in the following terms, formal parts omitted:

“With reference to our meeting yesterday, I provide the following information to you in clarification of your employment status at our College for the 2005 school year.

As previously advised, you were offered a position of Assistant Principal (Admin) at our College commencing in the 2005 school year, which you have declined. If you would like to reconsider and accept the position, I would be more than happy to cease the advertising and filling of this position, even though the deadline notified to you earlier has since past. Please advise me by close of business, Friday, 10th December 2004 if you wish to accept.

For your information and reference, I am pleased to provide you with the salary scales for you to undertake this position, which is attached.

If you do not accept the position of Assistant Principal (Admin), your position as a classroom teacher at St Cecilia’s College will take effect from 1st January 2005. I have provided you with this information verbally in the past, but I am now providing it to you in writing to clarify any misunderstanding you may have in regards to your ongoing employment at our College, and I apologize if this has been the case. I would be happy to discuss the classroom options with you further, if required. I am also providing you with the salary scales for this position, for your information and reference.

If you would like to discuss the above information or require further clarification please don’t hesitate to contact me direct.”

(Exhibit A40)

- 54 This letter attached a schedule headed “Carmelina Grigson AP (Admin) Salary Schedule”, which set out the salary for an Assistant Principal commencing on 1 January 2005, the appropriate allowances, and the classroom teacher’s salary schedule. It is not clear which of the two letters dated 9 December 2004 came first.

- 55 On 13 December 2004, Mr Chinnock and Mrs Grigson had a further discussion in which Mr Chinnock asked Mrs Grigson if she intended to reply to his recent letters. She said that she did not intend to reply any further and did not intend to return in 2005 under the conditions offered. Mr Chinnock then wrote to her on 14 December 2004 confirming that discussion. In this letter he said, amongst other things:

“Your statements about not retuning (sic) next year come after my reassuring you, in writing, that the College has not terminated your employment. I am therefore forced to conclude that you have resolved to abandon your employment at the end of this term. I will accordingly plan for the 2005 school year without your presence at the College.”

(Exhibit A41)

- 56 Mrs Grigson’s departure from the school was noted in the school newsletter dated 15 December 2004 and she was referred to in glowing terms (Exhibit A44).

- 57 Mrs Grigson then returned to Perth.

- 58 Mrs Grigson has submitted receipts covering the expenditure incurred by her to return to Perth. She has also submitted a memorandum to her from the respondent dated 25 May 2004 which set out her long service leave entitlement as being 22.806 days as at 31 December 2004 (Exhibit A50).

- 59 Mrs Grigson’s evidence is that on 20 March 2005 she gave birth to her third child. She has not worked since her departure from Port Hedland. Although she has looked at positions advertised in newspapers and looked at the Catholic Education Office’s website in respect of positions available, she had not made any applications for employment.

The Parties’ Submissions

- 60 The applicant says that she had a contract of employment with the respondent by which she was employed as Head of Primary until December 2009 (Exhibit A10). The respondent abolished this position. No suitable alternative employment was negotiated between them. Her employment came to an end by the abolition of the position of Head of Primary. That termination constituted a dismissal. She says that in all the circumstances, the dismissal was unfair. Further, she says that she has been denied the benefit of salary from her contract up to December 2009.

- 61 Mrs Grigson says she has been denied other benefits from her contract including 22.806 days long service leave and 47 days of sick leave entitlement. She has also incurred relocation and travel expenses in relocating her family to Perth, a total of \$4,869.61.

- 62 Mrs Grigson acknowledges that if there is an overlap between the claim of unfair dismissal and the denied contractual benefits in respect of the claim for payment of salary up until 2009, then she does not seek to double dip. She would receive payment up until 2009 and not expect compensation for loss of salary for any period on account of unfair dismissal but says that such costs as the removal and travel expenses incurred by her constitute either a contractual entitlement or a loss compensable in accordance with the unfair dismissal which she suffered.

- 63 The respondent says that the primary issue is whether Mrs Grigson was appointed for the period claimed and that is determined by the operative provisions of the Second Deed in clause 5. The expression contained in the Review Report makes it clear, according to the respondent, that “as a result of the satisfactory review, the second segment” was to be offered to Mrs Grigson.

- “The third term was entirely problematic based upon the need to meet conditions, time for which had not arrived.” (transcript page 161)
- 64 The respondent says that the execution of the schedules per se has not effected a substantial change to the contractual arrangements between the parties. Further, Mrs Grigson’s employment conditions were also prescribed by the Independent School’s Teacher’s Award 1976 (“the Award”), the Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 1 of 2000 (“the EBA”), and the policies and procedures of the Catholic Education Commission of Western Australia (“the policies”), in particular regarding redundancy. The respondent says that clause 4.3 of the Deeds which provides that the Head of Primary shall implement the policies, guidelines and instructions promulgated by the Catholic Education Commission of Western Australia from time to time means that there must be an acceptance on her part of those policies, guidelines and instructions as applicable to her and thus were an operative part of her employment conditions. The respondent says that Clause 3.1 of the Deed provided that execution of the Deed by her deemed her to have read and agreed to be bound by the conditions of employment set out therein and in any other external documents which were appended to it. The respondent accepts, however, that the evidence does not suggest that there were any documents appended to the Second Deed when it was provided to Mrs Grigson, which set out conditions or terms of employment but says that clause 3.1 of the Second Deed, when read in conjunction with clause 4.3, underscores the point that the Award, the EBA and the redundancy policy, as a minimum, formed part of her agreement in her role as Head of Primary.
- 65 The respondent says that if the Commission finds that Mrs Grigson had an enforceable contract until the end of 2009, then Mrs Grigson’s evidence that she has taken 12 months’ maternity leave in respect of each of her previous children allows a reasonable inference that it is likely, if not highly likely, that she would have done the same in 2005 for the birth of her third child in March 2005.
- 66 As to the issue of whether Mrs Grigson had mitigated any loss which might have arisen, the respondent says that a random bundle of newspaper clippings (Exhibit A51) submitted by Mrs Grigson does not demonstrate any support for her claim.
- 67 The respondent says that there is no challenge to Mrs Grigson’s performance as a teacher or as Head of Primary and the documents are an endorsement of her in that regard. On that basis, the respondent says that she would have had no difficulty in obtaining a position equivalent to the Head of Primary in Port Hedland.
- 68 The respondent also says that it is clear that as a result of seriously declining numbers at the middle school campus, and with the high level of turnover of students in Port Hedland creating serious difficulty, that a plan was made over a period of time for the closure of the senior campus which ultimately occurred from the commencement of 2005. The effect of this was the abolition of the position of Head of Primary. The respondent says that if that is construed as creating a redundancy, then the Award, EBA and policies apply to that situation and, in particular, clause 21. – Redundancy Provisions of the EBA. The respondent says that whichever provides the greater benefit to Mrs Grigson of the Workplace Relations Act 1996, the Catholic Education Commission’s policy on redundancy or the EBA would be that which applies to Mrs Grigson.
- 69 The respondent says that it attempted to provide suitable alternative employment to Mrs Grigson by the offer made to her. Although “suitable alternative employment” was not defined, the respondent says it does not require that it necessarily be “acceptable” employment. The respondent does not resile from the fact that there is a measurable difference between the salaries of the positions of Head of Primary and that which Mrs Grigson was offered as Assistant Principal (Administration) but says that while that is an aspect to be considered, it is not to be a determinative aspect.
- 70 In respect of the issue of the costs incurred by Mrs Grigson in returning to Perth and the cost of transportation of her personal goods and effects, the respondent says that as Mrs Grigson was not resigning, nor was she being appointed, that the policy on which she relies did not apply to her and she was not entitled to that benefit.
- 71 In reply, the applicant says that in respect of clause 4.3 of the Second Deed, that merely because the Second Deed required her to implement policies, guidelines and instructions promulgated by the Catholic Education Commission from time to time, it does not mean that they became terms of the contract of employment. They are not incorporated into the contract either impliedly or expressly. The contract required that as Head of Primary, Mrs Grigson implement them, but there is no importation of the terms of the policies, the EBA or the Award into her contract. Mr Stubbs for the applicant points out that the respondent concedes that there was nothing appended to the Second Deed, except the schedules, which would have the effect of importing other conditions of employment into the contract.

Conclusions

- 72 I have had the benefit of observing the witnesses as they gave their evidence. Where there is conflict between the evidence of Mrs Grigson and Mr Chinnoek, in particular as to the circumstances and timing of the presentation to Mrs Grigson by Mr Chinnoek of the “Review of Mrs Carmelina Grigson” dated November 2001 (Exhibit A9) and the Second Deed (Exhibit A10), I prefer the evidence of Mrs Grigson. I do so notwithstanding that in Mrs Grigson’s evidence, in examination in chief and in re-examination, she mentioned that Mr Chinnoek had said to her during their discussion in March 2002 at her home that the school was extremely hard to staff, to find the appropriate people etc., and that she did not repeat this when asked in cross examination, in particular, when she was asked if there was anything further discussed, she did not mention that. Nonetheless, Mr Chinnoek’s evidence in respect of the time, place and the circumstances under which he presented her with the Review Report (Exhibit A9) and the Second Deed (Exhibit A10) is quite unclear. He cannot recall those circumstances with any certainty. He suggested that the offer of continuation of employment through a second term was discussed as part of the debriefing in the presence of Mr Hendriks at the conclusion of the review meeting in November 2001. He does not recall whether the Review Report was provided to Mrs Grigson by himself personally, whether she picked it up from the school, and whether she was at work at the time or not.
- 73 In all of the circumstances, I make the following findings which are relevant, in particular, to the conclusions as to whether or not there was a dismissal and the question of the entitlements arising from the contract. I find that there was a review undertaken in accordance with the terms of the First Deed in anticipation of the expiration of the first term. That review was undertaken by Mr Chinnoek and Mr Hendriks in November 2001 taking account of the views of relevant people. The Review Recommendations demonstrate, and I find, that Mrs Grigson was very hard working and dedicated; very supportive and encouraging of staff; had very good organisational skills at all levels; was extremely pastoral and strategic in dealing with parents, students and staff; was very thorough in tasks that were undertaken; was recognised as a practitioner and mentor; was committed to her faith; had a sound educational background; had been responsible for curriculum innovation; was a good listener and communicator, and was enthusiastic about her job. It was recommended that she “be affirmed” for the contribution that she had made to fulfilling the role of Head of Primary over the previous two years; that she be offered the opportunity to take the second segment of her Deed of Agreement; that there be discussion with her as to an appropriate teaching role associated with the Head of Primary position, and that attention be given to the day to day roles of the college executive members including the Head of Primary.

- 74 In accordance with the requirements of the First Deed, a decision was made by the School Board to offer Mrs Grigson at least one further phase of her contract of employment, at least being the second term referred to in clause 5. – Contract of Employment. The Second Deed was then prepared by Mr Chinnock and his administrative assistant. Mrs Grigson was provided with the Second Deed (Exhibit A10) by Mr Chinnock at Mrs Grigson’s home on 12 March 2002, when Mrs Grigson was on leave. Mrs Grigson asked Mr Chinnock whether she was to sign both schedules and he indicated that she was to sign both schedules and she did so. The Second Deed included two schedules, the first, in sequence, covering the period 1 January 2006 until 31 December 2009. This was signed by Mrs Grigson on 13 March 2002 and by the Chairperson of the School Board, Mr Cavey, on 12 June 2002. The second Schedule, in sequence, which covered a period of appointment from 1 January 2002 until 31 December 2005, was also signed by Mrs Grigson on 13 March 2002 and by Mr Cavey on 12 June 2002.
- 75 There is no evidence to suggest that Mr Chinnock had not intended to provide to Mrs Grigson the Second Deed with both of those schedules attached, other than the terms of the second recommendation set out in the Review Report (Exhibit A9). Although there is some suggestion in the evidence of Mr Chinnock that he had some discussion with Mrs Grigson in June of that year, after Mr Cavey had signed the Second Deed, and that there was agreement between himself and Mrs Grigson that what was “activated” was only the second term or, in Mr Chinnock’s words, the next segment of the Deed of Agreement, this was not put to Mrs Grigson. I find that there is no credible evidence that it was ever suggested to her, or raised with Mr Cavey or anyone else for that matter, either verbally or in writing, that the signing of the schedule covering the period 1 January 2006 until 31 December 2009 was in error.
- 76 The question which arises, though, is whether the signing of the schedule covering the period to 31 December 2009 meant that the third term in the Second Deed had in fact been offered and accepted and whether this was to be subject to the terms of clause 5. – Contract of Employment.
- 77 In determining the terms of Mrs Grigson’s employment conditions it is necessary to examine the terms of the Second Deed (Exhibit A10) which are, for all intents and purposes, identical to those set out in the document which covered the period 1 January 2000 to 31 December 2001, the First Deed. The Second Deed provides in the Preamble that the purpose of the Deed is to define and clarify the agreed basis of the employment relationship. That is so. The contractual arrangements in terms of the period of the application of the Second Deed and arrangements for review are set out in clause 3. – Employment, 3.1 and 3.2, clause 5. – Contract of Employment, clause 6. – Review, and then, by reference to the schedules, certain other aspects.
- 78 Clause 3. – Employment notes that “upon the execution of this Agreement, the Head of Primary shall be conclusively deemed to have read and agreed to be bound by the conditions of employment set out herein and as set out in such external document, or documents as appended”. Clearly, there were no documents appended other than the schedules. Therefore, the schedules take on significance in that, subject to what else the agreement might have to say, Mrs Grigson is bound by the conditions in the Agreement (the Second Deed) and the schedules.
- 79 Clause 3.2 records that “the parties agree that the term of this Agreement shall commence on the date specified by the Employer and shall continue for a period specified in the Schedule”. In this case, “the Schedule” is in fact two schedules. Therefore, according to 3.2, “the term of the Agreement” shall continue to 31 December 2005 to 31 December 2009.
- 80 Clause 5. – Contract of Employment sets out that there are three contractual terms, the first being for 2 years, the second being for 4 years, and the third being for 4 years. Clause 5.2 says that subject to the terms of clause 5, the employer may offer a term of contract. Clause 5.2.1 says that at the completion of the first two years the Head of Primary may be offered a new contract and that that new contract shall be for a period of 4 years commencing on the day following the expiration of the first 2 years. At point 5.2.3 it provides that a further contract may be offered for a final 4 years commencing on the day following the expiration of the second term i.e. the first period of 4 years. I note that 5.2.1 says that the second term contract period may be offered at the completion of the first two years, but there is no such provision as to the timing of the offer of a third term. Clause 5.2.3 simply says when the final period of 4 years would commence, not when it is to be offered. Clause 5.3 gives the employer sole discretion as to whether or not to offer a new contract term and “shall in any event only offer such a contract Term in accordance with” the condition set out in the clause, being, provided that during the term of the contract the Head of Primary has not committed a serious breach of her responsibilities and, if in the opinion of the School Board and as a result of the review, the performance is such as to qualify her for a new and separate contract of employment.
- 81 Clause 5.4 says that at the conclusion of the third term the position is to be advertised. The remainder of clause 5 refers to what is to occur at the conclusion of the third term. None of those provisions is relevant as they arise only at the completion of the third term.
- 82 Clause 6. – Review requires the employer to undertake a formal review of the Head of Primary during at least the second year of the first term and in the last year of the second term and at such time as the employer elects from time to time. It sets out the scope of any review and by whom it is to be conducted. At 6.4, it says that the review is to be used as one of the factors to be considered by the employer when determining whether to offer a new contract.
- 83 There does not appear to be any requirement upon the employer to only offer the third term in the final year of the second term, or that it is to be offered only after a review in the last year of the second term. There is a suggestion that it was intended to be that way, i.e. by reference to the timing of the review, but it is not prohibited for the employer to do it any other way eg. to offer the second and third terms at the same time.
- 84 Clause 5.2 says that subject to the conditions set out in that clause, the employer may offer the Head of Primary a term of contract, and the employer may offer the second term at the completion of the first term and may offer the third term. In deciding whether to make that offer, it has to consider whether there has been a serious breach of responsibilities, and it has to have undertaken a review of the Head of Primary’s responsibilities. There is nothing to prohibit the employer in particular circumstances from offering a contract for the second and third term at the same time, albeit I conclude that it was anticipated that the offer of the third term would occur at the conclusion of the second term. One can well imagine, given the staffing difficulties that there were with the School, that the respondent would wish to ensure that it had and would retain for some years to come, the services of such an exemplary teacher and Head of Primary as Mrs Grigson had demonstrated herself to be, which was recognised in the review, performed by Mr Chinnock and Mr Hendriks.
- 85 The provisions of clause 6 which set out the arrangements for the review, likewise say the employer shall undertake a formal review at particular points but does not link the review only to the offer of another term or say that those reviews shall only be for the purpose of determining whether a new contract is to be offered. Clause 6.4 says that the review will be used as one of the factors to be considered when determining whether to offer a new contract term. Therefore, I conclude that while a review is one of the factors it is not the only factor, and there is no prohibition upon the second and third terms being offered together following the first review.
- 86 Further, my conclusion that the respondent was able to offer Mrs Grigson both the second and third term of the arrangement is fortified by reference to clause 3. – Employment, at 3.2. which provides “that the term of the Agreement shall commence on

- the date specified by the Employer and shall continue for a period specified in the Schedule.” In this case, there were two schedules, the latter period covered by them expires on 31 December 2009. Both were signed by the respondent.
- 87 Although it is unnecessary to deal with the parties’ intentions, I find that it was the respondent’s intention, and that of Mr Chinnock in advising the School Board, that Mrs Grigson would be offered both the second and third terms. I say this on the basis that Mr Chinnock was instrumental in the preparation of the Second Deed and the two schedules, made a presentation to the School Board, provided the Second Deed with the two schedules attached, to Mrs Grigson and advised her to sign both schedules. He presented the Second Deed with the two schedules to the School Board Chairperson for signature and both were signed. Neither Mr Chinnock nor the School Board advised Mrs Grigson that the respondent believed it was not bound by the period specified in the two schedules. Nothing was raised in writing with anyone which might suggest that Mr Chinnock, either then or soon thereafter, or at any other time until after the termination, believed that the parties were not contracted for the third term. The discussions and communications between Mrs Grigson, on one hand, and Mr Chinnock and the Catholic Education Officer, on the other hand, regarding the restructure of the school and the status of Mrs Grigson’s contract, centred on the assertion of the contract being “redundant” or “abolished”, not on any assertion by the respondent of it expiring on any given date.
- 88 As to the application of the Award, the EBA and the policies of the Catholic Education Office, it is true that there is no capacity for parties to contract out of the entitlements of an award or an enterprise bargaining agreement (*Industrial Relations Act 1979, s.114*). However, where parties enter into an agreement that provides conditions which are more beneficial to an employee, then those conditions are to be applied to the employee’s benefit. That is what occurred in this case.
- 89 Further, there is no provision within the conditions of employment which applied to Mrs Grigson by virtue of the Second Deed, which provide for her employment to be terminated due to her position being made redundant. The Second Deed provided only limited ways for the employment to be brought to an end and they are in circumstances set out in clause 14, i.e. that the Head of Primary may terminate the Agreement prior to the expiration date by giving six weeks’ notice in writing. There is no provision for the respondent to terminate the employment other than in not offering a new contract, or rather the second or third terms of the contract, on account of the Head of Primary committing a serious breach of his or her responsibilities or as a result of a review finding that the Head of Primary has not discharged his or her responsibilities. Otherwise the arrangement between the parties would continue until the expiration of the third term. The only circumstances under which it might come to an end are those specified in the Second Deed or by agreement. There was no agreement.
- 90 There is no suggestion that the position of Head of Primary was not made redundant. Although the position was made redundant, the employer has no entitlement to declare the contract redundant. The parties still have a contract between them and nothing within any of the other documents, the Award, the EBA or the policies, overrides the entitlements set out in the Second Deed. The Second Deed sets out all of the necessary conditions of employment, including the arrangements for termination, leave, and determination of salary. This contract is complete in itself and would appear to require no additional provisions to give it efficacy (*Hawkins v Clayton* (1988) 164 CLR 539 at 573).
- 91 Accordingly, I find that Mrs Grigson had an entitlement to continue employment with the respondent as Head of Primary with the attached conditions for the period until 31 December 2009. The salary to be paid for that period is set out in the Second Deed by reference to clause 7. – Head of Primary Salary, i.e. to be the salary set out in the Appendix which is to be an amount determined for the school by the Catholic Education Commission. This salary was subject to review by the employer in accordance with the determination by the Catholic Education Commission provided that the salary was to be no less than that payable to the Head of Primary prior to the review. There could be adjustment to the salary according to the number of enrolments but that salary could not be reduced, according to clause 7. Therefore, Mrs Grigson’s salary was to continue at least at the rate applicable to her at the time of the termination of her employment. Exhibit A52 indicates that it would have been \$79,774.00 as a category 2 Head of Primary.
- 92 The termination of employment came about by the respondent deciding to restructure its organisation. The position of Head of Primary held by Mrs Grigson was to no longer exist from 1 January 2005. The school structure was to be replaced by a Principal together with an Assistant Principal (Religious Education) and an Assistant Principal (Administration). Mrs Grigson was offered the position of Assistant Principal (Administration) from 1 January 2005.
- 93 There is no reference within any of the documents including the Second Deed, the Award, the EBA or the policies which sets out any right on the part of the respondent to place Mrs Grigson in a suitable alternative position. There is no definition of what might constitute a suitable alternative position. There are decisions and awards of various tribunals, industrial agreements and legislation which define “suitable” or “acceptable alternative employment”. They specify that the test to be applied is an objective one and usually includes consideration of the wage or salary of the new position being as close as possible to that being lost; the level of duties, responsibilities, qualifications and experience being at a similar level, and the hours of work and location not being to the employee’s detriment (see *Termination, Change and Redundancy Case* (1984) 294 CAR 175, (1984) 295 CAR 673; *Clothing and Allied Trades Union of Australia v Hot Tuna Pty Ltd* (1989) 31 IR 365; *Public Sector Management Act 1994, s94(6)* and *Public Sector Management (Redeployment and Redundancy) Regulations 1994, Reg. 3*).
- 94 It is quite clear, though, that the position offered to Mrs Grigson was a lesser position than that of Head of Primary. This is confirmed by the job description for the new position requiring lesser duties than those contained within the requirements of her position as Head of Primary, it involved a greater teaching load, and the salary package difference between the position offered to her and that for the Head of Primary was approximately \$24,000.00 per annum, not \$17,500 referred to in Exhibit A27 (see Exhibit A52). This could not be considered to be a minor difference. The new position was not in overall charge of the primary school in the way the Head of Primary was. I find that the position offered to Mrs Grigson was significantly less in salary, conditions and status. Accordingly, it was not a suitable or acceptable alternative position by any measure.
- 95 As Mrs Grigson had a contract of employment with the respondent as Head of Primary, and that position was abolished, it does not mean that Mrs Grigson was automatically required to take on an Assistant Principal position. Her contractual entitlement was the higher position.
- 96 It is clear that Mr Chinnock wished to have Mrs Grigson continue in employment with the respondent even in the lesser position. The respondent offered to her an ex gratia payment for her acceptance of the lesser position, which was not acceptable to her. Given her contractual entitlement, it is not surprising that a lesser salary and position, plus \$3,365.00, was not acceptable. The respondent, through Mr Chinnock, continued to try to urge Mrs Grigson to accept the lesser position. Prior to November 2004, Mrs Grigson had made clear her rejection of the lesser position. The ex gratia payment was then offered to her. On no less than 6 occasions between 11 November and 14 December 2004, Mr Chinnock wrote to Mrs Grigson in varying tones from urging to threatening. In addition, over the period he raised the issue with her in a number of discussions. Mr Chinnock continued to speak with Mrs Grigson, write to her and, ultimately, cancelled her arrangements to uplift her possessions from the town and attempted to insist that she take on the position. He acted as if her acceptance of a lesser position was a fait accompli by instructing that her salary be adjusted as of 1 January 2005, and saying that he would

arrange for the ex-gratia payment offered in Mr Riley's email of 25 October 2004 to be paid directly to her bank account (Exhibit A36). In the end, this constituted hounding of Mrs Grigson to accept the lesser position notwithstanding that she was unequivocal in her rejection of that position, and was entitled to do so. The respondent and the Catholic Education Office appear to have believed that they were entitled to require her to take up the lesser position and were completely at a loss to understand what their obligations were to Mrs Grigson. In the end, Mrs Grigson was adamant, as was her right, in rejecting a lesser position than she was contracted with the respondent to enjoy.

- 97 Accordingly, the termination of her employment came about because of the abolition by the respondent of the position contracted between the parties for Mrs Grigson to perform. She was not simply engaged as an employee, she was engaged as Head of Primary. For there to have been a change to the contract of employment would have required her consent. She did not consent. There was no right on the part of the respondent to unilaterally change the contract between the parties to place Mrs Grigson in another position. Nor was there the right on the part of the respondent to unilaterally terminate the contract between the parties other than in accordance with the terms of the contract (*Twaddle trading as Mount Hospital Pharmacy v Byrne* (2003) 83 WAIG 5 at 12 (FB)). This is what the respondent effectively did. There has been a dismissal by the respondent (*Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf* (1981) 61 WAIG 611 at 616).
- 98 As to the manner of the dismissal, I have noted earlier that Mr Chinnock continued to raise the issue with Mrs Grigson, both in writing and verbally, and to attempt to push her to take a new and lesser position, and to treat it as a fait accompli. The respondent's conduct in cancelling the uplift of her goods when it was clear that her intention was to leave town was also unfair. Mr Chinnock also advised her that her expressed intentions led him to conclude that she had resolved to abandon her employment (Exhibit A41). She was hounded. There has not been a fair go all round as required in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia* ((1985) 65 WAIG 385 at 386).

Amounts Due

- 99 In respect of the claim of denied contractual benefits, Mrs Grigson claims she is due payment of salary at the rate of \$79,774.00 (Exhibit A52) until 31 December 2009.
- 100 In this case, Mrs Grigson had a fixed term contract to 31 December 2009. It is not necessary in a case such as this that she perform the work, and the employer is under no obligation to provide work (*Tony Welsh v Laurence Hills* (1982) 62 WAIG 2708 at 2709). I find that the respondent has breached the contract and by virtue of this breach Mrs Grigson was not allowed the benefit of working for the unexpired period of the contract and thus receiving the salary attached to that unexpired period. According to *Perth Finishing College Pty Ltd v Susan Watts* ((1989) 69 WAIG 2307 at 2316-17), the employee is entitled to receive the benefit of the remuneration attached to the unexpired period of the fixed term contract. Therefore, Mrs Grigson is entitled to payment of salary at the rate of \$79,774.00 per annum until 31 December 2009.
- 101 The parties have not specifically addressed whether Mrs Grigson is entitled to the allowances paid to her for remote towns, country complexity allowance and location allowance. It would, on first blush, appear that these were not due to her on the basis that she did not remain in Port Hedland and was therefore not incurring the conditions one imagines were relevant to those allowances (see *Chevrontexaco Australia Pty Ltd (Formerly Chevron Australia Pty Ltd) -v- Anthony Richard Ross* (2004)(84 WAIG 3120). However, the parties are to confer and advise if they are not able to resolve that matter.
- 102 There is one deduction which ought to be made from this award and that is in respect of the period relating to the birth of Mrs Grigson's third child. In 2002, Mrs Grigson took 12 months' maternity leave in respect of the birth of her first child, and again from the middle of 2003 to the middle of 2004, she took 12 months' maternity leave for her second child. She has given evidence of having given birth to her third child on 20 March 2005. Mrs Grigson says she does not know how much maternity leave she might have taken had she been employed, although she thought it might have been 6 weeks. However, Mrs Grigson was not employed from the end of the 2004 school year and at the time of hearing, she had made no efforts to find employment.
- 103 Based on the fact that Mrs Grigson took 12 month' maternity leave in relation to each of her first and second children, I find that, on the balance of probabilities, she would have taken 12 months' maternity leave in respect of her third child. Accordingly, she would not have been paid for that period in accordance with the Second Deed.
- 104 The respondent says that Mrs Grigson would have benefited from the payment of 6 weeks' pay on account of its Paid Maternity Leave policy (Exhibit R1), so one would assume the respondent would make that payment to her as if she had been employed.
- 105 As to her claim for long service leave, the Second Deed provides that long service leave is portable within the Catholic Education system, and no particulars were argued before the Commission as to the payout of any entitlement. Given my earlier finding regarding the dismissal, the parties are to confer and advise the Commission if they are unable to resolve this aspect of the claim. The same applies in respect of sick leave, albeit there is no provision within the Second Deed for any accrual to be paid out on termination.
- 106 As to the question of the unfair dismissal, it would be impracticable to order reinstatement as the position held by Mrs Grigson has been abolished. Therefore, the question of compensation for loss or injury arises, as does the issue of mitigation. Mrs Grigson's evidence was that she was only interested in jobs as Head of Primary in Perth, and these were the only jobs she looked at. Given that she had been working in Port Hedland, and prior to that in Busselton, to so restrict herself creates some difficulty for her to demonstrate that she has mitigated her loss. In any event, she made no applications for any positions. Mrs Grigson says that she was confident that in due course she would get a position as Head of Primary. There was no suggestion in her evidence of any damage to her job prospects or to her reputation by the dismissal. She has suffered no injury in that regard. There is no other evidence of injury. In any event, any claim for compensation for loss in respect of salary, if established, would be double counting, and Mrs Grigson does not seek this in the event of her denied contractual benefits claim succeeding, which it has. She does, however, claim loss in respect of her relocation costs. I am satisfied that these costs for removals of \$3,818.81 and accommodation expenses of \$88.00 have been incurred as a result of the unfair dismissal. Accordingly, they ought to be paid to her.
- 107 There is also a claim for travel allowance in the amount of \$960.00 for the approximately 1600 kilometres from Port Hedland to Perth, in accordance with the Remote Area Package (Exhibit A48). Clause 3.6 – Travel Provisions provides for an allowance payable on appointment or on resignation. There is no provision for an entitlement on dismissal, or at the expiration of a contracted period. However, Mrs Grigson would have incurred costs for travel which constitute part of the loss she suffered. Accordingly, the parties ought to confer regarding any amount due.
- 108 The parties are to confer regarding the amounts to be paid to Mrs Grigson as a consequence of these Reasons for Decision and advise the Commission within 14 days of the outcome of those discussions.

2006 WAIRC 03856

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CARMELINA GRIGSON	APPLICANT
	-v-	
	THE ST CECILIA'S COLLEGE SCHOOL BOARD	RESPONDENT
CORAM	COMMISSIONER P E SCOTT	
HEARD	THURSDAY, 9 JUNE 2005, FRIDAY, 10 JUNE 2005, MONDAY, 12 DECEMBER 2005	
DELIVERED	THURSDAY, 2 MARCH 2006	
FILE NO.	APPL 1555 OF 2004	
CITATION NO.	2006 WAIRC 03856	

CatchWords	Industrial Law (WA) – Claim of denied contractual benefits – Manner of dismissal unfair - denied Remote Towns, Country Complexity and Location Allowances – denied claim of superannuation entitlements – entitlement to contractual salary and long service leave – entitlement to travel allowance and expenses – entitlement to paid maternity leave – <i>Industrial Relations Act 1979 (WA) s.29(1)(b)(i) and s.29(1)(b)(ii) – Independent Schools' Teachers' Award 1976 (No. R 27 of 1976) – Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 1 of 2000 – Policies and Procedures of the Catholic Education Commission of Western Australia – Superannuation Guarantee Charge Administration Act – Catholic Schools' Superannuation Fund</i>
Result	Denied contractual benefits of salary, expenses and long service leave granted
Representation	
Applicant	Mr G Stubbs (of Counsel)
Respondent	Mr P McGowan (of Counsel) and with him Mr M Jensen (of Counsel)

Supplementary Reasons for Decision

- 1 On 24 November 2005, the Commission issued Reasons for Decision which found that Mrs Grigson's employment had been terminated unfairly and that she was entitled to certain benefits arising from her contract of employment which had been denied her. At paragraph 100 of the Reasons for Decision, I found that "Mrs Grigson is entitled to payment of salary at the rate of \$79,774.00 per annum until 31 December 2009". Twelve months was to be deducted from that period due to the probability that Mrs Grigson would have taken maternity leave associated with the birth of her youngest child. I understand that the parties are agreed that she is due to be paid of 6 weeks maternity leave as provided by the respondent's policy.
- 2 The parties were to confer as to whether Mrs Grigson was entitled to Remote Towns, Country Complexity and Location Allowances for the period to 31 December 2009. They were also directed to confer as to any entitlement to long service leave and travel allowance.
- 3 The parties advised that they had conferred without resolving the matter. The Commission convened on 12 December 2005 to hear from the parties as to the progress of their discussions. It was resolved at that hearing that the respondent would make written submissions within seven days and the applicant was to reply within a further seven days, as to the amounts due as a consequence of the Reasons for Decision. Those written submissions have been received.
- 4 The applicant's submissions are that the amounts due are as follows:
 - "1. The parties are in agreement as to the amounts of the various items to be considered in relation to the claim for denied contractual benefits. The amounts are as follows:
 - (a) Salary - \$79,774.00
 - (b) "Allowances":
 - (i) remote towns - \$3,340.00 per annum;
 - (ii) country complexity allowance - \$2,505.00 per annum;
 - (iii) location allowance - \$3,027.36 per annum.
 - (c) Paid maternity leave – 6 weeks @ \$1,704.73 per week or \$10,228.38. This amount is agreed by the respondent in terms of the amount and also that the respondent should pay the applicant the amount.
 - (d) Expenses:
 - (i) removal expenses - \$3,818.81;
 - (ii) accommodation - \$88.00;
 - (iii) travel - \$960.00

The respondent has agreed the expenses amounts and also that these amounts should be paid to the applicant."
- 5 The applicant also seeks payment of superannuation contributions of 9% on the basis that the Deed of Agreement provided:

"The employer shall contribute to an approved superannuation fund in an amount equal to that determined by government legislation".

(Clause 9.1)
- 6 The applicant also seeks payment for long service leave, for pro rata leave said to be due as at 31 December 2004, of 22.806 days, plus a further entitlement which it is said would have accrued to 31 December 2009. This latter amount would have been 52 days taking account of the year's maternity leave the Commission determined ought be provided for.

- 7 It appears from the respondent's submissions that the respondent agrees with the applicant's identification of the amounts, but in respect of base salary, allowances, superannuation and long service leave, disputes whether they are payable.

Allowances

- 8 The first issue is that of salary. The applicant says that the salary is inclusive of the allowances and is therefore \$88,646.36. The country allowances are said to have been expressly incorporated into Mrs Grigson's salary as part of her overall salary without reference to the requirement that she actually serve at the remote location. Mrs Grigson says that situation might be different if the allowances were additional amounts payable pursuant to the Award or any Enterprise Agreement, however, they were incorporated into the amount of the contractual salary and are simply a contractual benefit.
- 9 In the Reasons for Decision, I referred to *Chevrontexaco Australia Pty Ltd (Formerly Chevron Australia Pty Ltd) -v- Anthony Richard Ross* (2004)(84 WAIG 3120). Mrs Grigson says that the circumstances in that case were quite different in that the allowances claimed in that case were not part of the applicant's contract with the employer, were not payable because they were conditioned in such a way as to only be applicable during the term of overseas service. Mrs Grigson says that this is not the case in respect of the allowances applicable to her salary and they were not conditional upon her serving in the country or at any particular school. In the alternative, she says that the benefits should be considered in the context of compensation for unfair dismissal as a loss which she will suffer.
- 10 The respondent says that the Remote Towns, Country Complexity and Location Allowances do not form part of the denied contractual benefits for the applicant. The allowances are derived from the Catholic Education Office's Remote Area Package and are paid to teachers in acknowledgement that:
- “...principals and teachers in these schools live and work in conditions vastly different from those encountered in the metropolitan area...”.
- (Exhibit A48)
- 11 The respondent also says that Exhibit A48 contains a schedule setting out the rates payable dependent on the location and the size of the school. This schedule was not attached to Exhibit A48 and was attached to the respondent's submission as “RS1”. This sets out the salaries and allowances scales Principals, Deputy Principals, Heads of Primary/Secondary in the following terms:

**“SALARY SCHEDULE
PRINCIPALS, DEPUTY PRINCIPALS,
HEADS OF PRIMARY/SECONDARY
PARAMETERS FOR THE SALARY DETERMINATION OF LAY
PRINCIPALS IN DIOCESAN-ACCOUNTABLE SCHOOLS**

NB: The enrolment numbers are based on the July census of each year. If there is a variation in enrolment numbers, salary rates are only adjusted by consultation with the Director or through the Principal's review process. Kindergarten enrolment numbers are based on FTE for salary purposes.

DATE OF OPERATION: FROM 1 JULY 2004

SECONDARY / PRIMARY PRINCIPALS

ENROLMENT

		Base Salary
Category 1a	<100 (Primary only)	\$80,649
Category 1	100 – 149	\$87,318
Category 2	150 – 299	\$90,652
Category 3	300 – 449	\$97,314
Category 4	450 – 599	\$100,647
Category 5	600 – 749	\$105,647
Category 6	750 – 899	\$108,979
Category 7	900 – 1050	\$112,314
Category 8	>1050	\$115,646

COUNTRY SCHOOL ALLOWANCE

Area 1	Small rural cities	\$835
Area 2	Rural towns	\$1,670
Area 3	Remote towns	\$3,340
Area 4	Remote centres	\$5,010
Area 5	'Desert'	\$6,678

BOARDING

<100 students	\$5,010
>100 students	\$6,678

SPLIT CAMPUS ARRANGEMENTS \$5,010

SCHOOL COMPOSITION

K – 10	\$1,670
K – 12	\$3,340

DATE OF OPERATION:—continued**FROM 1 JULY 2004****SPECIAL STUDENT CHARACTERISTICS**

(including special education units, new arrivals units, majority Aboriginal enrolment)

For each characteristic \$1,670

SECONDARY SCHOOLS

Deputy Principals

88% of the Principal at the school's base salary.

ENROLMENT

		Base Salary
Category 1a	<100 (Primary only)	\$70,971
Category 1	100 – 149	\$76,840
Category 2	150 – 299	\$79,774
Category 3	300 – 449	\$85,636
Category 4	450 – 599	\$88,569
Category 5	600 – 749	\$92,969
Category 6	750 – 899	\$95,902
Category 7	900 – 1050	\$98,836
Category 8	>1050	\$101,768

COUNTRY SCHOOL ALLOWANCE

100% of the country school allowance of the Principal at the same school.

COMPOSITE SCHOOLS K-12

Head of Primary / Head of Secondary /

Deputy Principal (with responsibility for the secondary section only)

88% of the base salary of an equivalent enrolment size stand alone primary or secondary school Principal's salary.

ENROLMENT

		Base Salary
Category 1a	<100 (Primary only)	\$70,971
Category 1	100 – 149	\$76,840
Category 2	150 – 299	\$79,774
Category 3	300 – 449	\$85,636
Category 4	450 – 599	\$88,569
Category 5	600 – 749	\$92,969
Category 6	750 – 899	\$95,902
Category 7	900 – 1050	\$98,836
Category 8	>1050	\$101,768

COUNTRY SCHOOL ALLOWANCE

100% of the country school allowance of the Principal at the same school.

Country complexity allowance (for Head of Primary at country composite school);

for a single stream school \$2,505

for two or more streams \$4,175

Country complexity allowance (for sole Deputy at country composite school);

for 8 – 10 schools \$4,175

for 8 – 12 schools \$6,678

- 12 The respondent says that the allowances "are paid as an incentive to principal and teachers to take up positions in remote schools and to compensate them for the disadvantages associated with living and working in these areas" (paragraph 11 – respondent's submission). The allowances are said to be paid only where the teacher or principal works in the area for which the allowances are compensation. It is said that because the applicant no longer works or resides in a remote area and does not suffer the disabilities associated with living and working in the remote area that there is no entitlement to the allowances as part of the denied contractual benefits claim.

Conclusions

- 13 Having considered the submissions of the parties in respect of the salary and its components, I note that the applicant's salary was to have been set out in the Appendix to her contract of employment, the Deed of Agreement (Exhibit A10) ("The Second Deed"). The Appendix to the Agreement provides:

"Salary stated here ... I.e. Including all allowances e.g. Country complexity, district, etc".

- 14 However, no amount or amounts were actually specified. In addition, the Head of Primary was eligible to receive "all allowable benefits from the Pilbara Package."
- 15 Interestingly, Exhibit A7 which was the First Deed of Agreement for Mrs Grigson as Head of Primary, set out her salary for the period of 1 January 2000 until 31 December 2001 as being a base salary of \$59,303.00, plus Country Complexity Allowance of \$1,859.00 and District Allowance of \$2,413.00. In addition there was the Pilbara Package.

16 Exhibit A52, the salary schedule for Heads of Primary and Assistant Principals (Admin) shows the salary for Head of Primary from 1 January 2005 as being \$79,774.00, the Country School Allowance for Area 3 - Remote Towns was \$3,340.00, the Country Complexity Allowance was \$2,505.00 and the Location Allowance was \$3,027.36. The total annual salary was \$88,646.36.

17 Exhibit A48 is the "Summary Guide To The Remote Area Package as provided for in Schedule 1 of the Western Australian Catholic Schools Enterprise Bargaining Agreement 2000, and Teacher Housing Scheme" ("the Remote Area Package"). "Section 2 – Introduction, 2.1 – What Are We Trying To Achieve?", says:

"The schools where teaching staff are being offered the Remote Area Package and Teacher Housing Scheme incentives are some of the most remote in the world. A number of the schools have a predominantly Aboriginal population. Not surprisingly these schools are distinctively different from other schools in terms of:

- Isolation;
- Distance from the town centre;
- Distance from Perth;
- Educational needs; and
- Cultural, social, climatic and recreational environments.

The Remote Area Package acknowledges that principals and teachers in these schools live and work in conditions vastly different from those encountered in the metropolitan area, through the provision of a range of financial incentives.

The Catholic schools mentioned in this booklet are indebted to the Bishop of each diocese for his support and commitment to providing low rent accommodation for teachers. Many buildings are still incurring considerable loan repayments, maintenance costs are high and many of the houses are in remote, difficult to access areas. This aside, every effort is made to provide adequate accommodation for all eligible teaching staff.

The provision of these incentives is one aspect of the Catholic Education Office's commitment to serving these Catholic communities – promoting Catholic education, providing schools with support and encouraging visionary Christian leadership, for the purpose of promoting the Church's mission to transform society."

(page 4)

Location Allowance

18 The Introduction to Section 3 of the Remote Area Package says:

"This package introduces a set of allowances and conditions for teachers in schools that currently receive a Location Allowance as prescribed in the Western Australian Catholic Schools Teachers Enterprise Bargaining Agreement and are employed under said Enterprise Bargaining Agreement. While some of these conditions apply to Principals, Deputy Principals, Heads of Primary and Heads of Secondary, the specific conditions should be included as an Appendix in each individual's Deed of Agreement."

19 Section 3.1 categorises schools covered by the Package as including Port Hedland as a Town Centre.

20 The Location Allowance is defined in the Remote Area Package (Exhibit A48) as:

"3.4 Location Allowances

- a) Location Allowances are provided to assist in offsetting the additional living expenses incurred in remote and isolated areas."

21 Clearly, the Location Allowance is applied to the location in which the work was performed. Where that location was no longer the place of work then the additional living expenses were no longer being incurred, and no such allowance would be payable. Whilst living in Perth, Mrs Grigson is not incurring any additional living expenses associated with living in remote or isolated areas. Therefore, she is not entitled to the Location Allowance as part of her salary.

Country School Allowance

22 The document referred to earlier, headed "Salary Schedule – Principals, Deputy Principals, Heads of Primary/Secondary" (RS1), sets out Country School Allowances according to areas, which describes the range of locations from "Small rural cities" to "Desert". The Country School Allowance for Area 3 – Remote towns was \$3,340, the same description and amount as set out in Exhibit A52, the Salary Schedule. It is apparent that the allowance varies according to the area. Clearly, the Country School Allowance relates to the school being in a remote town.

23 From the time she left Port Hedland, Mrs Grigson was no longer working in the country, and was not working in a school which was in a remote town as defined for the purposes of the Country School Allowance. Therefore, there is no entitlement to this allowance.

Country Complexity Allowance

24 The Country Complexity Allowance is given definition only in the salary schedule referred to in paragraph 11 above (RS1), under the second heading of Country School Allowance. It states, amongst other things:

"Country complexity allowance (for Head of Primary at country composite school)".

25 For a single stream school, the allowance is \$2,505, and for two or more streams, \$4,175.

26 The salary schedule sets out an earlier heading of "Composite Schools K – 12". I take this to mean that a composite school is one which incorporates kindergarten through to year 12. The applicant's position was as a Head of Primary in the school which was made up of two campuses, the primary and secondary, under the one principal. It would appear to have been a composite school, thus attracting the Country Complexity Allowance, as reflected in the Appendix to the Deed of Agreement. Therefore, I conclude that the Country Complexity Allowance relates to the circumstances of a country school and whether it was made up of one or more streams. Once Mrs Grigson ceased at the school, she was no longer working in a country school associated with the number of streams at the school for which an allowance was payable. Accordingly, there is no entitlement to the Country Complexity Allowance.

27 Once she left Port Hedland, Mrs Grigson was not experiencing the circumstances which warranted incentives and compensation for the disadvantages associated with living and working in a remote area, in the country, in a composite school, which would bring an entitlement to the Remote Towns, Country Complexity or Location Allowances.

28 Accordingly, Mrs Grigson's salary for the purposes of her denied contractual benefits is \$79,774.00.

Mitigation

29 As to the issue raised by the respondent regarding Mrs Grigson mitigating her loss of salary as a denied contractual benefit, the respondent says:

“... In awarding the applicant any amount under the Deed, when the time for satisfaction of the requirements of the Deed has not yet passed, the Commission must take into consideration all of the circumstances, including whether the applicant has or will be able to mitigate the loss arising from a failure to meet future contractual obligations of the Deed.”

30 The respondent says that the applicant will be able to secure appropriate employment and thus mitigate the loss arising from the failure to meet future contractual obligations and therefore, will suffer no loss or alternatively minimal loss of contractual entitlements. Therefore, the respondent submits that there should be no payment awarded to the applicant or that the award should be a maximum of one year's base salary.

31 The respondent had previously raised the issue of the Mrs Grigson not mitigating her contractual loss in the course of the substantive hearing on which my Reasons for Decision of 24 November 2005 are based. (transcript pages 162 – 163). My Reasons for Decision in paragraph 100 noted that:

“... I find that the respondent has breached the contract and by virtue of this breach Mrs Grigson was not allowed the benefit of working for the unexpired period of the contract and thus receiving the salary attached to that unexpired period. According to *Perth Finishing College Pty Ltd v Susan Watts* ((1989) 69 WAIG 2307 at 2316-17), the employee is entitled to receive the benefit of the remuneration attached to the unexpired period of the fixed term contract. Therefore, Mrs Grigson is entitled to payment of salary at the rate of \$79,774.00 per annum until 31 December 2009.”

32 It is not my intention to revisit that matter.

Superannuation

33 The Deed of Agreement makes provision for the payment of superannuation contributions by the respondent in the following terms:

“9.1 The Employer shall contribute to an approved superannuation fund an amount equal to that determined by Government legislation.

Or

...”

(Exhibit A10)

34 The applicant says that superannuation contribution is a contractual benefit because its arrangements are set out in the Deed. If the contract had been silent, then the entitlement to superannuation would simply have been reliant on the Superannuation Guarantee Charge Administration Act (“SGC Act”) and not been a contractual entitlement. As the amount of the contribution referred to relies on the SGC Act, and that amount is 9%, then Mrs Grigson says she is entitled to a contractual benefit of contributions of 9% per annum being made to the superannuation fund for 4 years, to 31 December 2009.

35 The respondent says that the superannuation entitlement does not arise pursuant to the contract as it merely reflects and refers to the SGC Act.

36 Having examined the terms of Clause 9.1 of the Deed, I note that it requires the employer to make a contribution to “an approved superannuation fund”, the amount of the contribution being governed by statute. The Deed does not define “an approved superannuation fund”. It defines only the alternative “Superannuation Fund” being the Catholic Schools Superannuation Fund (WA) (clause 2.1.10). To determine the approved superannuation fund, the amount of the contribution and all other matters, the contract refers to the scheme of superannuation determined by government legislation. That is the SGC Act. Accordingly, no contractual entitlement arises separate from the legislated entitlement, and therefore it cannot be enforced pursuant to s.29(1)(b)(ii). See *Eleanor Angela Keane v Lomba Pty Ltd* (FB) (1998) 78 WAIG 810.

Long Service Leave

37 The Second Deed provides for Long Service Leave in the following terms:

“10.3 **Long Service Leave**

10.3.1 The Head of Primary shall be entitled to paid long service leave for each year of service within the Catholic Education system; such leave will accrue at the following rates:

- (a) up to ten years of continuous service, 9.1 calendar days for each year of service;
- (b) for each subsequent year, 13 calendar days for each year of service.

10.3.2 For any service prior to 1st January 1995, the provisions of long service leave shall be that accrued on the basis of 91 calendar days long service leave for each ten (10) years of continuous service.

10.3.3 For the purposes of this clause the calculation of the continuous years of service by the head of Primary to the Employer shall be made from the day upon which the Head of Primary first commenced employment with the Employer either pursuant to this agreement or pursuant to any similar agreement preceding this agreement or in the capacity as a school teacher in the employ of the Employer under any written or oral agreement.

10.3.4 The Head of Primary who, on or from the 1st day of January 1995, has accrued a minimum entitlement of 70 calendar days long service leave shall be entitled to take such leave.

10.3.5 Where the Head of Primary has become entitled to a period of long service leave in accordance with this clause, the Head of Primary shall commence such leave within two (2) years and no later than five (5) years of the accrual date of such leave.

10.3.6 Long service leave is to be taken in one continuous period except that, by agreement with the Employer, the leave may be taken in separate periods of not less than one week.

10.3.7 The Employer and the Head of Primary may agree that the Head of Primary forgo her/his entitlement to long service leave if:

- (a) the Head of Primary accepts as an adequate benefit instead of the taking of long service leave, payment of the amount that would otherwise have been paid to the Head of Primary should the long service leave been taken;
- (b) any agreement between the Employer and the Head of Primary to forgo the long service leave is in writing.

- 10.3.8 The Head of Primary shall advise the Employer no later than the completion of Term 3 of the preceding year of the Head of Primary’s intention or otherwise to take leave.
- 10.3.9 The Head of Primary continues to accrue long service leave for any period during which the Head of Primary is absent on full pay on approved leave; long service leave does not accrue for any period exceeding two weeks during which the Head of Primary is absent on unpaid leave.
- 10.3.10 For the purposes of calculating long service leave, the Employer shall allow a break of service of up to six (6) months without penalty to the Head of Primary. Such a break in service shall be deemed leave without pay for the purpose of calculating the Head of Primary’s entitlement.
The provisions of this sub-clause shall not prevail if the Head of Primary has been paid a pro-rata payment for accrued long service leave at the time of break in service.
- 10.3.11 Vacation leave observed by the school shall count for the purposes of calculating the Head of Primary’s entitlement to long service leave.
- 10.3.12 Any public holiday which occurs during the period the Head of Primary is on long service leave shall be treated as part of the long service leave and extra days in lieu shall not be granted.
- 10.3.13 Payment for the period of long service leave taken shall be made in full before the Head of Primary goes on long service leave or else by agreement between the Head of Primary and the Employer.
- 10.3.14 Where the Head of Primary has completed at least 7 years service but less than 10 years service and employment is terminated:
 - (a) by the Head of Primary’s death; or
 - (b) in any circumstances, otherwise than serious misconduct;
 the amount of leave shall be such as accrued under the provisions of subclause 10.3.1
- 10.3.15 In the case to which sub clause 10.3.14 applies and in any case in which the employment of the Head of Primary who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the Employer shall, upon termination of employment otherwise than by death, pay to the Head of Primary, and upon termination of employment by death, pay to the personal representative of the Head of Primary upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which the Head of Primary is entitled or deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the Employer in respect of long service leave.
- 10.3.16 Accrued long service leave entitlements are portable between all Catholic schools in Western Australia and those schools that are party to the Catholic Schools Long Service Leave Interstate Portability Agreement.”

(Exhibit A10)

- 38 According to Clause 10.3.1, the long service leave entitlement arises from service within the Catholic Education System. Mrs Grigson had been engaged in that system from 1993, when she originally commenced with the respondent. She then worked at St Joseph’s School in Busselton as a teacher for 2 years before returning to the respondent in 1998. Accordingly, at the time of the termination of her employment with the respondent on 31 December 2004, she had been engaged in the Catholic Education System for 11 years.
- 39 In accordance with Clause 10.3.9 and 10.3.10, the two periods of unpaid maternity leave taken by Mrs Grigson for the year 2002 and from July 2003 to July 2004 do not accrue long service leave.
- 40 Further, according to Clause 10.3.14, a period of service of at least 7 years is recognised in circumstances of termination of the employment other than for misconduct, for the purposes of an entitlement to payment. That payment is calculated by reference to the amount of leave referred to in clause 10.3.1, being 9.1 calendar days for each year of service up to 10 years.
- 41 Therefore, Mrs Grigson is entitled upon termination to long service leave of 9.1 calendar days for each year of service, i.e. 9 years. This provides an accrual of 81.9 calendar days long service leave. Therefore, she has such an entitlement to payment, calculated at her salary at the time of termination of employment.

In Summary

- 42 Mrs Grigson has an entitlement to denied contractual benefits of salary of \$79,774.00 for 4 years, plus accrued long service leave of 81.9 calendar days pay at the salary of \$79,774.00. The amounts for expenses of \$3,818.81 for removals, \$88.00 for accommodation, and travel of \$960.00 are agreed by the parties.
- 43 There is no entitlement to superannuation contributions as a contractual benefit. The Remote Towns, Country Complexity and Location Allowances are not to be included in the calculation of salary.

2006 WAIRC 03931

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CARMELINA GRIGSON	APPLICANT
	-v-	
	THE ST CECILIA'S COLLEGE SCHOOL BOARD	RESPONDENT
CORAM	COMMISSIONER P E SCOTT	
DATE	FRIDAY 10 MARCH 2006	
FILE NO	APPL 1555 OF 2004	
CITATION NO.	2006 WAIRC 03931	

Result Denied contractual benefits of salary, expenses and long service leave granted

Order

HAVING heard Mr G Stubbs (of Counsel) on behalf of the applicant and Mr P McGowan (of Counsel) and with him Mr M Jensen (of Counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby:

1. DECLARES that Ms Carmelina Grigson was unfairly dismissed by the respondent.
2. DECLARES that reinstatement is impracticable.
3. ORDERS that the respondent shall pay to Carmelina Grigson the following amounts being contractual entitlements:
 - (a) 4 years salary at the rate of \$79,774.00 per annum.
 - (b) 6 weeks' salary, being \$10,228.38, as paid maternity leave.
 - (c) 22.806 calendar days' pay as accrued long service leave.
 - (d) Expenses of:
 - (i) \$3,818.81 for removals,
 - (ii) \$88.00 for accommodation,
 - (iii) \$960.00 for travel.
4. The amounts set out in:
 - (a) paragraph (a) of Order 3 shall be paid within 28 days.
 - (b) paragraphs (b), (c) and (d) of Order 3 shall be paid forthwith.
5. The application otherwise be, and is hereby dismissed.

[L.S.]

(Sgd.) P.E. SCOTT,
Commissioner.

2006 WAIRC 04095

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	EDWARD JOHN IZYDORSKI	APPLICANT
	-v-	
	ANTHONY & SONS PTY LTD T/AS OCEANIC CRUISES	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR	
HEARD	TUESDAY, 11 OCTOBER 2005, MONDAY, 23 JANUARY 2006	
DELIVERED	MONDAY, 3 APRIL 2006	
FILE NO.	APPL 379 OF 2005	
CITATION NO.	2006 WAIRC 04095	

CatchWords	Termination of employment – unfair dismissal – principles applied – onus not discharged – <i>Industrial Relations Act, 1979</i>
Result	Dismissed
Representation	
Applicant	Mr M. Barrett-Lennard of Counsel appeared for the Applicant
Respondent	Mr D. Johnston appeared for the Respondent

Reasons for Decision

- 1 This application was filed in the Commission on 11th April 2005 by Edward John Izydorski (the Applicant). The Applicant alleges that he was dismissed by Anthony & Sons Pty Ltd t/a Oceanic Cruises (the Respondent) on or about 30th March 2005. By his application he seeks an order for compensation from the Commission on the grounds that the dismissal was harsh, oppressive and unfair. The original application also sought contractual benefits in the sum of \$641.45 being an amount of money said to be due under the contract of employment for Telstra, internet, fuel and lunches which was not paid at the completion of the contract of employment. Concerning the alleged unfair dismissal the Applicant seeks a remedy of compensation, he does not seek reinstatement.
- 2 The Commission heard evidence concerning contractual benefits claim but on exposure of the evidence the parties agreed that the matter could be settled between them. During the hearing they had a private discussion and later informed the Commission that the Respondent had agreed to pay the Applicant the sum of \$600.00 in settlement of that part of the claim. Neither party seeks orders concerning that settlement and the claim of contractual benefits will be dismissed.
- 3 In essence the Applicant's claim is that he was appointed in July 2004 to be the Marketing Manager of the Respondent. He entered into a contract of employment for a period of three months, coincidentally that period being a period of probation. It is common ground that during that three months there were discussions between the parties, apparently based on the

dissatisfaction of the Respondent with the performance of the Applicant. This led them to make a new contract of employment which was executed by them on or about 20th October 2004, at least that is the date that it was signed.

- 4 There is some assistance as to the duration of the probationary period in clause 10.1 of the contract (Exhibit B1) which provides that the employment would be 'adjusted' to a five month probation period commencing on the 19th October 2004. The clause provides that during that period both parties will be entitled to terminate the contract on 'four weeks notice without cause'. The drafting of this clause supports the contention that there was a previous probationary period which was 'adjusted' by the making of this new contract.
- 5 The contract is extensive, it sets out the working hours, provides that the Applicant would perform his responsibilities at the Company's office as well as being able to work from home premises, he would be entitled to access all relevant documents with regard to his position via the internet. He would also be required to perform work at areas away from the office. The contractual provision referring to a laptop computer used by the Applicant became a matter of contention between the parties on the complaint of the Respondent that the Applicant never produced any written reports always referring to his electronic record on the laptop which the Respondent says they never saw.
- 6 The contract also contained what might be described as standard conditions in an employment contract for instance, four weeks annual leave, ten days sick leave, long service leave after 10 years continuous service. There are also provisions for superannuation, requirements for dress and conduct and workers compensation. There is a salary and benefits clause which sets out the remuneration as well as money payments to which the Applicant was entitled for an internet connection at his home, recompense for the use of a mobile phone, free cruises for himself and family limited to four trips a year with a discount on trips for close family and friends. There was also a provision that he would go to the Australian Tourism Expedition in Melbourne in 2004 approximately four weeks after he had a knee reconstruction.
- 7 These things are all mentioned in the contract of employment as is confidentiality and a detailed description of the duties. These duties are set out below:

"11. Duties

11.1 You will be responsible for the marketing of Anthony and Sons ferry and charter services in all respects.

11.2 Your responsibilities will require you to familiarize yourself with:

- a) The markets available for the Company and products and services;*
- b) The products and services offered by the Company's competitors;*
- c) Developments in the Company's business in other markets not serviced by the company's;*
- d) Industry trends.*

11.3 You will within 6 months of your employment review the Company's operations prepare for the Company directors;

- a) Review the Company's marketing activities; and*
- b) A plan for the future marketing of the company over the ensuing 3-5 years.*

11.4 You will make personal contact with commercial tourism operators and agents with a view to securing for the Company the custom those operators might bring.

11.5 You will review the Company's marketing for social functions and social groups and include in the business plan a strategy to increase the Company's penetration of this marketing segments.

11.6 You will review and advise the Company as to the scope for development of new market segments.

11.7 You are to work with Catherine for inbound and agency bookings and etc.

11.8 You are to look after all brochures as different seasons start to produce and create new concept of tours in discussion with managers.

11.9 You are to have meetings with staff in order to inform them of new products.

11.10 you are required to deal and negotiate with the RIA as matters arise in reference to all matters in negotiation with Tony.

11.11 You are to negotiate in all matters such as package deals with the Rottnest Lodge, Rottnest Hotel, Rottnest Bike Hire and etc with DPI when matters arise in negotiation with Tony, with Swan River Trust, Wineries and etc."

- 8 The contract also provides a mechanism for termination. The contract could be terminated by the Respondent giving the Applicant, at any time, not less than one month's notice irrespective of his length of service. The right was reserved to the Respondent to pay the Applicant one month's salary in lieu of notice. Insofar as the Applicant's rights on termination are concerned he was required to give one month's notice. If he did not the Respondent could deduct from any amount owing the amount of salary that would have been earned during the period between the termination date and one month from the date of giving the notice. This policy was said to apply after the completion of the probationary period.
- 9 It seems from that provision that Clause 10. - Probationary Period wholly set out what would happen between the parties concerning termination of the contract if it was associated with the completion of the probation period.
- 10 It is said by the Respondent that the probationary period of employment was adjusted from six months down to five months at the request of the Applicant because that coincided with the commencement of Easter break in 2005 because he was of a mind that by that time he could have other interests to follow. This is said to be important in the case because it indicates a predisposition on the part of the Applicant that it might be that the relationship would not continue after the completion of the probationary period. In fact the probationary period was adjusted to suit his requirements.
- 11 As it transpired the arrangements concerning probation were brought into effect by the Respondent when in March 2005 it caused the Applicant to be served with a letter which terminated the contract of employment. The letter formal parts omitted appears hereunder:

"Dear Eddie

Re: Marketing Manager's Position

After some consideration in reference to the above, I regretfully wish to inform you that I am unable to offer you further employment after your probation period expires on the 19th of March 2005.

In lieu of four weeks notice, you will be paid four weeks wages, plus holidays owing to you.

In accordance to your contract, section 9 confidentially, (sic) kindly return all documents and files stored in your laptop computer or any further materials relating to oceanic cruises.

As from the 20th March 2005, your home internet and mobile phone charges will no longer be the (sic) paid by Oceanic Cruises, the vehicle supplied to you while employed by Oceanic Cruises is to be returned in good condition.

We wish you all the best in the future and we thank you for your contribution and effort while you were employed by our company.

Yours sincerely

Tony DiLatte

Managing Director”

- 12 There is some argument between the parties about when and if this letter was served upon the Applicant. The principal of the Respondent, Mr Anthony DiLatte, says that the letter was placed on the Applicant's desk but it may not have come into his possession until later. Ultimately not much turns upon the date that he may have received the document because it is otherwise clear between the parties that the relationship was to be brought to an end. For the Applicant's part he says that he performed all of the duties that are set out in clause 11. Duties of the Contract of Employment and that he was surprised when the relationship was brought to an end. As far as he was concerned he says that Mr DiLatte had told him that he was dismissed because "You just don't see [it] the way I see it".
- 13 The Applicant says that he was under a three month probation period which he successfully completed in mid September 2004. There was industrial action by all the Respondent's workers during November 2004 when there was a strike about safety and rates of pay. The Applicant says it was after this time beginning some time in December 2004 that Mr DiLatte said he wanted to extend the probationary period and the contract which has been submitted to the Commission was in effect back dated so that the probation period extended through to March 2005. At no time was he told that he was not performing well nor was he told he was not suited for the work. He had been involved in tourism for 15 years and was thoroughly skilled in the area. He had his own ABN number registered and had worked as a consultant for the Australian Tourism Commission which is a far more august body than the Respondent's operation. His view of the Respondent's method of operation dealing with the staff is that they use intimidation as a weapon. He says that in all of the circumstances the termination was unfair.
- 14 In its submissions the Respondent acknowledges that there was an initial agreement entered into about 19th July 2004 but there was a second contract of employment executed later. The Respondent denied that the second contract had anything to do with industrial action; this was clear from the evidence of Mrs DiLatte that she dated the document 20th October 2004. The Applicant had received this document in September prior to the expiry of the initial probation period and proof of this is that on receipt the document was sent by him to his legal representative. It is not the case that the contract was presented towards the end of 2004 around the time of industrial action. The Applicant was in receipt of the document in or around September 2004, apparently sought advice about it, and on the evidence of Mr DiLatte signed it on or about 20th October 2004. Mrs DiLatte also said she had a conversation with the Applicant around that time during which he acknowledged to her the extended probation and was not unhappy about it. What the document does, says the Respondent, is make it clear that there were concerns about the Applicant's performance in September 2004 and certainly by October 2004. So much so that the Respondent was unwilling to confirm the engagement as a marketing manager after the three months probation period and wished to extend the period for a further six months which, at the Applicant's instigation, was reduced to five months so that it finished on 19th March 2005. He was well aware from October 2004 on that his performance was not up to standard required by the Respondent and that the concerns about his performance was ongoing.
- 15 From the Respondent's point of view there is an abundance of evidence which shows that the duties which are set out in clause 11.1 through to 11.11 were not performed to the standard required by the Respondent. This clause clearly set out what the Applicant was required to achieve. He did not comply with the requirements of the contract, including reviewing marketing activities, planning marketing strategy up to five years into the future and developing new markets. The Respondent became aware of these failures in September and October 2004 and told the Applicant that his performance was unsatisfactory. Over the ensuing period which did include the industrial disruption, there were other instances where disquiet about his performance was made clear to him. For instance, the Respondent found it necessary to raise with him careless language used between him and a competitor of the Respondent about the alleged sale of a vessel and the financial health of the business. There was also concerns consistently raised with him about excessive telephone calls and lunches. It was made clear to the Applicant that the Respondent was not happy with the way he was conducting himself in relation to that type of expenditure.
- 16 Ms Wardrope, the Applicant's subordinate, and Mrs DiLatte's evidence is that there was a reluctance by the Applicant as a marketing manager to deal properly with the clients. Ms Wardrope's evidence about that is enlightening. Even minor issues such as identifying himself on the telephone were raised with him by Mrs DiLatte.
- 17 All of this led the Respondent to conclude that the Applicant was not committed to the business and even may have been running his own business on the side using their resources. Although the Respondent admits there is no direct evidence of such conduct, there is certainly strong circumstantial evidence which would suggest it happened. The other issue was the reluctance to put things in writing. The Respondent never saw any written reports. When asked about the reports the Applicant would always respond they were on his laptop but these electronic records were never produced.
- 18 According to the Respondent the Applicant had been told from 20th March 2005 that the phone charges would not be paid any more and that four week's notice would be paid in lieu. It is the evidence of Mr DiLatte that on 30th March 2005 when he terminated the employment of the Applicant he expressed no surprise at all. According to Mr DiLatte the Applicant said he had been expecting it. If the dismissal did take place after the probation period had finished the Respondent says that the termination is consistent with the explicit terms of the contract in any event and on that basis the Respondent was comfortable with the termination of employment at the time that it took place.
- 19 The preceding is sufficient summary of the facts to allow the Commission to draw conclusions about the outcome of this matter.
- 20 The Commission heard evidence from the Applicant in person. It must be said that this case was conducted in an unusual way by Counsel for the Applicant. There was limited evidence in chief from the Applicant's Counsel who attempted to build his case through the Respondent's witnesses, who were subject to a detailed exhausting forensic cross examination by Mr Barrett-Lennard.
- 21 Insofar as credibility is concerned I have some unease about the way the Applicant gave his evidence, his responses in cross examination were less than convincing and I have doubts about the amount of weight which should be given to his evidence. Insofar as Mr Antonio DiLatte is concerned he was subject to a detailed cross examination. Even though at times his answers were confusing or confused the general thrust of his evidence remained undisturbed by the detailed cross examination by Mr

Barrett-Lennard. Considering his evidence carefully there is no reason to believe that he has not told the Commission the truth to the best of his knowledge. Insofar as Gabrielle DiLatte is concerned her evidence in chief is untouched by the cross examination. She appears to be a witness of truth and I accept her evidence as being credible. I say the same for Ms Wardrope the employee who was subordinate to the Applicant. Her evidence is credible.

- 22 The evidence of Mr DiLatte is corroborated by the evidence of his wife Gabrielle DiLatte and if further corroboration was required it comes very strongly from the evidence of Ms Wardrope who in effect supported the allegations the Respondent makes through its evidence from Antonio DiLatte and Gabrielle DiLatte. Having considered the evidence carefully I have concluded that where the evidence of the Respondent differs from the evidence of the Applicant I favour the evidence of the Respondent.
- 23 I find that the Applicant entered into a contract of employment with the Respondent, the first contract was replaced by a detailed contract of employment which carries the date 20th October 2004, I reject the evidence that this contract was concocted sometime after that date and back dated. I accept the evidence of the Respondent that the Applicant had the knowledge of the contract in September 2004 and that he, on the evidence, understood its contents particularly in respect of the duties.
- 24 I find that the Applicant had been evasive about the way he went about his duties and that there were many occasions when either Gabrielle DiLatte or Antonio DiLatte had drawn to his attention their concerns. I find that the Applicant was inclined to gild the lily in his evidence about the changes that he allegedly introduced to the cruises conducted by the Respondent. More likely than not any changes he made were around the periphery of established routines that the Respondent used to conduct its operations. I find the Applicant did not present marketing plans as he was required to. I find that he never produced any documentation, if he had no doubt it would have been presented to the Commission to support his contentions. Nor were any electronic records produced to support his contentions. It is open to conclude therefore that these requirements of the contract of employment were never executed by him.
- 25 At the end of the day the evidence is overwhelming that the Applicant's attention to his duties was far less than was promised by him at engagement particularly given his long experience in tourism. But that is not to say the Applicant is inexperienced in tourism but it appears that it is that experience was not translated to the benefit of the Respondent as was anticipated when the parties entered into this contract of employment.
- 26 For all those reasons the Commission has concluded that the Applicant has not discharged the onus of proof which lies upon him to prove that there has not been a fair go all round as set out in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985) 65 WAIG 385*, for that reason the application will be dismissed.
- 27 There is no need therefore for the Commission to record a concluded position whether the Applicant was dismissed during a probation period. If he had been the law is the employer was entitled to regard the relationship as being at the first interview. The test for termination in that case is at a lesser standard than that for a dismissal once a contract is on foot (*East Kimberley Medical Service v Australian Nursing Federation (2000) 70 WAIG 3158* and *Sommerville v Brinzz Pty Ltd (1994) SAIR Comm 8*).
- 28 On the findings above even assuming the contract was not subject to probation at the time of dismissal, the Applicant was not unfairly dismissed.

2006 WAIRC 04096

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION EDWARD JOHN IZYDORSKI	APPLICANT
	-v-	
	ANTHONY & SONS PTY LTD T/AS OCEANIC CRUISES	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR	
DATE	MONDAY, 3 APRIL 2006	
FILE NO/S	APPL 379 OF 2005	
CITATION NO.	2006 WAIRC 04096	

Result Dismissed

Order

HAVING heard Mr M. Barrett-Lennard, of Counsel, who appeared on behalf of the Applicant and Mr D. Johnston who appeared 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 for unfair dismissal and contractual benefits is dismissed.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 03980

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AMANDA JACKSON	APPLICANT
	-v- HELEN NEWLAND	RESPONDENT
CORAM HEARD DELIVERED FILE NO. CITATION NO.	SENIOR COMMISSIONER J F GREGOR WEDNESDAY, 25 JANUARY 2006 MONDAY, 20 MARCH 2006 U 58 OF 2005 2006 WAIRC 03980	

CatchWords	Termination of employment – unfair dismissal – extension of time to lodge application – principles applied – <i>Industrial Relations Act, 1979 s.29</i>
Result	Dismissed
Representation	
Applicant	Ms A. Jackson appeared on her own behalf
Respondent	Mr P. Brunner of Counsel appeared on behalf of the Respondent

Reasons for Decision

- 1 This is an application by Amanda Jackson (the Applicant) for an extension of time in which to file an application alleging unfair dismissal of the Applicant by Helen Newland (the Respondent). The original application was filed on 28th September 2005. The documents accompanying the application purport that the date of termination was 1st September 2005.
- 2 If the Applicant was dismissed on 1st September 2005 the application would be in time.
- 3 It is therefore passing strange that she has made an application for an extension of time. The application is attached to the original application for unfair dismissal and sets out some reasons why the Applicant says her application for an extension should be considered.
- 4 I observe with respect to the Applicant that the reasons are extremely difficult to follow.
- 5 The Commission listed the application for hearing as it is required to do. The transcript discloses that the Applicant really put nothing in support of her application. She did not provide any sworn evidence although she was given the opportunity to do so. Further and bizarrely she refused to accept an offer by Mr Brunner of Counsel who appeared for the Respondent to correctly identify the Respondent to the application.
- 6 The Commission has not issued any orders to vary the name of the Respondent but it is clear from the submissions of Mr Brunner that Helen Newland is not the correct Respondent. More likely than not the correct employer is HE & BS Newland t/a Sylvania Station. However in view of the Applicant's attitude to the name change the Commission can take the matter no further.
- 7 The Respondent says that the claim by the Applicant that she was somehow temporarily dismissed on 16th August 2005 and later in her application, confirms this date. The Applicant by doing so concedes the application is filed out of time. This is evident from the statements she has made both in her application and during the proceedings before the Commission. The Applicant has advanced one single reason for the delay in filing and that is her alleged engagement did not fit any wage classification in the Pastoral Industry Award. In his submissions Mr Brunner made it clear that it is simply an irrelevant consideration and does not assist the Commission in determining whether it should accept the application out of time.
- 8 The Commission is to apply the criteria which are set out in the decision of the Full Bench in *Director General of Education v Prem Singh Malik* 2003WAIRC09090.
- 9 This case essentially confirms the test which were set out by Kenner C in *Azzalini v Perth In-flight Catering* (2002) 82 WAIG 2992 where the learned Commissioner said as follows:

“Statutory provisions similar to s 29(3) exist in other State industrial jurisdictions and also in the Federal jurisdiction, in ss 170CE(7) and (7A) of the Workplace Relations Act 1996 (Cth) (“WRA”). The Australian Industrial Relations Commission and the Industrial Relations Court of Australia, have considered the present federal provisions and their predecessors, in a number of cases, as for example in Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298 and in Application by Telstra-Network Technology Group (1997) 42 AILR 3 - 590.

In this State, this Commission and the Industrial Appeal Court, have established and applied relevant principles in relation to extensions of time from mandatory statutory time limitations imposed by the Act. In this respect, I refer to the well known decisions in Tip Top Bakery v TWU (1994) 74 WAIG 1189; Ryan v Hazelby and Lester t/as Carnarvon Waste Disposals (1993) 73 WAIG 1752 (both of which referred to and applied Gallo v Dawson (1990) 64 ALJR 458) and Robowash Pty Ltd v Michael (1997) 78 WAIG 2323.

Additionally, the Full Court of the Supreme Court in this State, in the often quoted judgement in Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196, held that four factors needed to be considered by the court exercising a discretion to extend time including the length of the delay; the reason for the delay; whether there was an arguable case and the extent of any prejudice suffered by the respondent.

Having regard to the principles referred to in these cases, and considering the nature of ss 29(1)(b)(i) and 23A of the Act in my opinion, for the purposes of s 29(3) of the Act as it now is, consideration by the Commission of whether it ought extend time for the purposes of this subsection should include the following:

- (a) *Prima facie, time limits imposed by the Act are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;*

- (b) *An extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;*
- (c) *It is for an applicant to demonstrate that strict compliance with s 29(2) of the Act will work an injustice and be unfair in all of the circumstances;*
- (d) *Considerations relevant to whether it would be unfair to not extend time include:*
 - (i) *the length of any delay;*
 - (ii) *the explanation for the delay;*
 - (iii) *steps taken if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested;*
 - (iv) *the merits of the substantive application in the sense that there is a sufficiently arguable case; and*
- (e) *Whether there would be any prejudice to the respondent in granting the application to extend time although the absence of prejudice to the respondent, without more, is not a sufficient basis of itself, to grant an application for an extension of time."*

- 10 I respectfully adopt what Commissioner Kenner said in *Azzalini* for the purposes of the relevant principles to apply in determining whether a grant of extension of time should occur in this case.
- 11 It is clear that the time limits imposed by the Act are to be complied with and clearly on the facts of the matter this has not occurred. The extension of time is not to be automatic and a discretion residing with the Commission to enable it to do justice between the parties.
- 12 Although the length of the delay is not long the explanation is less than convincing. The Applicant took no steps prior to the time application was filed to raise the matter with the Respondent even though she did raise it with others. The Applicant has put nothing in the proceedings in support of an extension of time which would allow the Commission to form a view that there is a sufficiently arguable case. In fact more likely than not there has been a mutual termination and the essential pre-requisites for jurisdiction under s.29 of the Act are not present in this case.
- 13 Clearly the tests set out in *Prem Singh Malik* (ibid) have not been met in this case at least not in anything the Applicant has said to the Commission during these proceedings. For those reasons the application for extension of time to file the application will not be granted. The Commission will proceed to deal with the Applicant's claim for contractual benefits in Application B58 of 2005 in due course. An order dismissing the application for extension of time to file an application will be now issue.

2006 WAIRC 03981

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AMANDA JACKSON	APPLICANT
	-v-	
	HELEN NEWLAND	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR	
DATE	MONDAY, 20 MARCH 2006	
FILE NO	U 58 OF 2005	
CITATION NO.	2006 WAIRC 03981	

Result	Dismissed
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Order

HAVING heard Ms A. Jackson on her own behalf and Mr P. Brunner, of Counsel, for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the application for extension of time to file an application be, and is hereby, dismissed.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 04004

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION LINDA JOHNSON	APPLICANT
	-v-	
	AIMS CORPORATION	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
HEARD	FRIDAY, 3 MARCH 2006	
DELIVERED	WEDNESDAY, 22 MARCH 2006	
FILE NO.	U 103 OF 2006	
CITATION NO.	2006 WAIRC 04004	

Catchwords	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred out of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should not be exercised - Acceptance of referral out of time not granted - <i>Industrial Relations Act 1979</i> (WA) s 29(1)(b)(i), s 29(2), s 29(3)
Result	Order issued
Representation	
Applicant	In person
Respondent	Mr P Jarman of counsel instructed by Jarman McKenna Barristers & Solicitors

Reasons for Decision

- 1 The substantive claim in this matter is one brought pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 (“the Act”) by which the applicant claims to have been dismissed harshly, oppressively or unfairly on or about 19 August 2003. Given that the application was filed on 9 February 2006, it is substantially outside of the 28 day time limit for bringing such claims pursuant to s 29(2) of the Act.
- 2 The Commission has discretion to accept such an application out of time pursuant to s 29(3) of the Act. Accordingly, the Commission listed this matter of its own motion to consider whether it should do so.

Factual Background

- 3 The applicant testified that she commenced employment as a court security and custodial services officer with the respondent on or about 28 March 2000. Her duties in that position were various, including prisoner transport; providing custody services; court security; hospital security and various administrative responsibilities connected thereto at locations throughout the metropolitan area in Perth. The applicant says she was casually employed and was paid on average in 2003, equivalent to a rate of pay of \$38,000 per annum. Her working hours appeared to be various. The applicant remained a casual employee throughout the period of her employment.
- 4 The applicant testified that she encountered certain events which placed her under stress, including a prisoner escape and other difficulties. As a consequence of this, she requested the respondent give her stress leave, in order to recover, but this was apparently refused. The applicant testified that the circumstances which had arisen in her employment caused her to consider leaving that employment for many months. Indeed, the applicant testified that she had been considering her position for some 15 months or thereabouts. The evidence was that to preserve her well being she tendered her resignation and left the respondent's employ.
- 5 The applicant testified that at about this time she made contact with the “Industrial Relations Commission” about proceedings against the respondent, but said that at the time she was not in a fit state to take the matter further. In about July 2004 the applicant retained a solicitor in relation to commencing workers’ compensation proceedings which she did, which proceedings apparently continued up until about August 2005, when settlement negotiations between the parties broke down. The applicant said that she initially spoke to her solicitors in relation to the termination of her employment, but the matter was not taken any further at that time.
- 6 It seems on the applicant's evidence that she only became aware of “constructive dismissal” recently when speaking with a friend. The applicant, following that conversation, then commenced these proceedings alleging she was unfairly dismissed by the respondent in August 2003. The applicant said that the delay in commencing these proceedings was largely because she was not aware of the notion of “constructive dismissal” at the time of the termination of her employment.
- 7 The Commission’s acceptance of the application out of time was opposed by the respondent. Counsel for the respondent submitted that there is an excessive delay in commencing the claim and the applicant does not have a credible explanation for it. Furthermore, counsel submitted that on the relevant authorities, it is the case that the applicant, for whatever reasons, decided she had had enough in her employment with the respondent and left of her own volition.

Consideration

- 8 The relevant principles to apply in matters of this kind are set out in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683.
- 9 Firstly, it is necessary for the Commission to consider whether there is any merit in the applicant's claim, albeit that the evidence before the Commission only enables a “rough and ready” assessment of the merits. It is the case that the applicant resigned from her employment and the uncontroverted evidence is she had been considering that course for many months. Ultimately, the applicant simply decided she did not wish to work for the respondent in the circumstances in which she found herself and made the decision to resign. Whatever notion the applicant may have in relation to “constructive dismissal”, the law in this jurisdiction is that the Commission is required to consider who really terminated the contract of employment: *Attorney General v Western Australian Prison Officers Union of Workers* (1995) 25 WAIG 3166. That was a case in which the employee resigned in the face of a direct and imminent threat of dismissal.
- 10 The circumstances are very different in this case. Even accepting the applicant's evidence at its highest, I am far from persuaded that the applicant on her own evidence has a case on the merits. She first must establish that she was dismissed by the respondent to attract the jurisdiction of the Commission pursuant to s 29(1)(b)(i) of the Act. From the applicant's evidence, it is clear that for whatever reason, she was experiencing some difficulties in her employment and she made the conscious decision, after many months of consideration, to tender her resignation. It is difficult to see in those circumstances how the applicant could establish that she was dismissed in accordance with the law.
- 11 However, even if the applicant could establish she was dismissed, given the period of the delay commencing this claim, which is excessive, being almost two and one half years after the termination of her employment, I would not be minded to accept the application out of time. It is clear from the evidence that the applicant had reasonable opportunities to pursue any rights arising from the termination of her employment both at the time of her resignation and certainly when she consulted solicitors regarding her workers’ compensation claim. She chose not to do so. The issue of the termination of the employment was raised by the applicant with her then solicitors but the matter was not progressed. The applicant also made inquiries immediately at the time of her resignation it seems, although on the evidence she was experiencing some personal difficulties at that point.

- 12 The applicant had an obligation to act expeditiously to pursue any matters arising from the termination of her employment if she considered she had been unjustly dealt with. Employees cannot wait as long as the applicant has and expect the Commission to accept a claim in these circumstances. This includes at least making the necessary inquiries as to her rights and taking appropriate action at the earliest time. Moreover, given the inordinate delay in commencing these proceedings, it would be quite unfair on the respondent for it now to be put to a defence of the applicant's claim, given the passage of time and the requirement to obtain all relevant evidence from persons concerned with the applicant's employment. Naturally, with the passage of time memories fade and the burden upon the respondent would, in my opinion, be substantial. The Commission is required by s 26(1)(c) of the Act to consider the interests of not just employees but also employers.
- 13 For all of these reasons the Commission declines to exercise its discretion to accept the application out of time and the application is dismissed.

2006 WAIRC 04005

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LINDA JOHNSON **APPLICANT**

-v-
AIMS CORPORATION **RESPONDENT**

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 22 MARCH 2006
FILE NO/S U 103 OF 2006
CITATION NO. 2006 WAIRC 04005

Result Order issued
Representation
Applicant In person
Respondent Mr P Jarman of counsel instructed by Jarman McKenna Barristers & Solicitors

Order

HAVING heard Ms L Johnson on her own behalf and Mr P Jarman of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2006 WAIRC 04118

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LOUISE MC DADE **APPLICANT**

-v-
BUICK HOLDINGS PTY LTD **RESPONDENT**

CORAM COMMISSIONER P E SCOTT
HEARD MONDAY, 21 NOVEMBER 2005, TUESDAY, 31 JANUARY 2006
DELIVERED THURSDAY, 6 APRIL 2006
FILE NO. U 60 OF 2005
CITATION NO. 2006 WAIRC 04118

CatchWords Industrial law – Harsh, oppressive or unfair dismissal – Constructive dismissal – Contractual terms – Principles applied – Hours of work changes subject to conditions – Termination of employment by resignation – Industrial Relations Act 1979 (WA) s29(1)(b)(i)

Result Application Dismissed
Representation
Applicant Mr L McDade
Respondent Mr E Rea (as agent)

*Reasons for Decision*The Applicant's Case

- 1 Louise McDade claims that she was unfairly dismissed by the respondent. She says that notwithstanding that she resigned, the termination of employment was on the basis that she was coerced into resignation by the conduct of the respondent.
- 2 Ms McDade worked for the respondent as a new car sales person, initially for a period of ten months in 2002. During that time, she worked from 8.00am to 6.00pm Monday, Tuesday, Thursday and Friday, 8.00am to 9.00pm on Wednesday and 8.00am to 1.00pm on Saturday. These were described generally by the parties as the standard hours of work for new car dealerships. That period of employment came to an end at Ms McDade's instigation due to personal reasons. Sometime after Ms McDade ceased working for the respondent, Mr Glen Miller, the respondent's then New Car Manager, telephoned her encouraging her to return to work. She says that the arrangement of her working hours was discussed between them. She says that she has two young children, one of whom needs to be dropped off for childcare in the mornings between 8.00 and 8.30am and that she needs to pick them up in the late afternoon. Accordingly, she said that she could not work the standard hours. She says that it was agreed with Mr Miller, following consideration with David Di Virgilio, the then dealer principal, that she would commence at 9.00am instead of 8.00am. In cross examination, Ms McDade said that in fact she commenced at 8.30am rather than 9.00am (Transcript page 19). Ms McDade submitted into evidence a letter from Midland/Guildford Child Care Centre Director, ML Hillary, dated 30 January 2006. The last sentence of this letter says:

"From my own experience and a perusal of the logs, I can confirm that Louise always delivered Fiona to the centre after 8 a.m. and on average between 8.20 to 8.30 a.m."

(Exhibit A2)

- 3 Ms McDade says that in April 2005, approximately 18 months after she recommenced, she approached Dominic Di Virgilio, the then Dealer Principal, and asked him if she could finish work at 5.00pm on Monday, Tuesday, Thursday and Friday due to the need to collect one of her children from child care. Ms McDade says that when she first approached Dominic Di Virgilio he said to her "you're not handing in your resignation, are you?" indicating that he would not be happy with her doing so. She says that he agreed to her finishing work at 5.00pm subject to the need for her to speak with Michael Tomeo, the New Car Manager. When she went to see Mr Tomeo, he had already been spoken to by Mr Di Virgilio, appeared to know of the arrangement and agreed to it. Her retainer was reduced by \$50.00 per week, and her rostered day off was removed to adjust her hours and remuneration to take account of her not being available at the commencement and at the end of the trading day, to undertake those normal daily duties of preparing the yard and the cars for the day and putting them away properly in the evenings.
- 4 Ms McDade says that during her discussions with Mr Di Virgilio and Mr Tomeo it was never suggested to her that these arrangements were to be for a trial period or that there were any other conditions attached to them. The first she became aware of any difficulty was when Michael Tomeo called her at around 10.00am on 1 September 2005 and told her that Dominic Di Virgilio said that he wanted her to do the same hours as everyone else. She says that she responded that she could not do that. He said that he would give her two weeks to make the necessary arrangements. She says that she went back to her office. About an hour and half later, she says, Mr Tomeo called her back to his office and told her that she had "until tomorrow" to make the necessary arrangements (Transcript page 7). Later in her evidence, Ms McDade said she was given 24 hours to make the necessary arrangements. She also says that Mr Tomeo told her that she was to start at 8.00am the next day (Transcript page 23 & 24). She responded by saying that they were holding a gun to her head because she could not change the hours, and he said that she had to make the change that "the boss just said he wants you to the ... the full hours like the rest of the guys." (Transcript page 7) She says that she had no choice but to leave. Ms McDade denies that when she was told initially that she had two weeks to make arrangements to change her working hours and then 24 hours to make arrangements and that, in fact, those time lines were for the purpose of her giving an answer to the respondent as to whether or not she was prepared to undertake those arrangements or enter into negotiations. She says that the instruction was that she was to make those changes and there was to be no other negotiation entered into. Ms McDade went to her desk and packed her things into a cardboard box. This was observed by other members of staff and, she says, by any customers who were in the dealership at the time.
- 5 Ms McDade says that Tim Rose, another sales person, also saw this. An employee named Stewart asked her what was going on and she explained. He suggested that his wife could look after her children while she undertook the necessary hours. He said that his wife would probably not want any money to do this. Ms McDade says that she felt that she could not accept this suggestion for a number of reasons including that she wanted her children in proper formalised care with trained personnel and so she refused the offer.
- 6 Ms McDade says that the respondent let her have a car for a few weeks. Mr Di Virgilio asked her for her fuel card and walked her off the premises.
- 7 Ms McDade's suggests that prior to her approaching Mr Di Virgilio and then Mr Tomeo regarding finishing at 5.00pm she had in fact been given approval to commence at 8.30am or 9.00am rather than the standard 8.00am. She says that for one and a half years prior the termination of her employment, her formal commencing time had been 9.00am but she actually went in at around 8.30am and that this had not been a problem for the dealership. She denied that training was provided in the early morning and says that the later commencement and earlier finishing time had no effect upon her work. She says her sales did not drop. There were only two of them in sales, and Tim Rose, the other sales person, was getting better sales results than she was as he was receiving referrals from management which she did not receive. She says that there were about four to five such referrals made to Mr Rose each month. Ms McDade says that it is uncommon for there to be part time work within the industry, she says that even though her finishing time was 5.00pm it was often that she would not leave until 5.30pm.
- 8 Ms McDade denies that her working from 9.00am to 5.00pm would put a strain on the rest of the team, saying that she had worked for one and a half years doing 9.00am to 6.00pm.
- 9 Ms McDade says that there were difficulties in her relationship with Mr Tomeo. The relationship seems to have soured from the time she wore jeans to work for a charity fund raising day and was told by him that it was not acceptable and that she was to return home and change.
- 10 Ms McDade says that the day of or the day after the termination of her employment she received a call from Mark Tapley, asking her to put her resignation in writing so that her final pay could be made up. She did so and her letter of resignation reads, (formal parts omitted):

"Dear Michael,

I confirm that I am unable to work the extended hours that you have stated I must work. Under the circumstances, I have no choice but to reluctantly tender my resignation, therefore, please take this letter as

giving two weeks (sic) notice. I have enjoyed working at Metro Mitsubishi and am very disappointed that I have been forced into making this decision to resign.”

(Exhibit A7)

- 11 On 6 December 2005, some two months after her employment ended, Ms McDade sent an email to Michael and David Di Virgilio, brothers and Dominic Di Virgilio, saying how disappointed she was at the situation and received no reply.
- 12 Ms McDade seeks compensation for loss of earnings and for injury.
- 13 Since the termination of her employment, Ms McDade has applied for one position with a car yard but the industry's standard hours were expected of her and this was unacceptable to her. Ms McDade says that after undertaking a Centrelink course, an Australian Government workshop to examine her career path options and preparing resumes, she commenced a six weeks' training programme on 5 December 2005, graduating on 20 January 2006. Since then she has been engaged as a casual for AIMS undertaking court security work. Under this arrangement, she will be casual for a period of six months, with between 20 and 25 hours' work per week. She currently works four and a half to five hours per day at courts. She received an amount of \$13.65 while she was unqualified and now that she has qualified, receives \$20.53 per hour.
- 14 Ms McDade's tax return for the previous financial year indicates that she earned \$46,799.00 from her employment with the respondent (Exhibit A1). This was on the basis of a \$400.00 per week retainer, which was reduced to \$350.00 per week, and commissions.
- 15 Ms McDade's conditions of employment included the benefit of a company car for which she paid \$95.00 per fortnight, and fuel to the value of \$120.00 per month was provided to her.
- 16 The evidence of the applicant was from time to time confused and unclear as to her starting and finishing times, and the conversation related to changes in those times.

The Respondent's Case

- 17 The respondent called evidence from Dominic Di Virgilio, the Dealer Principal and a Director of the respondent. He described his role as that of mentor and to provide training and development for the 80 or so staff within the dealership. He does not have day to day management of the staff. In the case of Ms McDade, this was undertaken by the New Car Manager, previously Glen Miller and then more recently, Mr Tomeo.
- 18 Mr Di Virgilio says that Mr Glen Miller told him that Ms McDade was commencing at around 8.30am. When Ms McDade approached him and requested a 9.00am start so that she could take her child to school because her ex-husband could no longer do it, Mr Di Virgilio says that he viewed that sympathetically. He was conscious of her difficulties and believed that it would be beneficial to her performance to have her not distracted or unhappy with that arrangement. However, he says that the arrangement was not without conditions. He says that he told her that she would need to speak to Mr Tomeo and that while he was agreeable, there were two provisos to her commencing at 9.00am. They were that her sales performance was not adversely affected, and that the relationship with other employees was not adversely affected. He says, however, her sales performance went backwards considerably. Her attitude changed and the relationship with others deteriorated. Mr Di Virgilio says that he had discussions with Ms McDade on a number of occasions about how to improve her sales performance. He says together, he and Ms McDade worked out how many hours she was spending at the dealership and broke this down into the number of hours she spent contacting customers, preparing letters, dealing with sales and the like. He says that although she was required to be at the dealership for approximately 60 hours per week, according to the breakdown of the work that she was doing, she was physically working only 31 hours per month. According to the estimate that he and Ms McDade made, she was spending up to 32 hours per month standing outside the front door smoking. They talked about how she could double her productive hours.
- 19 Mr Di Virgilio says that the bench mark sales figures per sales person is 12 to 14 cars per month. The last two to three months, Ms McDade's sales' figures were between four and ten per month. Mr Di Virgilio was aware that Ms McDade was not happy with working with Mr Tomeo. She had spoken to him on a couple of occasions about what she saw as difficulties. He advised her that Mr Tomeo simply wanted her to do her job.
- 20 Mr Di Virgilio says that whilst it was intended that Ms McDade's new hours were to be reviewed after about three months and that the arrangement was subject to not having any adverse impact her sales or on staff relationships, for a number of reasons the situation rolled on for a while longer, however, it was clear that her sales had dropped. He felt that her attitude had changed and she had no commitment to her job. The relationship with other staff had deteriorated.
- 21 Mr Di Virgilio says that the retainer paid to the sales people is for the more physical work done between 8.00am and 9.00am and 5.00 and 6.00pm. If one sales person is not doing that work it affects others, and that is what occurred in this case. It is Mr Di Virgilio's evidence that the arrangement for Ms McDade's hours to be cut back to the 9.00am start was conditional upon there being no adverse impact and that if those conditions were not met then the arrangement was that she would go back to the normal hours for the dealership. Mr Di Virgilio says that he was not aware that Ms McDade had an agreement with Mr Tomeo to finish at 5.00pm, and that if he had known about the request it would have been refused.
- 22 I found Mr Di Virgilio to be a credible witness.
- 23 Mr Tomeo says that when he took over as Sales Manager in mid February 2002, Ms McDade was working from just before 8.30 in the morning and leaving at 6.00pm. In April 2005, she requested to work from 9.00am until 5.00pm. When he spoke with Dominic Di Virgilio, they discussed her working from 9.00am until 6.00pm. However, Mr Tomeo says that when she spoke to him, Ms McDade also requested an earlier finishing time of 5.00pm instead of 6.00pm. He took it upon himself to agree to her request to work 9.00am to 5.00pm because they were short staffed and he wanted her to remain with the business. Mr Tomeo says that he agreed to the arrangement on a temporary basis and it was subject to review or trial. He says he spoke to the other sales person who agreed to Ms McDade working the lesser hours on a temporary basis. Mr Tomeo says that Ms McDade's performance went up for a while and then deteriorated. He says that he expected her to revert to her former hours when she was required to do so.
- 24 Mr Tomeo says that the discussion with Ms McDade on 1 September 2005 as to her hours was, in effect, that she was required to revert to standard hours. She was initially given two weeks in which to make necessary arrangements. However, he says that he then spoke to Alex Martelli, the General Manager. Mr Martelli said that he believed that two weeks was unnecessary, that Ms McDade had no intention of going back to the normal hours and that she might as well be told that she had 24 hours in which to make the arrangements. Mr Tomeo says though that he believed that having told her she had two weeks, that if Mr Martelli wanted to specify a lesser period, then Mr Martelli ought to do so and that this is what occurred. Mr Tomeo says that it was Mr Martelli who spoke to Ms McDade advising her of that 24 hour time frame. He says, though, that the 24 hours was

to let them know what she was going to do, however, he also accepts that she had made clear that she would not be able to work the hours that were required of her.

- 25 Mr Tomeo says that he organised a car for Ms McDade and gave her the keys. The car was to be available for her for two weeks but the company then had difficulty retrieving the car from her for some time thereafter.
- 26 The respondent says that it would be prepared to re-employ the applicant at normal hours particularly due to a shortage of qualified sales people.

The Test

- 27 The test to be applied in a case such as this is whether the employer's conduct constitutes "a breach going to the root of the contract to justify its acceptance by the employee." (*Denning MR in Western Excavating (EEC) Ltd v Sharp [1978] QB 761 @ 769*). If the applicant is able to demonstrate that the respondent, by its actions, committed a breach of an essential element of the contract of employment, then what might otherwise appear to have been a resignation would actually have been a dismissal by the respondent.

Conclusions

- 28 Where the evidence of the applicant conflicts with that of Mr Tomeo and Mr Di Virgilio, I have no hesitation in accepting the evidence of the witnesses for the respondent. Mr Tomeo's evidence in particular was clear and precise. Where Ms McDade's evidence was confused particularly as to when she commenced what hours, and who told her about the 24 hour time frame, I have no hesitation in preferring the evidence of Mr Tomeo.
- 29 In those circumstances, I find that when Ms McDade commenced employment with the respondent, her hours of work were from 8.30am to 6.00pm Monday, Tuesday, Thursday and Friday, from 8.30am to 9.00pm on Wednesday and from 8.00am until 1.00pm on Saturday. I accept that it was her usual practise to drop her younger child at the childcare centre between 8.15 and 8.30am and that her arrangements changed in around April 2005 when her ex-husband was no longer able to take her other child to school and she needed to commence work later. At that time, she first asked Mr Di Virgilio if she could start at 9.00am. She did not mention to him the request to finish at 5.00pm. This latter request was made to Mr Tomeo. Mr Di Virgilio consented to the later commencement time on the basis of there being no adverse impact on Ms McDade's sales performance or on staff relations. I am satisfied that, because of market conditions and the lack of sales people, Mr Tomeo agreed to Ms McDade working from 9.00am until 5.00pm on a trial basis also subject to there being no adverse impact on her sales performance or on the relationships with other staff. The arrangement also involved her having a reduced retainer, from \$400.00 to \$350.00 per week and she was required to do some additional administrative work.
- 30 I am satisfied and find that during the initial part of this arrangement, Ms McDade's performance was maintained at an acceptable standard. However, after some time and possibility because of her dissatisfaction with working with Mr Tomeo, her performance deteriorated. During this time, in accordance with his role in mentoring, motivating and training staff, Mr Di Virgilio discussed with Ms McDade how to improve her performance. They analysed what she was actually doing during her working hours and how she was using her time. They discussed methods of obtaining improved sales. He was supportive of her and attempted to improve her performance. However, it was clear after some period of time that the arrangement was not satisfactory in that the conditions which had been set for her working reduced hours were not being met. Her sales performance deteriorated and there was some disharmony within the staff on account of Ms McDade not being available to undertake the physical work which was necessary for the preparation and closing of the yard at the commencement and end of the working day, work which was normally done between 8.00 and 9.00am and 5.00 and 6.00pm. Ms McDade was seen as not doing her share of that work.
- 31 Accordingly, it was decided to put an end to what had been a conditional arrangement. The respondent initially put to Ms McDade, through Mr Tomeo, that she had two weeks in which to make alternative arrangements. I find that it was not two weeks in which to respond to any proposal but two weeks in which to get her affairs in order so that she could revert to industry standard hours. She immediately made it clear that she was not able to meet those requirements at all. She put forward no alternative arrangement but merely refused to accept the reversion to standard hours. I am satisfied that her response was quite clear and unequivocal that she would not be undertaking the revised arrangement. In those circumstances, Mr Tomeo discussed the situation with Mr Martelli who indicated to him that because of the situation, it was reasonable to require Ms McDade to make arrangements for the changes within 24 hours. Mr Martelli then put that requirement to Ms McDade.
- 32 I find that the respondent's requirement that Ms McDade revert to standard hours was within her contract of employment. The change to her hours to 9.00am to 5.00pm was only a temporary arrangement subject to conditions. Those conditions were not met and therefore it was appropriate to revert to the standard hours and in those circumstances, the respondent's instruction for Ms McDade to revert to standard hours was in accordance with her contract of employment. Therefore, the respondent has not acted in a way such as to bring about the termination of employment. It came about because Ms McDade was not able to meet her contractual obligations, i.e. to work standard hours when the temporary arrangement was brought to an end due to the conditions of that temporary arrangement not being met.
- 33 However, there was a question of whether there was an element of unfairness in Mr Martelli giving Ms McDade only 24 hours to make the necessary arrangements. It is quite clear that by the time Ms McDade was spoken to by Mr Martelli, she had already indicated her refusal or incapacity to make the necessary changes at all. Therefore, notwithstanding that a 24 hour period would have been unfair had she not already indicated her refusal or inability to revert to the standard hours, even with two weeks' notice, the employment relationship had effectively come to an end.
- 34 Accordingly, I find that there was no breach of an essential element of the employment contract by the respondent. Indeed, its conduct was in accord with the contract between the parties, that the changes to Ms McDade's hours were conditional. If those conditions were not met by her, the changes would cease. That is what occurred. The termination of employment arose due to Ms McDade's resignation. It was because Ms McDade was unable to revert to the hours of employment required by her contract of employment. She had not been able to meet the conditions for the changed hours and therefore the respondent was entitled to revert to the standard hours. In all of those circumstances, I find that there was no dismissal. Accordingly there is no jurisdiction in the Commission and the application will be dismissed.
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2006 WAIRC 04116

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LOUISE MCDADE **APPLICANT**

-v-
BUICK HOLDINGS PTY LTD **RESPONDENT**

CORAM COMMISSIONER P E SCOTT
DATE THURSDAY, 6 APRIL 2006
FILE NO U 60 OF 2005
CITATION NO. 2006 WAIRC 04116

Result Dismissed

Order

HAVING heard Mr S. McDade on behalf of the applicant and Mr E. Rea 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.

[L.S.]

(Sgd.) P.E. SCOTT,
Commissioner.

2006 WAIRC 04019

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JAMES MORRIS **APPLICANT**

-v-
C LEONARD & M SPURWAY TRADING AS FUCHE **RESPONDENT**

CORAM COMMISSIONER S J KENNER
HEARD THURSDAY, 16 MARCH 2006
DELIVERED FRIDAY, 24 MARCH 2006
FILE NO. B 280 OF 2005
CITATION NO. 2006 WAIRC 04019

Catchwords Industrial law - Termination of employment - Contractual benefits claim - Entitlements under contract of employment - Salary and annual leave entitlements - Principles applied - Application upheld in part - Order issued - *Industrial Relations Act 1979* (WA) s 27(1)(m), s 29(1)(b)(ii); *Minimum Conditions of Employment Act 1993* (Cth) s 5, s 23, s 83(3)

Result Order issued

Representation

Applicant In person

Respondent No appearance

Reasons for Decision

- 1 This is an application made pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). By it, the applicant claims certain denied contractual benefits by way of unpaid salary and annual leave.
- 2 At the commencement of the proceedings on 16 March 2006, despite being notified by a notice of hearing dated 7 March 2006, the respondent failed to appear.
- 3 In earlier conciliation proceedings pursuant to s 32 of the Act, conducted by a Deputy Registrar, the respondent also failed to appear. The Deputy Registrar, in reporting to the Commission as to the outcome of the conciliation conference, noted significant difficulties in making contact with the representative of the respondent, a Mr Kool. It was noted that on several occasions when arrangements were made for the Deputy Registrar to speak with Mr Kool, Mr Kool failed to be available. Subsequent attempts by the Deputy Registrar to make contact with the respondent were also unsuccessful. The Deputy Registrar reached the view from her endeavours in contacting the respondent that it was being evasive in responding to the Deputy Registrar's attempts to deal with the matter.
- 4 As the Commission has noted above, the notice of hearing in relation to this application was sent to the parties at their respective addresses for service on 7 March 2006. On 14 March 2006, a facsimile was received in my Chambers from Mr Kool of the respondent, advising that he would be unable to attend the hearing of the matter on the basis that "he would be absent from 15 March 2006 to 26 April 2006". No reasons are advanced for this absence. No request was made in the facsimile to adjourn the application and no appearance was made by counsel or an agent for the respondent to do so. It is

to be noted that the facsimile from the respondent was received shortly before the hearing of the matter and well after the notice of hearing had been sent to the parties.

5 I was satisfied that the respondent had been given due notice of the proceedings in accordance with reg 32(2) of the Industrial Relations Commission Regulations 2005. In the absence of an application for and the grant of an adjournment of the proceedings, and in particular, given the history of the respondent's failure to appear before the Deputy Registrar or to co-operate in the conciliation proceedings conducted by the Deputy Registrar, and given the applicant's right to have his application heard and determined by the Commission, pursuant to s 27(1)(d) of the Act, I determined to proceed to hear and determine the matter in the absence of the respondent: *McConkey v M and A's of Denmark* (2001) 81 WAIG 1561; *Burch v Oretok* (2002) 82 WAIG 2853.

6 A preliminary issue arose as to an application by the applicant to amend the notice of application. The notice of application as filed particularises the respondent as "Fuche". The applicant sought to amend the notice of application to substitute for "Fuche" the name "C Leonard and M Spurway trading as Fuche". The applicant informed the Commission that he had conducted a business name search and realised that he had misdescribed the employer in the notice of application as filed. I was satisfied that the applicant intended to commence the proceedings against his employer and this was a case of misdescription, such that the Commission's power to amend the proceedings pursuant to s 27(1)(m) of the Act should be exercised: *Rai v Dogrin* (2000) 80 WAIG 1375.

The Facts

7 The only evidence adduced in the proceedings was from the applicant himself. He testified that he commenced employment with the respondent on or about 2 October 2005 as its licensed manager. The respondent is a cafe, lounge bar and restaurant business. The applicant described his position in broad terms as being responsible for the day to day running of the cafe and he was also engaged in duties involving waiting on tables, rostering staff, daily ordering, supervising rostered shifts and cash handling. The applicant and the respondent through Mr Kool entered into a contract of employment, a copy of which was tendered as exhibit A1 ("the Contract"). This described the applicant as "Licensed Manager" and the Contract was described as being effective on 24 October 2005. The applicant testified that the Contract took a few weeks to be prepared and was signed after he commenced work. Both the applicant and a person the applicant identified from his signature as Mr Kool, signed the Contract. The essential terms of the Contract for present purposes, provided a salary of \$46,800 per annum to be paid fortnightly; ten days' paid annual leave per annum; ten days' paid public holidays and a requirement for either party to give two weeks' notice of termination of employment.

8 The applicant testified that he duly commenced work at the respondent. The applicant testified that on or about 10 November 2005 he received his salary for the previous week about three days late. For the following week from 6 to 13 November 2005 the applicant testified he only received part of his salary by way of a cheque for \$450.00. This was apparently raised with the respondent. By this time, the applicant appeared to have some difficulties with the respondent's business practices leading to an incident on 17 November. The applicant testified that on this day Mr Kool requested the applicant to go outside of the cafe to have a discussion with him which he did. The applicant's evidence was he was spoken to rudely by Mr Kool when the applicant told him that he had some concerns about his business practices and failure to keep appointments. The applicant testified that it was at this point that Mr Kool informed the applicant that he did not intend to change his business practices and if the applicant spoke to the police regarding his business operations then he would kill him. The applicant said he felt very intimidated and avoided being alone with Mr Kool after this.

9 The next day the applicant submitted a letter of resignation in light of Mr Kool's threat the previous day. This letter was tendered as exhibit A4. Specific reference is made in the letter of resignation to Mr Kool's threat. The applicant gave two weeks' notice in accordance with the Contract.

10 The applicant said he was still not paid for the ensuing period from 14 to 20 November. On 25 November, after keeping his distance from Mr Kool, the applicant testified that at about 8.30am that day Mr Kool arrived at the cafe and was rude, intimidating and verbally abusive towards him. The applicant said without any warning he was told he was dismissed on the spot and he was required to leave the premises immediately. The applicant said the respondent refused to pay him salary he was owed, said to the applicant "I am sick of the sight of you" and demanded that the applicant leave. The applicant did so. The applicant testified that Mr Kool followed him out of the premises on to the footpath in front of the building. The applicant said that Mr Kool told him to f... off and that if he spoke to the police regarding his business dealings he would "hunt him down and shoot him". According to the applicant, as he said this, Mr Kool followed him and repeatedly made gestures with his hands, simulating a gun and making shooting noises.

11 The applicant testified he felt so intimidated by these threats that he sought and obtained a restraining order against Mr Kool.

12 Furthermore, the applicant testified that on each occasion he approached Mr Kool for his unpaid salary, which by that time was done in the presence of at least another person, Mr Kool was rude and threatening towards him. The applicant kept a contemporaneous note of these events, a copy of which was tendered as exhibit A5. Additionally, during this time, the applicant said he was sending emails to his parents about these incidents, copies of which were tendered as exhibit A3.

13 The applicant said that he took no annual leave during his period of employment with the respondent.

14 In the absence of any evidence from the respondent to the contrary, and unless I find the applicant's testimony to be inherently incredible, which I do not, I am bound to accept the applicant's evidence as to these events which I do. Indeed I found the applicant to be a very credible witness. I find accordingly.

Conclusions

15 The relevant principles in relation to claim of the present kind are well settled. The applicant is required to establish on the balance of probabilities, that at all material times he was an employee; that the matter before the Commission is an industrial matter; that the subject matter of his claim is a benefit under his contract of employment; that he is entitled to that benefit and it has been denied; and the benefit does not arise under an award, order or industrial agreement of this Commission: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704; *Ahern v AFTPI* (1999) 79 WAIG 1867.

16 From the evidence adduced and my findings, I am satisfied that these elements have been met. I am satisfied that under the Contract with the respondent, over the period of his employment, the applicant had an entitlement to gross salary in the sum of \$3,600.00. I am satisfied that save for a payment of \$450.00, the applicant has received no salary from the respondent in respect of the services that he has performed under the Contract. He has therefore been denied a contractual benefit, by way of salary payments, in the sum of \$3,150.00 gross.

17 As to the applicant's claim for holiday pay, the Contract provided for 20 paid days' annual leave per annum. The Contract was silent as to a pro rata entitlement and as a matter of common law, none would arise. Whilst by the combined effects

of ss 5 and 23 of the Minimum Conditions of Employment Act 1993, pro rata annual leave is implied into every contract of employment, such an entitlement can only be enforced before an Industrial Magistrate by reason of s 83(3) of the Act: *Oats v Sanders Executive* (1998) 78 WAIG 1198; *Brown v University of Western Australia* (2004) 84 WAIG 189. This claim is therefore refused.

- 18 A final matter arises. The evidence before and findings of the Commission earlier in these reasons sets out circumstances of very poor treatment of an employee by an employer. This includes threats to the life and well being of the applicant about which evidence has been given before this Commission, on oath in open court, and in respect of which the applicant has sought and obtained a restraining order. Employees and employers should treat one another with mutual respect and dignity. Threats of any kind are wholly unacceptable in the workplace, in particular threats of the kind described by the applicant. Given that threats of this kind constitute an indictable offence under Chapter XXXIII A of The Criminal Code, a copy of these reasons for decision, together with the transcript and exhibits tendered during the proceedings, will be forwarded to the Western Australian Director of Public Prosecutions for his consideration.

2006 WAIRC 04078

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JAMES MORRIS	APPLICANT
	-v-	
	C LEONARD & M SPURWAY TRADING AS FUCHE	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	TUESDAY, 28 MARCH 2006	
FILE NO/S	B 280 OF 2005	
CITATION NO.	2006 WAIRC 04078	

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the applicant in person and there having been no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

ORDERS the respondent to pay to the applicant the sum of \$3,150.00 gross as a denied contractual benefit less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 14 days of the date of this order.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2006 WAIRC 04003

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ERMIR ERWIN SEHOVIC	APPLICANT
	-v-	
	COMBINED INSURANCE COMPANY OF AMERICA T/AS COMBINED INSURANCE COMPANY OF AUSTRALIA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
HEARD	22, 23 AUGUST 2005, 7, 8 DECEMBER 2005, 9 JANUARY 2006	
DELIVERED	WEDNESDAY, 22 MARCH 2006	
FILE NO.	APPL 888 OF 2004	
CITATION NO.	2006 WAIRC 04003	

Catchwords Industrial law - Termination of employment – Harsh, oppressive and unfair dismissal – Contractual benefits claim – Whether applicant an employee or independent contractor of respondent – Written agreement between the parties defining the relationship as independent contractor - Principles applied – Applicant held to be an independent contractor of respondent - Commission lacks jurisdiction - Application dismissed – Industrial Relations Act 1979 (WA) s 29(1)(b)(i) and (ii).

Result	Dismissed
Representation	
Applicant	Mr E Sehovic (on his own behalf)
Respondent	Mr A J Power (of counsel)

Reasons for Decision

- 1 On 8 July 2004 Ermir Erwin Sehovic ("the applicant") lodged an application pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") against Combined Insurance Company of America trading as Combined Insurance Company of Australia (ARBN 009 714 425) ("the respondent") claiming that he was unfairly terminated on or about 10 June 2004 and that he is owed benefits under his contract of employment with the respondent. The respondent denies that the applicant was unfairly terminated and claims that the respondent does not owe the applicant any outstanding contractual entitlements. The respondent also maintains that the Commission does not have the jurisdiction to deal with this application on the basis that the applicant was an independent contractor and not an employee of the respondent.

Background

- 2 It was not in dispute that between August 2002 and June 2004 two written contracts governed the applicant's relationship with the respondent. The first contract was entered into on 12 August 2002 between the parties after the applicant completed two weeks of training conducted by the respondent in Melbourne and under this contract the applicant was contracted to work as an insurance sales representative. On 16 June 2003 the applicant signed a second contract with the respondent which was similar in its terms to the first contract, to work as a territory representative ("TR") (see Exhibits A1 and A2). On 11 June 2004 the respondent advised the applicant that his contract with the respondent was terminated in accordance with Clause 6 of the contract he signed on 16 June 2003.

Applicant's evidence

- 3 The applicant gave evidence that after he applied to work with the respondent Mr Stanley Gomes interviewed him and the applicant stated that at this meeting Mr Gomes advised him that the position with the respondent was full time, he was told that he could earn between \$40,000 and \$60,000 per annum and he was advised that the position involved undertaking country travel and working long hours. The applicant gave evidence that he was also told that he could earn bonuses and that he could be promoted if he worked hard. The applicant stated that at the time he was unaware that his earnings would be on a commission only basis and the applicant stated that he would not have considered working with the respondent if his earnings were to be on this basis. The applicant stated that he understood he would be an employee of the respondent.
- 4 The applicant stated that he was advised that if he passed a training course the respondent would give him a job and the applicant gave evidence that towards the end of the training course which he attended in August 2002 he was given a contract to sign and the applicant was told he could consult a lawyer about the terms of this contract. The applicant stated that as other participants on the course were signing their contracts he also signed his contract. The applicant stated that he was unaware when he signed the contract that his position with the respondent would be on an independent contractor basis. The applicant gave evidence that when the respondent later advised him that he had to have an Australian Business Number (ABN) and that he had to pay Goods and Services Tax (GST) on his earnings he then understood that he was an independent contractor. The applicant stated that he accepted the position of a representative with the respondent on this basis as he needed an income.
- 5 The applicant gave evidence he has two tertiary qualifications – a degree in journalism and one in mechanical engineering.
- 6 The applicant stated that his role was to sell defined benefit healthcare insurance to customers and he stated that he sold insurance under rules set by the respondent.
- 7 The applicant stated that soon after commencing work with the respondent he performed well and that his performance was rewarded by the respondent giving him a number of awards and he stated that he made substantial progress towards achieving a 'ring of diamonds' which was the highest award.
- 8 The applicant gave evidence that prior to becoming a TR on 16 June 2003 the respondent sent him to the Gold Coast for one week for executive training to become a TR and that during this course the respondent gave the applicant an executive training manual (Exhibit A4).
- 9 The applicant stated that his role as a TR was to train representatives to sell insurance products and that he was required to report his and the daily sales figures of the representatives in his territory to the respondent. The applicant stated that after the weekly schedule of his sales and the sales of the representatives in his area were submitted payments were made on a weekly basis by the respondent to himself and the representatives in his area. The applicant stated that his commission consisted of a percentage of his sales and a percentage of the sales of policies sold by the representatives working in his area.
- 10 The applicant stated that he worked over seven days of the week and that his job was full-time. The applicant maintained that he was supervised by the respondent and the applicant claimed that if he did not generate income for the respondent and that if he did not attend meetings arranged by the respondent he would be terminated.
- 11 The applicant stated that the respondent provided him with leads for potential customers and each representative and TR then made his or her own appointments with these customers and he stated that the respondent provided approximately ninety per cent of his customers. The applicant stated that all representatives had to undertake country travel, that the respondent organised country trips and that he was required to attend these trips with other representatives. The applicant stated that part of his role as a TR was to arrange accommodation for representatives in his area and he stated that on most occasions whilst on these trips he paid for his own accommodation and costs. The applicant stated that the respondent provided food and accommodation on some country trips. The applicant stated that he and other representatives used their own vehicles to undertake their duties in both metropolitan and country areas.
- 12 The applicant gave evidence that in April 2004 the respondent required him to travel to Albany to train a representative who was not part of his area and the applicant stated that even though this representative was not in his area the respondent told him that if he did not train this representative he would be terminated.
- 13 The applicant stated that the respondent retained part of the commission he earned into an agency account for future contingencies if a policy was discontinued.
- 14 The applicant stated that in addition to being paid commission on his sales the respondent sometimes paid him a bonus. The applicant stated that he did not receive a bonus in the last year that he worked with the respondent even though the respondent should have paid him a bonus of between \$20,000 and \$21,000 for the period 1 July 2003 through to 31 December 2003. The applicant stated that his budget was \$40,000 for this period and he maintained that he and his team sold approximately \$200,000 worth of business in this period. The applicant stated that during the period 1 January 2004 to 30 June 2004 the applicant and his team's budget was \$75,000 and as his team sold \$111,000 he should have been paid a bonus of \$20,000. The applicant stated that he was required to successfully complete two full cycles in order to be paid a bonus and he conceded that he was terminated before the second cycle finished.
- 15 The applicant maintained that at the time he was terminated he was the most successful TR in Australia.
- 16 The applicant gave evidence about his termination. The applicant stated that at about 1.00pm on 10 June 2004 the respondent's sub-regional representative ("SR") for his area, Mr Peter Alport, contacted him and asked him to attend a

meeting. The applicant initially refused to meet Mr Alport due to business commitments but Mr Alport required him to meet with him and Mr Hudson Hard, the respondent's state manager in Western Australia. The applicant maintains that at this meeting he was unfairly accused of advising customers to cancel the existing policies they had with the respondent and take up a new ones and the applicant stated that he was then advised that five customers had similar issues with the applicant and that Mr Roger Hutchison was one of them. The applicant stated that there had been a misunderstanding and that what he was being accused of was not possible and the applicant went through the procedure he used for selling policies to demonstrate that customers had to make an informed decision about taking out a new policy and that a new policy had to match a customers needs. The applicant claimed that Mr Hutchison did not support the respondent's claim that he had been twisting customers. The applicant asked if he was being terminated because of a bonus and promotion that he was due. The applicant stated that the respondent did not acknowledge what he was saying and the applicant stated that he thought that Mr Alport and Mr Hard were joking and that it was all a misunderstanding. The applicant stated that after a brief break Mr Hard and Mr Alport then asked the applicant to hand them his sales roll which is the manual used for selling policies and Mr Hard asked him for copies of the policies that the applicant had written for that week. The respondent stated that Mr Alport tried to convince Mr Hard to retain the applicant, however he was unsuccessful. The applicant stated that he then shook hands with Mr Alport and Mr Hard and left.

- 17 The applicant maintained that no evidence was given to him at this meeting detailing the reasons for his termination.
- 18 The applicant commented on a number of the respondent's documents which were given to customers who considered purchasing the respondent's products including a product disclosure statement and a financial services guide (Exhibits A6 and A7). The applicant stated that he asked customers questions to fill out the required documents and he stated that he had to believe what the customer told him.
- 19 The applicant stated that if he was unsure about any issue relevant to filling out these forms he would check with Mr Alport for clarification.
- 20 The applicant gave evidence that in 2003 he attended a 'kick-off' meeting which was also attended by the vice-president of sales, Mr John Thompson and Mr Alport and he stated that Mr Alport told the applicant after this meeting that he would be terminated and the applicant maintained that this decision was overturned when Mr Thompson intervened.
- 21 The applicant stated that he had no problems gaining employment prior to working with the respondent and the applicant gave evidence that he applied for many positions after he ceased working with the respondent but he claimed he was unsuccessful gaining a position because of a poor reference from the respondent. The applicant gave evidence that he was employed as a computer sales person for approximately three months in November 2004, he undertook some casual work as a fitter for one or two weeks and five weeks prior to the hearing of this matter he commenced casual employment as a machinist and he currently remains in this position.
- 22 The applicant detailed the contractual entitlements he believes he is owed. The applicant is claiming \$10,000 from his agency account which he maintains is owing to him, the applicant maintains that as he acted in Mr Alport's position in April 2004 and undertook his duties for two weeks he should have been paid \$5,000 and the applicant is claiming a platinum award and relies on one of the respondent's bulletins in support of this claim (see Exhibit A12). The applicant estimates that the cost to the respondent for him to attend a convention at the Gold Coast was \$5,000 and he claims that he would have attended this convention if he was not terminated.
- 23 The applicant gave evidence about a number of awards and pins that he was given when he worked with the respondent and produced a number of trophies confirming these awards.
- 24 Under cross-examination the applicant stated that he had read the contract given to him at the training course held in Melbourne in August 2002 but he stated that he did not understand much of it as it was not written in plain English and he stated that he only read parts of the first page. The applicant agreed that Mr Gomes asked him to sign a business course agreement on 25 July 2002 however he stated that he did not read this document and did not see the words 'independent contractor' in the first paragraph of this agreement as he stated that Mr Gomes had his hand across the document to prevent the document being read by him. The applicant agreed that he was given copies of the representative's ethics manual and a compliance manual at the training course he attended in August 2002 and was told to read these manuals and the applicant confirmed that he successfully completed tests about the content of these manuals to ensure he understood the information. The applicant reiterated that he was unaware that he was to be an independent contractor when he signed the contract presented to him by the respondent during this course. The applicant stated that he was aware of what an independent contractor is and the applicant stated that he worked as a contractor prior to commencing work with the respondent. The applicant was aware that persons working at each level within the respondent's operations up to and including a SR had a subcontract arrangement with the respondent.
- 25 The applicant confirmed that whilst working with the respondent he claimed car expenses on his taxation returns and the applicant confirmed that one of the cars included on his taxation return was used by his son who also worked with the respondent (see Exhibit R1). The applicant confirmed that the address of Erwin's Eternally, which was the business name detailed on his taxation return, was his home address. The applicant confirmed that he claimed business expenses of \$15,376 for the financial year ending June 2003.
- 26 The applicant agreed that when he was a representative he was trained in the General Insurance Code of Practice and signed a statement confirming this training (see Exhibit R13 attachment HH7).
- 27 The applicant did not agree that as a TR it was in his interests for representatives in his territory to do well. It was the applicant's view that he was required to supervise representatives in his area to make more money for the respondent yet he acknowledged that he gained monetarily if representatives in his territory sold the respondent's policies.
- 28 The applicant stated that he had no guarantee of a set income each week and he stated that he was only paid when a policy was sold.
- 29 The applicant stated that at his initial interview with Mr Gomes he was not told that he would be paid a wage nor did he state the range of income that he would be earning.
- 30 The applicant stated that as a TR he occasionally paid representative's expenses and he stated that Mr Alport occasionally paid some of the applicant's expenses, for example, he paid the cost of the applicant's accommodation during a trip to Kalgoorlie.
- 31 The applicant stated that part of his role as a TR involved training representatives and he stated that he incurred expenses when doing this and the applicant stated that as well as being a TR he continued to write his own business. The applicant stated that when he or one of his representatives wrote a policy he would report these sales to Mr Alport on a daily basis.
- 32 The applicant stated that he was aware that Mr John Holland's role was to ensure that representatives were aware of the legislative requirements on the respondent and he agreed that Mr Holland was his trainer during the course he attended in Melbourne in August 2002. The applicant stated that the course was hard but Mr Holland was a good trainer and the applicant

- stated that he understood what was being taught and that he passed the course with good marks. The applicant stated that Mr Holland did not explain the contents of his contract to him, he stated that there was no discussion about the contract and he stated that he signed this contract at the time because other participants did. The applicant could not recall discussing the contract in any detail apart from being told during a course break that he would be supplied with a copy of the contract and the applicant could not recall a copy of the contract being given to him during a session set aside for this purpose. The applicant stated that he was not taken through the contract line by line. The applicant claimed that he was not told that he did not have to sign the contract if he did not want to nor was he told that if he wanted to show the contract to a lawyer before signing it he could do so. The applicant denied that on the day he was given a copy of the contract Mr Holland told him that he was to be an independent contractor and he could not recall if he was told during this course that he would be an independent contractor.
- 33 The applicant denied that he provided the respondent with monthly tax invoices however the applicant agreed that he signed a document given to him by the respondent for the provision of recipient created tax invoices (Exhibit R13 attachment HH-10.1.8). The applicant could not recall receiving any tax invoices similar to one shown to him at the hearing (Exhibit R13 attachment HH-10.1.2). The applicant agreed that the commissions he received from the respondent included an amount for GST and the applicant confirmed that he has held an ABN since June 2000. The applicant stated that he did not have a cheque book for his business, he did not claim mileage for using his vehicle on his tax returns but claimed for petrol, depreciation and for repairs, he paid for the business cards he used whilst working with the respondent and he could not recall if he had documents with a letterhead detailing his business name. The applicant confirmed that he paid for petrol whilst on country trips and in the main he paid for his accommodation and meals when undertaking work related travel. The applicant agreed that he paid \$10 per week to the respondent for materials provided by the respondent and he was aware that he had to pay for the loss of any materials. The applicant maintained that his start and finish times were not at his discretion because he was told that he had to start at 8.30am and the applicant stated that he had to attend compulsory meetings with the respondent on Monday and Tuesday of each week. The applicant agreed that there was nothing in his contract about working set times or the minimum and maximum hours to be worked each week, however, the applicant claimed that he had to attend meetings called by the respondent. The applicant also maintained that Mr Hard told him that he must attend a meeting at 8.30am on Monday and Tuesday each week and that he had to work full time. The applicant confirmed that he did not wear a uniform and the applicant stated that the meetings he attended with his clients were set to meet the client's needs.
- 34 The applicant confirmed that during his training course in August 2002 he was trained about the relevant ethics and laws and rules to be followed when selling the respondent's policies and the applicant stated that he had been given some brief training in privacy laws and he confirmed that he was told not to mislead customers. The applicant also agreed that he was trained not to use high pressure sales techniques.
- 35 The applicant claimed that he had sales targets to be met which were set by the respondent's state manager and his SR, Mr Alport.
- 36 The applicant was aware that some complaints were made against him in 2003 about his sales techniques and the applicant stated that the respondent spoke to him about these complaints and asked him to attend retraining for one week because of these complaints. The applicant agreed that as part of this retraining he had to demonstrate an understanding of how he should and should not conduct himself with customers and he stated that he completed a written test during this course. The applicant agreed that during this course the respondent told him that it expected high ethical standards when conducting himself on behalf of the respondent.
- 37 The applicant maintained that he was not told when he was retrained in 2003 that if he misled a customer about a policy that his contract with the respondent could be brought to an end.
- 38 The applicant disagreed that he was ever told if he was found to be involved in 'twisting' a customer that his contract with the respondent would cease and the applicant maintained that he was not involved in 'twisting' customers, which involved selling new policies to replace existing ones which provided essentially the same cover.
- 39 The applicant agreed that he had read and understood the representative's handbook given to him by the respondent and the applicant then maintained that even though twisting was specified as a ground for termination in this manual he maintained that it does not say termination was immediate if he was found to have twisted a customer and the applicant maintained that every representative had a right to replace an existing customer's policy.
- 40 The applicant confirmed that in May 2003 he attended a Tier 1 training course, for which he paid, and that undertaking this course was a requirement of the Australian Securities and Investments Commission ("ASIC") and the applicant stated that he was aware that unless he passed this course he could not work with the respondent. The applicant stated that he undertook further training in July 2003 and that in October 2003 he was trained in fact find documents and filling out statements of advice ("SOA") and he completed a test about these areas. The applicant confirmed that he also attended a two day course in October 2003 about the respondent's new products. The applicant confirmed that he attended TR training in November 2003. When it was put to the applicant that by the time he had completed all of this training he should have been aware that twisting should not be done the applicant stated that this was not the case and the applicant denied that in early 2004 Mr Hard told him that if a replacement policy was sold to an existing customer then no commission should be claimed and he could not recall a meeting where this issue, involving the applicant's son doing the same thing, was discussed. The applicant also disputed that he had regular meetings with Mr Hard where issues of this nature were discussed.
- 41 The applicant was aware that the respondent gained a Financial Services Licence on 8 September 2003 and that for the respondent to retain this licence to operate its business a number of legal requirements had to be met and that the respondent had to ensure that its agents complied with these requirements in order to retain its licence.
- 42 The applicant was asked about the procedure he adopted when selling policies to customers. The applicant stated that after completing a fact find form, he then wrote a SOA for the customer. He stated that a product disclosure statement is given to the customer followed by a financial services guide explaining the services to be given to the customer and commissions. The applicant stated that he was aware that by law he was required to explain the basis for recommending a particular product to a customer and that the SOA he gave to customers had to set out all relevant advice each time a policy was sold. The applicant stated that he was unaware that if he did not complete a SOA properly he would be breaking the law. The applicant agreed that section 3 of the SOA only had to be filled out when an existing policy was being replaced and that any benefits the customer was going to lose under the policy being replaced had to be noted on the SOA (see Exhibit A9).
- 43 The applicant was asked about his dealings with Mr Anthony Senior. The applicant gave evidence that in early June 2004 he made an appointment to visit Mr Senior. The applicant disagreed that he told Mr Senior that he wanted to make an offer to him to save him money on his current insurance policies with the respondent. The applicant denied that he advised Mr Senior to take out two new policies and the applicant denied that he told Mr Senior that the new policies covered everything in his existing policies plus additional items. The applicant denied that he told Mr Senior that the premiums for the new policies would be less than his existing premiums and that these policies would give him better coverage at a cheaper rate nor did he

tell Mr Senior that the new policies offered better benefits or that his current policies were inadequate and that new policies offered better cover and that all he had to do was to buy new policies and cancel his old ones. The applicant denied that he handed Mr Senior a piece of paper detailing which policies he was to cancel and when a piece of paper with words to this effect was given to the applicant, the applicant denied that it was his handwriting on this document. The applicant gave evidence that he did not tell Mr Senior to write this information down nor did he see him do it and the applicant denied that he told Mr Senior that the only way to pay for the new policy was by way of a lump sum payment of \$1,700.00. The applicant could not recall if Mr Senior asked him if he and his wife were eligible to be covered under these policies and the applicant did not tell Mr Senior that he was entitled to automatic cover under the policies nor did he ask Mr Senior not to divulge to the respondent that the applicant had sold him the policies. The applicant maintained that he asked Mr Senior about his medical history and the applicant stated that he gave Mr Senior an envelope containing a number of the respondent's documents but he could not recall if Mr Senior wrote anything on the back of this envelope or if he asked Mr Senior to write anything on the back of the envelope. The applicant could not recall crossing out section 3 of the SOA given to Mr Senior (see Exhibit R9 attachment ARS5). The applicant said that he wrote down the commission due to him and told Mr Senior that he would be paid this commission. The applicant claimed that he told Mr Senior about the losses and negative trade-offs of taking out the new policies and the applicant stated that he gave a summary about the new products to Mr Senior and that he questioned Mr Senior about his pre-existing conditions. The applicant denied that the policies he sold Mr Senior did not provide the same cover as Mr Senior's existing policies and he stated that he sold these policies to make money for the respondent and that it was up to Mr Senior to decide whether or not to take on these new policies. The applicant stated that the policies taken out by Mr Senior were appropriate and that he qualified to take out these policies. The applicant stated that he did not recommend to Mr Senior that he cancel his existing policies and the applicant agreed that he should have advised Mr Senior that the new policies were different to his existing policies and that he stated that he would not have advised Mr Senior to take up new policies and cancel his existing ones if the policies were different. The applicant maintained that his actions did not break any law. The applicant disagreed that the SOA that he gave to Mr Senior was incorrect, nor did he tell Mr Senior that the two new policies he was recommending were better value for him and that he should cancel his old policies (Exhibit R9 attachment ARS5).

- 44 The applicant denied that it was wrong for a representative not to tell the respondent about a situation when a customer took out new policies and cancelled old ones and he stated that he did not know if he had been trained about this requirement.
- 45 The applicant confirmed that he had a business name, Erwin's Eternally, which was registered in May 2000 and he stated that Business Activity Statements ("BAS") for this business were completed for the period October 2002 through to September 2004. The applicant confirmed that the business expenses he claimed for the period 1 July 2003 to 30 June 2004 were \$25,722.70.
- 46 The applicant stated that he was unsure if a representative was required to comply with and be aware of the respondent's ethics manual and compliance manual.
- 47 The applicant confirmed that section 3 of the SOA form was required to be filled in if new cover was sold to a customer in replacement of an existing cover.
- 48 The applicant agreed that he understood and undertook to abide by the insurance code of practice.
- 49 The applicant conceded that he undertook extra training at the end of 2003 because of complaints made by Mr Emir Kuc, Mr Iustini and Ms Arita Simulus. The applicant could not recall if he told Mr Kuc that he needed to take out a policy in order to obtain a bank loan and the applicant did not recall selling a policy to Ms Simulus when she had a pre-existing illness. The applicant denied that he sold a policy to Mr and Ms Edna Seesink without complying with relevant requirements. A number of propositions were put to the applicant in relation to customers Senior, Donkin, Iustini, Best and Coyne and it was put to the applicant that he misled them in relation to the policies that he sold them and about the benefits contained in these policies and the difference between the old and new policies for these customers. The applicant disagreed that he misled these customers and that he did not tell them that he would be receiving commission on the sale of the new policies and he denied that he incorrectly filled out the SOAs for these customers and that he gave incomplete or inaccurate advice to them. The applicant denied that he claimed commission on some of the policies he sold to these customers when he should not have done so and the applicant maintained that he had a sound basis for selling the policies he did to these customers.
- 50 The applicant was asked about his dealings with Ms Margaret Higgs in mid March 2004. The applicant could not recall telling her that she would have no problem obtaining insurance even though she had difficulties doing so in the past nor could the applicant recall having a discussion with her about claiming monies from the respondent and the applicant could not remember Ms Higgs telling him that she would give him her bank details on the Monday following his meeting with her. The applicant claimed that he did not ring Ms Higgs' mother that weekend and ask her for Ms Higgs' bank account details. The applicant could not remember Ms Higgs contacting him on 22 March 2004 to tell him that she was unhappy that he had contacted her mother and that she was going to cancel her policy and the applicant denied that he visited Ms Higgs on Tuesday 23 March 2004 to return the deposit she gave him and to fill out a form to cancel that policy. The applicant then recalled speaking to Ms Higgs' mother on one occasion.
- 51 The applicant was asked about his interactions with another customer Mr John Best. The applicant denied that he told him to take out an additional policy or that he would get a bigger payout if Mr Best signed up to a new policy and the applicant stated that he did not tell Mr Best about any loss of any benefits for him and his wife if a new policy was taken out.
- 52 The applicant denied that on or about 17 March 2004 he told Ms Helen Coyne that her husband should upgrade his cover and take out new policies to receive a better pay out and that if he was sold new policies he would save money nor did the applicant agree that he wrote a note for Ms Coyne to cancel his old policies. The applicant stated that he told Ms Coyne how much commission he would earn as this was written on the SOA he gave to her and the applicant stated that he did not tell Ms Coyne that her husband would lose some benefits if he took out a new policy.
- 53 The applicant denied that he told some customers to cancel their old policies some time after taking out new policies and to delay making these cancellations.
- 54 The applicant stated that he was aware that if he was caught twisting that his contract with the respondent would be terminated however the applicant maintained that he did not twist customers.
- 55 The applicant was asked about the meeting with Mr Hard and Mr Alport which took place on 10 June 2004. The applicant agreed that the respondent told him at this meeting that it believed the applicant had been twisting customers on more than one occasion and the applicant denied that examples of his actions in this regard were given to him. The applicant denied that he was told that some customers had complained about being told to cancel their existing policies after upgrading their policies and that section 3 of the SOA had not been filled out for some customers and the applicant denied that he was told that he was claiming commissions when he should not have done so. The applicant maintained the meeting went for approximately three hours and he claimed he did not have an adequate opportunity to answer the allegations put to him. The applicant denied that

he had ever engaged in twisting any customers and he disagreed that the names of specific customers were put to him. The applicant then stated that at the time of this interview he was not aware that he should not have been twisting customers yet he was aware that twisting was inappropriate as he was advised of this during training sessions. The applicant maintained that he was not engaged in twisting prior to and after he was retrained in 2003.

- 56 In re-examination the applicant stated that at the meeting held on 10 June 2004 he was accused of twisting five customers and when he asked for the names of these customers he claimed that the only example he was given was the name of Mr Hutchison. The applicant maintained that he was not given the opportunity to contact Mr Hutchison to clarify the accusations made against him. The applicant stated that the complaint made by Mr Best did not have the applicant's name on it and the applicant stated that he had a disagreement with Mr Hard and Mr Alport about their product knowledge at this meeting. The applicant then stated that Ms Higgs was discussed at this meeting and the applicant stated that he understood that she had never complained to the respondent about him and that she was never a policy holder. The applicant then stated that Ms Higgs told him that she would fax her bank details to him after he discussed her taking out a policy with the respondent and if not her mother would do so and he explained to her that he needed her bank details before her policy could take effect. The applicant stated that he spoke to Ms Higgs' mother late Sunday evening as he was expecting a fax from her and because he wanted to include Ms Higgs' premium in his weekly report to the respondent. The applicant stated that during this conversation Ms Higgs' mother was upset with him and she was rude. The applicant stated that after this meeting he was told to hand over his sales roll and when he asked Mr Hard if he had been dismissed he was told he was. The applicant stated that Mr Hard was happy with his performance as he broke income records in Western Australia for the respondent. The applicant stated that Mr Hard and Mr Alport disagreed about whether or not the applicant should be terminated at the end of the meeting.
- 57 The applicant stated that he was assisting a representative called Mr Seletkovic when he had dealings with Ms Coyne in Albany and he helped him with the sale of a policy to her as Mr Seletkovic had a problem filling out the required forms.
- 58 The applicant stated that it was the customer's fault if incorrect information was given to him by a customer and that on occasions customers are naive and unclear about the details of the policies they are taking out. The applicant maintained that the last policy he sold was to Mr Senior and that Mr Senior was happy with this policy and that Mr Senior's complaint only arose after he was terminated. The applicant stated that he did not engage in twisting customers and if he did so he would not have achieved the targets he did.

Respondent's evidence

- 59 Mr Frank Gurney gave evidence in chief by way of witness statements (Exhibits R8-A, R8-B and R8-C). He is the respondent's assistant vice president legal and insurance services director and he has been employed by the respondent since 1980. Mr Gurney stated that the respondent markets accident and sickness insurance products and has about 100,000 customers in Australia and New Zealand and its products are marketed mainly through independently contracted representatives. Mr Gurney stated that the respondent engages the services of about 367 independently contracted representatives throughout Australia and of these, around 24 are SRs, 92 are TRs and 251 are sales representatives. Mr Gurney stated that the applicant was engaged in the health care division which offers cover against loss of income due to an illness, trauma, cancer and confinement.
- 60 Mr Gurney stated that the products offered by the respondent to customers are regulated by the Corporations Act 2001 as amended by the Financial Services Reform Act 2001. Mr Gurney stated that the respondent is required to ensure that its representatives adhere to the Corporations Act, financial services regulations administered by ASIC under the Corporations Act, the requirements under the respondent's licence, the Insurance Contracts Act (Cth), the insurance industry General Code of Practice, the Trade Practices Act and Fair Trading Act, the Privacy Act and State and Federal laws governing sexual harassment, discrimination and occupational health and safety. Mr Gurney stated that the respondent is required to hold a financial services licence to conduct its business and the respondent has held this licence since 8 September 2003. Mr Gurney stated the Corporations Act required that the respondent must ensure that its financial services are provided 'efficiently, honestly and fairly' and that its representatives comply with the conditions of the licence and all relevant laws and regulations. Mr Gurney gave evidence that if the respondent does not ensure that its representatives comply with its licence requirements and a number of regulations under the Corporations Act the respondent may lose its licence and as a result its ability to conduct its business. The respondent therefore imposes specific controls on the manner in which its contractors conduct themselves when selling the respondent's products and on the engagement and training of contractors.
- 61 Mr Gurney stated that ASIC requires the respondent to demonstrate that all of its contracted representatives have successfully completed training covering the relevant legislative requirements and representatives must be assessed as competent in a range of areas or the respondent cannot maintain its licence. The respondent must also demonstrate to ASIC that its representatives maintain competency at this level of training and in turn the respondent undertakes regular training and assessment of its representatives. Under these requirements the respondent must ensure that contracted representatives do not breach any of the specific duties required of the licence holder such as 'cold calling' customers or potential customers seeking business and representatives must provide adequate disclosure documentation to customers as required by the Corporations Act and confirmation of purchase of the product when a policy is sold.
- 62 Mr Gurney explained that the respondent's compliance manual and its representative's ethics manual set out the obligations on representatives and TRs in relation to its licence requirements and Mr Gurney stated that the respondent only regulates the conduct of each contractor's business in areas which might result in vicarious liability for the respondent if proper compliance standards are not maintained by its representatives.
- 63 Mr Gurney stated that a representative must follow a number of steps when dealing with a prospective or existing customer as follows:
- (a) do a fact find to understand the customer's personal circumstances, by completing a fact find;
 - (b) consider, in light of that information, what cover might be appropriate for the customer;
 - (c) advise the customer what, if any, cover the representative recommends;
 - (d) if the customer agrees to take out a policy, give the customer:
 - a financial services guide, that explains the services that the representative is authorised to provide to the customer and gives the customer information about the commissions that the representative may receive for providing that service;
 - a Product Disclosure Statement, that explains the product and helps the customer assess whether they want to purchase it; and
 - a Statement of Advice (a SOA), that sets out the personal advice that representative has given to the customer;
 - (e) complete the application form with the customer.

- Mr Gurney stated that the Corporations Act requires a representative to have a reasonable basis for providing advice to a customer and to complete and give the customer a SOA every time a representative sells one of the respondent's financial services products. Mr Gurney stated that a breach of either of these obligations is an offence under the Corporations Act.
- 64 Mr Gurney stated that to assist representatives and the respondent to meet these statutory duties the respondent issues standard forms including a Financial Services Guide, a Product Disclosure Statement and a SOA to all representatives and requires all representatives to give a copy of these forms to potential customers. Mr Gurney stated that the respondent requires all representatives to complete SOAs in full and he stated that section 3 of the SOA must be completed by a representative if the representative recommends that a client replaces their existing cover with a policy the representative recommends. A representative must identify and record the benefits (if any) that the client will or may lose as a result of the recommended change, including any reduction in the scope of the cover offered, the additional cost to the client under the new policy, any charges the client will or may incur as the result of the change and information about any other significant consequences for the client of taking the recommended action. Mr Gurney stated that the duty to complete section 3 of the SOA is required under s 947D of the Corporations Act.
- 65 Mr Gurney stated that all of the respondent's representatives are aware of the necessity to fill out a SOA and they are trained in these requirements and Mr Gurney stated that if a representative does not demonstrate an adequate understanding of these requirements they are not offered a contract with the respondent. Mr Gurney stated that the applicant was trained in these requirements over three days from 24 July 2003 onwards prior to the respondent obtaining its licence on 8 September 2003.
- 66 Mr Gurney stated that after the respondent received three serious complaints from clients about the applicant's conduct in 2003 it investigated these complaints. Mr Gurney stated that as a result of these investigations the applicant was offered and accepted retraining in late 2003.
- 67 Mr Gurney gave evidence that the respondent gives TRs lead cards which show existing customers who may be due for a service visit and details about the level of a client's existing cover. Mr Gurney stated that a TR decides whether and how these leads are shared with the representatives in their territory and Mr Gurney stated that a TR may keep leads for themselves. Mr Gurney gave evidence that these leads are provided as opportunities to "gap" existing cover if there is a change in the client's needs and circumstances or where there is an opportunity to sell cover that the client may not yet hold.
- 68 Mr Gurney gave details about how he believed the applicant had breached the duties imposed on him under the Corporations Act in relation to Mr Senior. Mr Gurney stated that on 9 June 2004 the applicant sold insurance protection insurance to Mr Senior even though Mr Senior had three existing policies. Mr Gurney stated that the policies the applicant sold to Mr Senior offered a new type of cover and he maintained that the applicant did not have a reasonable basis for giving Mr Senior the advice that he did. Mr Gurney maintained that the applicant gave Mr Senior a note detailing his existing policies and instructed him to advise the respondent to cancel his existing policies. Mr Gurney also claimed that the applicant did not complete section 3 of the SOA which he was required to do in this instance. Mr Gurney maintained that the applicant's declaration that the SOA was complete and accurate was a false declaration and the respondent maintained that the applicant claimed a commission for the sale of the policies to Mr Senior in breach of the respondent's "Replacement of Policies" policy. The respondent maintains that as a result of the applicant's dealings with Mr Senior he breached a number of statutory duties under the Corporations Act and Mr Gurney maintained that the applicant's interactions with Mr Senior amounted to twisting. Mr Gurney stated that twisting takes advantage of customers as the representative sells them policies that they do not need, such as offering them benefits or cover that they already have or which do not offer as extensive a range of benefits or cover as before and Mr Gurney stated that it is a practice that the Corporations Act is designed in part to stamp out. Mr Gurney stated that twisting has a number of consequences for the old representative, the new representative and the respondent. The respondent pays to each continuing representative a small 'renewal commission' for an existing policy every time a policyholder renews that policy (that is, the policy sold by that representative) but only if the old representative remains engaged by the respondent and by terminating an existing policy and taking out a new policy the policyholder terminates the old representative's ability to receive renewal commissions and gives the new representative the opportunity to receive renewal commissions.
- 69 Mr Gurney stated that there were a number of other similar illicit sales made by the applicant in breach of statutory requirements including the sales of policies made by the applicant to Ms Seesink, Ms Carla and Mr Calvin Donkin, Ms Cheryl and Mr Best and Ms and Mr Russell Coyne.
- 70 Mr Gurney stated that the respondent is required by law to maintain Workers' Compensation insurance in respect of its contracted representatives in Western Australia even though they are not employees. Mr Gurney stated that the respondent makes no superannuation contributions on behalf of its contracted representatives nor does it deduct PAYG tax from the payments it makes to the contracted representatives it engages. Mr Gurney stated that representatives are responsible for their own tax affairs and no deductions are made from payments made to TRs and representatives in respect of taxation.
- 71 Mr Gurney stated that from time to time the applicant participated in bonus schemes offered to TRs when a target number of sales was met and Mr Gurney stated that a bonus was offered according to the terms of each particular bonus plan. Mr Gurney stated that the applicant signed the "Australian Healthcare Territory Representatives Bonus Cycle 2, 2003" relating to sales made in the second half of 2003. Mr Gurney stated that the general notes in this document set out the terms whereby the applicant was eligible to receive a bonus and Mr Gurney stated that the applicant did not meet a number of the conditions to receive the bonus for this period and was therefore ineligible to receive a bonus. Mr Gurney stated that the applicant may also have been ineligible to be paid a bonus because any bonus payment resulted from the exercise of the discretion of the respondent's vice-president of sales. Mr Gurney stated that the applicant did not qualify for a bonus in cycle 2, 2003. Mr Gurney stated that the applicant sold \$29,780 of new premiums in this cycle and the benchmark for the sale of new premiums was \$40,000 nett of cancellations and as a result the applicant did not qualify for factor A of this bonus (see Exhibit R8-C attachment FG2-14). Mr Gurney stated that to qualify for factor B of the bonus on offer during Cycle 2, 2003, the applicant had to achieve factor A, which he did not. Mr Gurney stated that the applicant did not complete the period to be eligible for a bonus in cycle 1, 2004 and was therefore ineligible for this bonus or to attend the annual convention held in September 2004. The applicant was also ineligible to attend this convention as he did not meet the criteria 4, 7, 16 or 17 of the "Conventions 2004 Conditions".
- 72 Mr Gurney stated that the respondent had a compliance review committee ("CRC") which deals with complaints about the conduct of representatives and TRs. In 2003 Mr Gurney stated that he was notified by the CRC about the applicant's inappropriate dealings with clients and he was advised that the applicant was offered and undertook retraining in the ethical conduct of the business of selling the respondent's financial services products. Mr Gurney stated that in mid 2004 the CRC received notification from its internal investigation unit that a number of further complaints had been made against the applicant and Mr Gurney understood that this unit had contacted clients who complained about the applicant and a report was generated about these complaints (see Exhibit R8-A attachment FG-20). Mr Gurney stated that the CRC believed that the applicant's sales activities and in particular his twisting of clients was so serious that it brought his activities to the attention of

- Mr Thompson and the CRC recommended that Mr Hard interview the applicant to understand and consider his version of events about these complaints and what if any explanation he was able to offer for his activities. Mr Gurney stated that he understood that Mr Hard interviewed the applicant and that after Mr Thompson received Mr Hard's report he decided to terminate the applicant's engagement with the respondent. Mr Gurney stated that after the respondent terminated the applicant's contract the respondent received at least one further complaint about the applicant engaging in twisting.
- 73 Mr Gurney maintained that as the respondent has an annual retention rate of 93% of its customers and the applicant was the subject of an inordinate number of customer complaints the respondent was obliged to investigate and act on the complaints about the applicant or risk its licence being revoked as well as a loss of customers.
- 74 In a supplementary statement Mr Gurney gave specifics of the applicant's dealings with a number of the respondent's customers including Ms Seesink, Ms and Mr Donkin, Ms Higgs, Ms and Mr Russell Coyne and Ms Cheryl and Mr Best.
- 75 Mr Gurney maintains that the applicant incorrectly filled out the SOA about existing policies in relation to Ms Seesink and he stated that the policy the applicant sold to Ms Seesink on 2 June 2004 covered the same risks as her existing policy without giving her any additional significant benefits. Mr Gurney maintains that the applicant could not have had a reasonable basis for providing the advice he did to Ms Seesink to buy the policies she did and Mr Gurney maintains that Ms Seesink was advised by the applicant by way of a handwritten note from him to instruct the respondent to cancel her two existing policies. Mr Gurney therefore believes that the applicant was aware that Ms Seesink had existing cover that would be affected by his recommendations. Mr Gurney also complained that the applicant did not complete section 3 of the SOA for Ms Seesink and that the SOA for Ms Seesink was incomplete because the applicant did not give her a complete analysis of the coverage she would be losing. Mr Gurney stated that it was also inappropriate for the applicant to claim a commission for the policies sold to Ms Seesink. In summary Mr Gurney stated that because of the way in which he dealt with Ms Seesink the applicant breached a number of his statutory duties under the Corporations Act.
- 76 Mr Gurney claimed that the applicant's dealings with Mr and Ms Donkin and Ms Coyne were also non-compliant.
- 77 Mr Gurney gave details about the applicant's dealings with Ms Higgs in March 2004. Mr Gurney maintains that the applicant again breached a number of requirements under the Corporations Act and the Privacy Act given the nature of his dealing with Ms Higgs.
- 78 Mr Gurney gave details about the applicant's dealings with Mr Best in March 2004, again Mr Gurney maintained that the applicant breached a number of the statutory duties required of him under the Corporations Act.
- 79 Mr Gurney gave details about the applicant's agency account. Mr Gurney stated that as a contracted representative the applicant is responsible for the business that he writes and for collecting and forwarding to the respondent all premium amounts arising from that business. Mr Gurney stated that the applicant's engagement as a TR was governed by the terms of the contract he signed to take up this engagement on 16 June 2003 and that clause 2b of this contract allows the respondent to withhold an amount of the applicant's contract earnings in an agency account for up to ninety days to reimburse the respondent for the cost of any commission it has paid to him for sales that were cancelled or where a payment collected by the applicant was dishonoured and commission had already been paid. Mr Gurney provided a copy of the reconciliation of the applicant's agency account which has now been finalised and he stated that a refund of the balance of the applicant's agency account was made to the applicant in two payments (see Exhibit R8-C attachment FG2-13).
- 80 Mr Gurney stated that prior to becoming a TR the applicant undertook TR training (JET 4 training) in May 2003 and he stated that this training assisted a TR to operate their business more successfully and therefore enhance the likelihood of the returns to a TR and the respondent. Mr Gurney stated that the TR's role was to maximise the override commissions that they receive from the representatives within their territory and that these commissions will be greatest if there is a sufficient number of representatives operating their own businesses within the TR's territory. TR's invest in developing the business conducted by each of the representatives in their territory, they help each representative in their territory to develop their business and they inspire and motivate representatives to achieve the goals that they set for themselves.
- 81 Mr Gurney stated that from time to time the respondent holds sales meetings to inspire and motivate TRs and representatives and he stated that attendance at these meetings is not compulsory.
- 82 Mr Gurney stated that the respondent has an elaborate complaints data base and copies of client complaints are provided to ASIC.
- 83 Under cross-examination Mr Gurney stated that the contractual arrangement between a TR and the respondent is as set out in his or her contract. Mr Gurney stated that there was no requirement in a TR's contract to work in country areas and therefore it would be unlikely that a representative's contract would be cancelled if a TR refused to operate in his territory. However Mr Gurney stated that if a TR does not want to work in an assigned area it is up to the TR's manager to deal with that situation. Mr Gurney stated that a TR's obligations were as set out in their contract and that leads were provided by the respondent to effect sales and it was the TR's role to motivate his or her team. Mr Gurney stated that it would be useful for a TR to train representatives because a well trained team would benefit a TR as the business would grow and there would be more profit for the TR. Mr Gurney agreed that there was no requirement in the applicant's contract to train a representative. It was put to Mr Gurney that the respondent had significant control over TRs and its representatives. Mr Gurney stated that income was by commission only and a TR had an incentive to build up good representatives in their territory. Mr Gurney acknowledged that leads were provided by the respondent and that background information was given to TRs with these leads and he stated that this was done as the Corporations Act outlaws cold calling. Mr Gurney stated that these leads provide preferred times for customers to be contacted but did not specify when an appointment should be held and he stated that it was up to a TR to give what advice he or she believed was appropriate to a client. Mr Gurney stated that the applicant was the respondent's most complained about representative and it was his view that complaints from five or six customers constituted a lot of complaints. It was put to Mr Gurney that a sales bulletin dated 17 November 2003 confirmed that the applicant had met the requirements to receive a bonus in 2003 (see Exhibit A17). Mr Gurney stated that the sales figures contained in this document could be inaccurate as the figures do not take into account policies that were cancelled as well as sales made out of a TR's area.
- 84 Mr Gurney stated that a representative was obliged to obtain all necessary and relevant information from policyholders and he stated that the representative was in the best position to advise a client about the terms and conditions of existing and new policies. Mr Gurney stated that a representative needed to ensure that a customer had a good understanding of what he or she was purchasing and that a record should be made in section 3 of the SOA why a new product was better than the pre-existing product.
- 85 Mr Senior gave evidence in chief by way of a witness statement (Exhibit R9). Mr Senior and his wife hold a number of policies with the respondent. Mr Senior stated that in early June 2004 he received a phone call from the applicant and he claimed that the applicant told him that he wanted to make an appointment with him because he had a proposal which would cost him less money and give him greater insurance coverage and bigger payouts than his existing policy. On the basis of these comments Mr Senior agreed to meet the applicant and did so on about 9 June 2004. Mr Senior stated that during this

meeting the applicant convinced him to take out a Bronze Critical Illness Lump Sum Benefit Policy and a Sickness Confinement Policy. Mr Senior stated that the applicant told him that these policies cover everything his current policies covered as well as additional items and the applicant told him that he could cancel his existing policies and just have these two policies for a lesser amount in premiums. Mr Senior stated that the applicant then told him which policies to cancel and he wrote the policies on a piece of paper. Mr Senior stated that the applicant did not ask him about his medical history. Mr Senior stated that he was happy with his existing cover and the only reason that he discussed new policies with the applicant was because the applicant had told him that he could offer the same cover at a cheaper price. Mr Senior stated that even though the applicant provided him with a SOA during this meeting he did not recall the applicant explaining the document to him and Mr Senior could not recall the applicant specifically drawing his attention to the commission he would receive for selling this policy but he recalled the applicant mentioning a figure of \$400. Mr Senior stated that the applicant did not tell him that there would be any losses or trade-offs as a result of purchasing the new policies. After this discussion and after receiving advice from the applicant Mr Senior decided to purchase the new policies and cancel his existing policies as suggested by the applicant. Mr Senior stated he then paid a lump sum of \$1657.70 and he filled out and gave the applicant a direct debit request form. Mr Senior stated that on 5 July 2004 Mr Senior's wife faxed a letter to the respondent requesting that all insurance policies held in either his or her name as from 9 June 2004 be cancelled. Mr Senior stated that on or about 27 July 2004 he was contacted by the respondent and Mr Senior was told that the policies he had taken out did not cover all of the items that he understood they covered and he was advised that it was in his best interests to keep his existing policies and cancel the new ones. Mr Senior stated that he then reverted back to the cover provided by his original policies. Mr Senior stated that he was advised to write a letter stating that he wished to cancel the new policies because he had been misled and that the applicant told him that it would cover him for everything and that the new policies were the only ones he needed. Mr Senior and his wife faxed another letter to the respondent on 27 July 2004 requesting that the policies he held as at 9 June 2004 be reinstated and he stated that the respondent then cancelled the policies the applicant had sold him (Exhibit R9-ARS12).

- 86 Under cross-examination Mr Senior stated that he recalled the applicant showing him a product disclosure statement during his meeting with the applicant and he agreed that he signed a fact finder form but Mr Senior could not recall being asked any questions about his health before he signed this form (see Exhibit R9-ARS6). Mr Senior stated that when he agreed to purchase the new policies he understood that they would operate in addition to the existing policies and he was aware that if he was unhappy with these policies he could cancel them within fourteen days.
- 87 Ms Higgs gave evidence in chief by way of a witness statement (Exhibit R10). Ms Higgs stated that on Sunday 14 March 2004 she was working at a roadhouse in North Bannister and she was approached by her boss who recommended that she speak to the applicant, which she did. Ms Higgs stated that at the end of a discussion with the applicant she arranged to meet him the following Friday at about 9.00am to discuss taking out an insurance policy.
- 88 Ms Higgs commented on a statement made by the applicant in response to a complaint she made to the respondent about her dealings with the applicant (Exhibit R10 attachment A). Ms Higgs stated that she disagreed with the applicant that she did not make an appointment on 14 March 2004 to meet the applicant on 19 March 2004 and she stated that she did not give her mobile telephone number to him and promise to make an appointment later and Ms Higgs stated that she did not give him her mobile number until she completed the application form on a subsequent date. Ms Higgs stated that the applicant did not turn up at the pre-arranged time on 19 March 2004. Ms Higgs stated that at one point during her discussion with the applicant on 19 March 2004 she told the applicant that she could not obtain insurance cover in the past because of a pre-existing medical condition and the applicant stated that the applicant did not see that her condition would be a problem and that she could be covered by the respondent's policies. Ms Higgs stated that during her discussion with the applicant he explained how she could get more value out of her policy by regularly visiting her doctor and obtaining a medical certificate and claiming money back from the respondent and Ms Higgs stated that the applicant told her that it did not really matter why she had time off as long as she was sick. Ms Higgs stated that at the end of her discussion with the applicant she decided to take out the policy proposed by the applicant and she filled out the relevant forms but as she did not have her bank details with her Ms Higgs told the applicant she would obtain the bank details from her mother and ring them through to him the following Monday and she stated that the applicant was happy with this arrangement. Ms Higgs stated that she never told the applicant that she would fax him her bank details or that her mother would do so. Ms Higgs stated that the applicant was comfortable with her calling him on Monday with her bank details and she gave the applicant a deposit towards the premium on her policy. Ms Higgs stated that she did not tell the applicant to call her or her mother for her bank details. Ms Higgs stated that on Saturday 20 March 2004 Ms Higgs's mother contacted her and told her that the applicant had contacted her requesting her bank account details and she refused to give them to him and she told her that the applicant was rude to her. Ms Higgs stated that she was annoyed by the applicant's actions because she had not given him permission to contact her mother. Ms Higgs stated that on Sunday 21 March 2004 her mother again contacted her and told her that the applicant had called her again asking for her bank account details. Ms Higgs stated that she believed the applicant did not pressure her to purchase the policy however she believed that his contact with her mother on two occasions constituted sales pressure as it was not authorised by her, the applicant was rude and he intruded on her privacy. Ms Higgs stated that she telephoned the applicant on 22 March 2004 and told him that she was unhappy that he had contacted her mother for her bank details and in response the applicant stated that he was trying to get the policy finalised. Ms Higgs stated that he spoke to her in a loud and angry tone of voice. Ms Higgs stated that the applicant's behaviour convinced her that it would not be a good idea to take out a policy with the respondent and later that evening she contacted the respondent and complained about the applicant. Ms Higgs gave evidence that on the following day 23 March 2004 the applicant came to the roadhouse where she was working and the applicant returned the deposit paid by Ms Higgs and she signed a form stating that she no longer wanted the policy. After the applicant left Ms Higgs's boss approached her and told her that the applicant had advised him that Ms Higgs could not afford to pay the insurance premium. Ms Higgs stated that she was angry that the applicant had spoken to her boss about her personal situation and she telephoned the applicant on 29 March 2004 complaining about this and in response the applicant hung up on her. On 25 October 2004 Ms Higgs received a letter from the respondent confirming that she no longer had a policy with the respondent.
- 89 Mr Best gave evidence in chief by way of a witness statement (Exhibit R11). Mr Best has held a number of policies with the respondent and currently holds only one which was issued to him in May 1999. Mr Best stated that the applicant visited him on the evening of 12 March 2004 and Mr Best stated that at the time he had a basic package of insurance with the respondent. Mr Best stated that at his meeting with the applicant he told him that the respondent had a policy that he should upgrade to which offered him greater benefits than his existing policy and the applicant advised him that he should upgrade to this policy to receive a bigger payout and the applicant told him that it may cost him a little bit more in premiums to upgrade but he would get a bigger payout from the upgraded policy. Mr Best stated that he understood the applicant advised him that if he upgraded to a new policy it would simply replace his existing policy and would offer better coverage and greater benefits and that he understood that in doing so his existing policy would be cancelled because there was no point in having two policies. Mr Best understood that even though he would be paying slightly more in premiums each month with the new policy he would get a better payout. Mr Best stated that he answered a number of questions put to him by the applicant and he stated that the

- applicant did not give him any time to think about this information and the applicant signed him up to the policy immediately after giving a very brief explanation about it. Mr Best could not recall the applicant telling him during this meeting that he would receive a commission from selling this new policy nor did the applicant tell him about any benefits he could lose if he changed over to the new policy. Mr Best stated that as a result of his discussion with the applicant he decided to purchase a new policy. Mr Best stated that his wife became suspicious about him taking out a new policy as he already had a number of insurance policies with the respondent and Mr Best stated that his wife could not understand why he needed to pay more for more insurance. Mr Best stated that because of these concerns his wife contacted the respondent and asked for a copy of all the policies held with the respondent which was received on 13 April 2004. When Mr Best reviewed this summary he realised that his existing policies covered essentially the same things as his new policy and he stated that the applicant had sold him a policy that he did not need and the only difference was that he would receive a slightly bigger payout if he made a claim on the new policy but the payout was a lot less than what the applicant had suggested it would be. Mr Best stated that in May 2004 he telephoned the respondent to complain about the applicant and the policies he had sold him and he advised the respondent that when he purchased the new policy from the applicant he was unaware that this would operate in addition to his other policies. Mr Best stated that his wife liaised with the respondent about which policies to retain and which ones to cancel and on 9 June 2004 Mr Best's wife drafted a letter for Mr Best to advise the respondent that he wanted to cancel all policies with the exception of the sickness indemnity policy and this was confirmed by the respondent on 8 July 2004.
- 90 Mr Holland gave evidence in chief by way of a witness statement (Exhibit R12). Mr Holland is the respondent's Compliance Manager and he has undertaken this role since February 2004. Prior to February 2004 he was employed by the respondent as a training facilitator. Mr Holland stated that in this role he facilitated the training of potential representatives who attended a two week business course that all potential representatives must attend and successfully complete before they are offered a contract with the respondent.
- 91 Mr Holland gave evidence about that part of the course dealing with the contract the respondent offers to individuals. Mr Holland confirmed that he was the training facilitator responsible for the applicant's training during July and August 2002. Mr Holland stated that individuals are not offered a contract if they do not successfully complete the business course. Mr Holland stated that during one training session attended by the applicant he explained the meaning of the representative's contract line by line in plain English to participants as required in the facilitator's notes for this course, which state that the facilitator must hand out to each prospective representative one copy of their unsigned representative's contract, explain the contract line by line in plain English, explain the contract during the 3.00pm afternoon session of the second Thursday of the two week business course and on the last day of the business course offer to all participants who had successfully completed the course the opportunity to sign a representative's contract in terms identical to those the facilitator had explained a week before. Mr Holland stated that it was his standard practice to adopt this procedure and to point out to the potential representatives that they did not have to sign the contract by the last day of the course if they were not comfortable in doing so or if they wanted to seek legal advice. Mr Holland also stated that it was his standard practice to stress that if participants successfully complete the course, they would be engaged by the respondent as independent contractors and not as an employee and he gave evidence that he stated this during the course the applicant attended. Mr Holland confirmed that as the applicant had successfully completed the business course he was offered a representative's contract.
- 92 Under cross-examination Mr Holland stated that no one was forced to sign the contract offered to successful representatives and some representatives took their contracts away to seek further advice before signing them.
- 93 Mr Hard gave evidence in chief by way of witness statements (Exhibit R13). Mr Hard stated that from November 2003 until 13 June 2005 he was employed as the respondent's State Manager in Western Australia and prior to that he was the respondent's National Audit Manager based in Sydney for eight years. Mr Hard stated that since 13 June 2005 he has been a contracted representative engaged by the respondent and he stated that as a result of this move he ceased being an employee of the respondent. Mr Hard confirmed that on 16 June 2003 the applicant signed a contract to be a TR with the respondent and prior to this he was contracted as a representative from 12 August 2002. Mr Hard stated that the respondent's contracted representatives operate their own businesses selling the respondent's products within areas called territories and each region is divided into a number of sub-regions and in each sub-region there are a number of territories and a number of sales representatives work within each territory.
- 94 Mr Hard stated that the respondent trains interviewers of prospective representatives to address a number of issues at their initial interview and he stated that their principal role is to explain the nature of the representatives engagement as a contractor, in particular stressing that each contractor has the ability to set his or her own hours, conduct their business as they see fit and 'be their own boss'.
- 95 Mr Hard stated that the business course the applicant attended in August 2002 addressed how a representative's business could be structured to help each representative make their business a success and the skills necessary to become a contracted representative were taught as well as the need to avoid creating issues of vicarious liability for the respondent when conducting their businesses. Mr Hard stated that the major elements of the respondent's compliance training is contained in the representative's ethics manual and the representative's compliance manual and Mr Hard stated that as the respondent cannot control how representatives conduct their businesses it trains them in the requirements of these manuals in an attempt to keep them and the respondent out of regulatory trouble. Mr Hard also stated that the ethics manual stresses that representatives are not employees of the respondent.
- 96 Mr Hard stated that in 2003 the applicant completed training to become a TR which included how TRs can develop their business and how to develop leads and assist representatives to develop their businesses.
- 97 Mr Hard stated that on 11 June 2004 the respondent terminated the applicant's engagement as a TR.
- 98 Mr Hard discussed the applicant's engagement as a TR. Mr Hard stated that each TR runs his or her own business and each representative who works in a TR's territory works for the benefit of the TR as a TR earns override commissions from the sales made by representatives in their area. Mr Hard stated that neither the respondent nor TRs employ representatives. Mr Hard stated that before signing a TR contract all representatives have the opportunity to take legal and financial advice about its terms and effect and the respondent encourages them to do so before signing the contract offered to them because of the complexity involved in running their own business. Mr Hard stated that TRs are not paid by the hour or for the efforts spent trying to sell the respondent's products and the respondent pays TRs commission for their own sales and overrides for the efforts of other representatives working in the territory. Mr Hard stated that TRs are not guaranteed a set income and do not receive wages. Mr Hard stated that commission payments are based on sales made regardless of the number of hours or effort involved and payments are subject only to the qualifying criteria set out in the TR's contract and TRs take the risk if a client's cheque is dishonoured as the respondent does not pay commission on dishonoured cheques or bad debts. TRs collect cheques from customers and are responsible for forwarding them each week to the respondent and when the respondent receives these cheques it pays TRs their commissions and through a clawback system deducts from each TR's standing account any payments which customers dishonour.

- 99 Mr Hard stated that each month each TR provides the respondent with a tax invoice and the respondent pays the TR the amount on the invoice plus GST (see the series of tax invoices for the applicant from March 2004 through to May 2004 - Exhibit R13 attachment HH-10). Mr Hard stated that when the applicant was a TR he shared the commissions he made from sales with new representatives he trained in their first week of field training and Mr Hard stated that TRs trained new representatives for one week. During this period TR's show the representative how to conduct a business focussing on the practical application of the theory the respondent has taught the representative during the business course and he stated that a number of TRs offered their representatives extra field training after the initial week. Mr Hard understood that the applicant provided some ongoing assistance to at least one representative in his territory. During the first week of field training the respondent pays a TR an additional commission to undertake the field training to compensate for the commission shared with the representative but does not pay the TR any additional amount for any expenses occurred in the course of that field training as business expenses are the TR's responsibility. Mr Hard stated that there is an incentive for TRs to train representatives to develop their business so that the TR gets the maximum income from that representative's business activity. Mr Hard stated that if the representative's in a territory are successful the TR of that territory will receive an override commission and he stated that TRs can be paid a bonus of up to \$20,000 in any six month cycle. Mr Hard stated that from time to time the applicant might offer a TR a bonus for participating in a road trip and achieving a target level of sales but it does not reimburse TRs' expenses.
- 100 Mr Hard stated that individuals or companies can be TRs as long as they meet the standards imposed on the respondent by regulatory authorities and Mr Hard stated that the respondent does not pay or reimburse a TR for any expenses that the TR incurs in conducting the TR's business. All TRs drive and maintain their own cars and pay for all travel costs and TRs do a significant amount of driving which may be tax deductible and TRs provide their own tools including their own cars and the respondent does not keep a record of how much each TR or representative spends on car or other expenses. TRs are charged an amount for tools they do not provide for themselves such as brochures, policy disclosure statements and selling aids to assist them in developing their business. Mr Hard stated that a levy of \$10 per week was in place for all materials used by TR's plus GST while the applicant was a TR and the respondent has the right to charge TRs for lost materials. TRs set their own hours of work and TRs determine how many hours a day they work, the time they work and in what order they visit customers and the respondent asks TRs to dress in a business like fashion.
- 101 Mr Hard stated that each territory is within a sub-region which is administered by SRs and that SRs are individually contracted representatives who conduct their own businesses selling the respondent's products. SRs develop each TR in their sub-region and they receive an override from the sale efforts of TRs in their region and SRs may develop TRs as they see fit subject to regulatory constraints. The respondent does not sponsor a SRs development of TRs and does not pay for any development costs. SRs hold regular meetings with TRs who work in their sub regions which are conducted independently of the respondent and Mr Hard stated that attendance at these sessions is not compulsory. Mr Hard stated that from time to time he would meet with TRs to look at the business targets they had set themselves and how well they were achieving those targets and he stated that in his role as state manager he mentored representatives including TRs and SRs as principals of their own businesses. Mr Hard stated that during specific weeks called incentive weeks the respondent offered prizes for achieving target levels. In his role as State Manager Mr Hard attended a number of SR sponsored meetings for TRs to keep in touch with the business activities SRs conducted. Mr Hard stated that from time to time the respondent holds training sessions or sponsors SRs and TRs to deliver training on its behalf, for example, when releasing a new product or if there was a change to the laws that regulate how the respondent operates. Tier 1 training is an example of this compulsory training.
- 102 Mr Hard stated that a TR or representative is not required to achieve a set number of sales each week or each month to retain their contract. Mr Hard stated that SRs, TRs and representatives advertise their services and their business and the respondent reviews all advertisements before they are released to ensure that they do not breach financial services regulations.
- 103 Mr Hard stated that the respondent does not require TRs to work exclusively or solely with the respondent and that TRs are able to and do hold jobs with other entities. Mr Hard stated that the only limit on this is that their engagements must not bring them into conflict with the obligations they owe to the respondent. Mr Hard stated that when he was state manager one contracted representative in Western Australia had his own kebab shop whilst working as a representative and one SR ran a business selling first aid equipment. Mr Hard stated that TRs do not apply for leave such as sick leave or annual leave from the respondent or the other contracted representatives they deal with and they do not need to notify the respondent that they intend to be absent, but Mr Hard stated that as a courtesy it is easier to administer a territory if they do so. Mr Hard stated that as State Manager he encouraged all representatives including TRs to take out some form of income protection insurance and the respondent made this available to representatives at a 50% discount.
- 104 Mr Hard stated that a TR's business leads came from two sources. TRs generate their own leads for new business or the respondent supplied a number of leads which included the names of individuals who had contacted the respondent seeking cover or who hold existing policies and each TR allocates these leads to the representatives who work in that TR's territory. The respondent does not tell the TR which lead to give to a representative and a TR can either delegate a lead or take it for themselves and they keep the lead they are paid both the override and the base commission. The respondent does not supervise TRs when they are working in the field and TRs decide how to approach each customer or potential customer. Mr Hard stated that the respondent provides TRs with training about compliance and the business tools they can use as they conduct their business such as scripts for interviews and telephone calls to ensure they comply with the applicable legislation. Mr Hard stated that the respondent and SRs encourage each TR to phone through to their SR the TR's production figures sold each day and at the time the applicant was engaged with the respondent it required all representatives to pay to their TRs all monies for policies sold by the end of each week.
- 105 Mr Hard stated that TRs hold regular meetings with the representatives who work in their territory and these sessions are conducted independently of the respondent and are not compulsory training sessions sponsored or run by the respondent. Mr Hard stated that these meetings are different from the compulsory meetings run by the respondent every quarter which are held to meet the Financial Services Reform Act requirements.
- 106 Mr Hard stated that when a complaint is received from a customer, the customer concerned is contacted and a number of other customers the representative sold products to in the same week as the customer who lodged the complaint are also canvassed. A report is then sent to the State Manager who is responsible for investigating the complaint within three weeks. Mr Hard stated that in his role as National Audit Manager he became aware of complaints about the applicant in 2003 relating to a number of customers. Mr Hard stated that most or all of the complaints against the applicant occurred after the respondent lodged its application for a licence in early 2003. Mr Hard stated that to obtain a licence the respondent had to show that it was operating as if a licence applied and any indiscretion could have jeopardised that application. Mr Hard stated that on or about October 2003 the applicant re-sat some modules of the two week business training course that the respondent offers to all prospective representatives and the applicant was completely retrained in all of the obligations that bind the respondent's representatives. Mr Hard stated that he hoped that this retraining would "iron out" the applicant's approach to conducting his business and the necessity for him to comply with respondent's licence conditions and financial services laws that regulated

the applicant's and the respondent's business. Mr Hard stated that the applicant completed his retraining in October or November 2003.

107 Mr Hard stated that in early 2004 he recalled having a conversation with the applicant about the appropriateness of selling a new policy to an existing customer as a replacement. Mr Hard stated that he told the applicant that if he believed that one policy was better than another this could be sold to a customer but he told the applicant that no commission could be claimed and if a new policy was sold to a customer it was necessary that the TR fill out section 3 of the SOA and set out the reasons for selling the client this policy.

108 Mr Hard stated that he received the following complaints about the applicant on 26 August 2003 from the respondent's head office:

"...

Emir Sehovic is one such Representative and as you are aware his complaints concern the following issues:

1. 03/02/03 – Emir was regarded as too "pushy" by a customer and he was cautioned by PKB and re-trained by Stanley Gomes.
2. 29/05/03 – Emir sold a prospect a Cancer Policy in March 2003 when she had had a kidney removed due to malignant cancer in 1999 and had allegedly disclosed this to Emir. Emir to be cautioned and re-trained.
3. 24/06/03 – Emir sold a prospect and allegedly advised that her previous medical history was not important. Prospect claims to have declared a chronic back injury, but this was not documented by Emir. Emir to be cautioned and re-trained.
3. (sic) 14/07/03 – Emir allegedly sold a prospect on the basis that they had to take our insurance first to qualify for a bank loan through a friend of Emir's in Sydney. Emir to be cautioned and re-trained.

The CRC note that you have formally warned Emir in writing on 15th July 2003 and that he will be attending a two week business course to re-train in those areas that he is falling down. We also note that as at 20th August, Emir had not yet attended the course, but that Peter Alport states he will be attending the next Healthcare business course to study Code of Practice, Tier 1 training and Underwriting. With Emir's history, we would expect that he be re-trained at the first available opportunity rather than be giving advice with his present shortcomings in underwriting.

While the CRC agrees with your warning letter in this instance and would like to see Emir re-trained at the first opportunity, we are also concerned that these examples of poor underwriting place the Company at significant compliance and claims risk. We would hope that Emir takes this opportunity to reflect on his obligations under the new FSRA regime and your warning and hope that he understands that any future complaints similar to those above cannot, and will not be tolerated by Combined. ..."

(Exhibit R13 attachment HH-13.4.1)

109 Mr Hard stated that towards the middle of 2004 he received a letter from Field Audit in Sydney advising him know that no-one had done a review of any of the applicant's production parcels during the 6 month cycle that was about to end. Mr Hard stated that he then reviewed the applicant's sales as this regular process had not been undertaken for some time. Mr Hard stated the following:

"I called 4 or 5 of the customers who had purchased a policy from Erwin in the previous week. Almost all of those customers reported that Erwin told them that:

- (a) their existing cover was outdated;
- (b) the new policy he was selling offered them better cover than their existing cover;
- (c) they should upgrade to the new policy he was selling; and
- (d) they should wait 30 days and then cancel their existing policy."

(Exhibit R13 Supplementary statement of Hudson Hard point 25)

110 Mr Hard stated that he was concerned by what he discovered for the following reasons:

- (a) Older policies can offer better value than newer policies because their premiums are usually lower for the benefits offered.
- (b) The customer's existing policies covered a wider range of illnesses than the critical illness policy Erwin was offering. Customers who cancelled their existing policy and kept Erwin's policy would not be able to claim for as wide a range of illnesses.
- (c) Erwin appeared to be claiming commission that he knew, or should have known, he was not entitled to.
- (d) If Erwin was deceiving customers and deceiving Combined, it might affect Combined's reputation.
- (e) If any of the above concerns was right, it might put at risk Combined's Financial Services Licence."

(Exhibit R13 Supplementary statement of Hudson Hard point 32)

Mr Hard also understood the applicant told clients to wait 30 days to cancel their old policies as a new policy does not come into force for 30 days and a delay of this timeframe would also make it hard for the respondent to detect if twisting had occurred.

111 On 3 June 2004 Mr Hard received the following email from the respondent's head office (formal parts omitted):

"This is a quick note to inform you that there has been another complaint against our Representative Erwin Sehovic. Our P/H John Best (A/C 7027347), (sic) has alleged that he was unaware that the policy Erwin sold him was an additional policy to his other coverage.

I have spoken to John's wife Sheryl and explained their coverage to them and explained additional policies to her. She understands and believes that there could, (sic) have been a misunderstanding regarding the matter. On the SOA provided by Erwin it does not mention that this policy will be "in addition" to his existing coverage. John is now sending a letter cancelling most of his coverage, including the CRIP policy that Erwin sold, because he was not fully aware of how the policy he purchased, would affect his other coverage.

Hudson, the Compliance Review Committee is now awaiting your response to this issue, as this is his second complaint in a short period of time, add (sic) to that the fact that he has had several cautions and re-trainings sessions in the past. Could you please forward a response as soon as possible. So (sic) that this matter can be finalised."

(Exhibit R13 attachment HH-13.9.1)

- 112 Mr Hard stated the following in relation to the events leading up to the termination of the applicant's contract with the respondent:

"In mid 2004, very shortly before Combined terminated Mr Sehovic's engagement, I received, in my role as State Manager, a report to say that no-one had reviewed Mr Sehovic's production parcel for the 6 month cycle that ended at around that time.

I reviewed Mr Sehovic's production parcels and identified a number of problems as a result. I spoke with the SR, Mr Peter Alport, and asked him to check a number of Mr Sehovic's other production parcels. Mr Alport found similar problems. Most were issues of 'twisting', of selling a replacement policy to an (sic) customer without any clear benefit to the customer, and claiming a commission on the sale. We also discovered, through production parcel review, a number of problems with a number of policies he sold (see HH-13).

In June 2004 I interviewed Mr Sehovic with Mr Alport present. We presented Mr Sehovic with evidence of the twisting in the sales, and while he agreed that he had made the sales and that he had sold replacement policies, he rejected any suggestion that he had not done the right thing. We spoke to the following effect:

Hard: "We've just done a production parcel and this is what we've found. You've been twisting."

By the time of our meeting, Combined's Field Audit Team had spoken with a number of customers involved and obtained a clear understanding of what had occurred. Mr Alport and I went through the SOAs for a number of customers where problems had been found. There were a number of customers involved. There were a number of irregularities in the paperwork associated with a number of customers so it took some time to go through the detail. We went through, for each customer, the benefits the customer lost, Mr Sehovic's understanding of the company policy about selling replacement policies, Mr Sehovic's understanding of the need to fill out the third section of the SOA, and Mr Sehovic's understanding of the need to claim zero commission if he sold a replacement policy to an existing customer. From Mr Sehovic's responses during that discussion, I understood that he was well aware of the legal requirements surrounding sales of replacement policies and the paperwork that he had to fill out, and Combined's refusal to pay any commission on a replacement sale. Once we had done that, I said to Mr Sehovic words to the effect of:

Hard: "What have you got to say about that?"

Mr Sehovic was adamant that he had no case to answer and that he had done nothing wrong. He was visibly upset and so we went through the paperwork a number of times. In all, our interview and discussion with Mr Sehovic lasted for about an hour and half or more."

(Exhibit R13 points 27-31)

- 113 Mr Hard stated that at the meeting held with the applicant on 10 June 2004 after the allegations were put to him arising from the respondent's investigation the applicant did not ask for time to consider his position and make his own investigations.

- 114 Mr Hard stated that as state manager he did not have the authority to terminate the applicant's contract with the respondent and he recommended to the respondent's head office that the applicant's contract with the respondent be terminated, which occurred soon after. Mr Hard stated that on 11 June 2004 the applicant was sent the following letter (formal parts omitted):

"This letter is to confirm that your Independent Contractors Agreement dated 16 June 2003 with the Healthcare Division of Combined Insurance Company of Australia has been terminated under Clause 6a of that Agreement effective 18 June 2004.

We also wish to confirm that during the duration of this Agreement you have been conducting your own business as an Independent Contractor, distributing this Company's insurance policies to members of the public on a commission – (sic) only basis. You should have been claiming expenses which you incurred in conducting your business as deductions against your gross income for tax purposes. In that role you should have also been filing your tax returns as an Independent Contractor and not as an employee.

Your Agency Account will be finalised after ninety (90) days from your effective termination date, and provided that all Company materials have been returned any credit balance will be refunded to your last known address. If your Agency Account is in debit we will send you the details to enable you to settle your account.

Your Agency Account balance will be refunded through your State Regional Office, and any queries should be directed to the Regional Office in writing.

(Exhibit R13 attachment HH-13.12.19)

- 115 Mr Hard stated that a TR can work outside of his or her territory. Mr Hard stated that approximately five meetings were held each year to inspire and motivate representatives and to issue awards and prizes and were held at times that minimised the impact on the representative's selling time. Mr Hard stated that representatives were invited to attend these meetings and that attendance at these meetings was not compulsory and there was no penalty for non attendance. Mr Hard stated that weekly meetings were held on Monday and Tuesday mornings at which most representatives attended and these meetings were to share sales made by representatives and also involved training to improve productivity and that SRs ran these meetings.

- 116 Mr Hard stated that it was unusual for a customer to cancel an existing policy and take out a new one.

- 117 Under cross-examination Mr Hard agreed that he asked the applicant to train a representative in Albany which was outside of his territory and Mr Hard rejected the proposition that he threatened to terminate the applicant if he did not train this representative. Mr Hard stated that he told the applicant at the meeting held on 10 June 2004 that four or five customers had a problem with the applicant and that each one was discussed with the applicant case by case and he stated that Mr Hutchison was mentioned at this meeting. Mr Hard stated that the applicant was told that he had been twisting Mr Hutchison. Mr Hard could not recall asking for the applicant's sales roll at the end of the meeting and he stated that when he was asked if he was being dismissed Mr Hard told the applicant that he could not do that as this was a decision for the respondent's head office. Mr Hard recalled Mr Alport saying that the applicant was an important player in his team. Mr Hard stated that on 11 June 2004 he contacted the respondent's head office about problems with the applicant and this led to the letter of 11 June 2004 being generated terminating the applicant's contract with the respondent.

- 118 The respondent tendered a number of additional witness statements and documents which were the unsworn evidence of Ms Cheryl Best, Ms Coyne and Ms Judith Higgs, a complaint from Ms Simulus dated 24 June 2003 and a complaint from Mr Kuc dated 6 July 2003. As this evidence was unsworn and the persons who made these statements were unavailable to be cross-examined about their evidence I have not taken this evidence into account when arriving at my conclusions in relation to this application.

Submissions

- 119 Written closing submissions were lodged by the applicant and the respondent.

Applicant's submissions

- 120 The applicant lodged extensive documentation as part of his closing submissions and much of this documentation was not relevant to this application. As I understand the submissions made by the applicant which in my view were relevant to this application, the applicant claims that the policies the respondent claimed the applicant sold in the period July 2003 to December 2003 did not conflict with the applicant's claim that he generated \$46,124 in policies during this period. The applicant maintains that he was selected by Mr Alport to provide field training to new employees and he asserts that he was selected by Mr Alport to fill the position of Acting SR at no extra expense to the respondent and that as a result the applicant's expenses and workload increased. The applicant maintains that when he worked for the respondent he conducted himself with honesty, integrity and in a diligent manner and he claims that his work was undertaken in line with the training given to him by the respondent. The applicant rejects the respondent's claim that he twisted customers.

Respondent's submissions

- 121 The respondent maintains that the Commission does not have jurisdiction to deal with this application as it argues that the applicant was never an employee of the respondent when applying the definition of employee in s7(1) of the Act. The respondent argues that at all material times the applicant was an independent contractor who provided services to the respondent in the course of undertaking his own business for his own reward. The respondent argues that the two contracts signed by the applicant both as a representative and a TR accurately described the relationship between the parties as being on the basis of a contract for service and the respondent argues that there was no ambiguity in these contracts about the nature of the relationship between the applicant and the respondent and the respondent argues that weight must be given to this lack of ambiguity.
- 122 The respondent maintains that the applicant's TR contract was not a sham as the applicant operated as an independent contractor throughout his relationship with the respondent. The respondent also argues that at all material times the applicant was aware of the true nature of his relationship with the respondent and maintains that it was only after the applicant was terminated that he raised any challenge about the nature of this arrangement with the respondent.
- 123 In support of its argument that the applicant was an independent contractor the respondent maintains that the respondent had no right to exercise control over the manner in which the applicant performed his work except for requiring the applicant to conduct his business in accordance with the relevant statutory and regulatory scheme which applied to the respondent and its representatives and the respondent claims that it exercised only that degree of control over the applicant that was absolutely necessary and no more. The respondent maintains that the applicant set his own hours subject only to the availability and convenience of customers with whom the applicant dealt, the applicant was responsible for his own financial affairs including tax and GST remittance, the applicant was not under any supervision in the field, he was able to work in the territory assigned to him or in any other territory, the applicant had no sales targets to meet other than the targets that he set for himself and his business, the applicant did not wear and was not required to wear a uniform and the applicant was able to decide, subject to legal requirements, how he would approach each customer and potential customers. The only training sessions the respondent compelled the applicant to attend were those addressing competency (such as knowledge of the respondent's products) and compliance with the applicable regulatory regime. Any meetings attended by the applicant were conducted by TRs or SRs, attendance at these meetings was by invitation and attendance was not compulsory and the respondent did not require the applicant to attend its premises as a place for work. The respondent also offered and provided the applicant with the training required to develop the skills necessary to conduct his own business. The applicant could work for others and there was evidence that some of the respondent's representatives took advantage of this option and the applicant was entitled to sell and renew insurance policies in territories granted to him under his contract or in other territories. The applicant was free to advertise his services in the manner he saw fit subject to the respondent ensuring the applicant did not breach financial service regulations or mislead the public. Clause 2 of the applicant's contract provided that the applicant had to pay for all rent, transportation, hiring, postage, telegrams, telephone, advertising and all premiums in respect of workers' compensation, income protection, health, accident and other insurances, superannuation contributions and all other expenses incurred in connection with the applicant's business and the applicant provided his own tools, including his own car and business cards and he was charged \$10 per week for any tools he did not provide himself, such as brochures, policy disclosure statements and selling aids to assist him in developing his business. As a TR the applicant was entitled to keep leads to himself or delegate them to a representative in his territory and the respondent argues that this structure adds weight to a conclusion that the applicant was an independent contractor.
- 124 The respondent maintains that the right of either party to terminate the applicant's contract is consistent with the strict regulatory scheme within which the parties operated and is commercial in nature and the short length of notice for long term engagements (at least 7 days) adds weight to a conclusion that the applicant was not an employee of the respondent.
- 125 The respondent argues that the applicant presented as though he was carrying on his own business. The applicant's TR contract required that he pay all applicable taxes, he was responsible for dealing with his own tax affairs, the applicant was not taxed as an employee as the respondent did not pay PAYG (Pay As You Go) tax with respect to the applicant, and the applicant was responsible for completing and remitting a BAS at the appropriate times and for remitting GST and all other taxes. The applicant had an ABN and traded under the registered business name "Erwin's Eternally" and the applicant paid for and supplied his own business cards. The respondent did not pay the applicant a wage or salary based on an hourly rate of pay, the applicant was not guaranteed any income or an income of a certain amount at any time and the applicant was paid on a commission basis only which was paid after the completion of defined tasks. Additionally the applicant also received income in the form of override commissions from the efforts of other independently contracted representatives working in his territory. The respondent did not reimburse the applicant for business expenses incurred by him including the cost of maintaining his car, travel and accommodation or for the costs associated with the field training of representatives and the applicant was not compensated by the respondent for incomplete sales, cancelled sales or bounced cheques. The respondent argues that the significant amount of deductions claimed by the applicant whilst working with the respondent adds weight to the applicant conducting his own business. For example, the applicant's gross earnings during the last 12 months of his engagement with the respondent was \$102,957.63 and the applicant claimed expenses of \$25,722.70 for this period which represents 25 per cent of his gross earnings. Each month the applicant provided the respondent with a tax invoice and the respondent paid this invoice plus GST. At all times during the applicant's relationship with the respondent he was registered for GST purposes and the applicant authorised the respondent to draw up recipient-created GST-compliant tax invoices.
- 126 The applicant was not given paid annual leave or sick leave and the commissions paid to the applicant did not include a component for sick leave or annual leave. The applicant's business was a saleable asset (see clause 1(g) of the applicant's TR contract) and the applicant created goodwill in the conduct of his business.
- 127 The respondent argues that when taking into account the relevant indicia that the applicant was not an employee of the respondent at any material time or at all and the Commission therefore has no jurisdiction to deal with this application. The

- respondent relies on a number of well known authorities in support of its claim that the applicant was an independent contractor (see *Hollis and Varbu Pty Ltd* (2001) HCA 44; (2001) 181 ALR 263 et al).
- 128 The respondent maintains in the alternative that if the applicant was an employee of the respondent it had no option but to end its relationship with the applicant as he had engaged in unethical and unlawful practices in breach of his statutory duties which threatened the respondent's ability to hold its license which it needs to conduct its business in Australia. The respondent also argues that the applicant's activities took advantage of a number of individuals who trusted him.
- 129 The respondent argues that it lawfully terminated the applicant as his termination was in accordance with the terms of his TR contract, the respondent had a valid reason for terminating the applicant's engagement as he committed gross misconduct and the respondent argues that the applicant's conduct jeopardised the respondent's license. The respondent also argues that it terminated the applicant in a manner which was fair and reasonable and which afforded the applicant procedural fairness.
- 130 The respondent maintains that the applicant engaged in twisting which is a practice that undermines the earnings of other representatives and constitutes a breach of the duties imposed on the respondent and its representatives under the Corporations Act, the respondent's license, the insurance industries General Code of Practice, the Insurance Contracts Act (Cth) and the contracts which TRs enter into with the respondent and the respondent argues that one instance of twisting is sufficient to warrant the termination of a TR's contract.
- 131 The respondent claims that between 5 May 2004 and 22 October 2004 the respondent discovered that the applicant had been twisting customers as a result of an internal review and complaints about the applicant from customers. The respondent maintains that the applicant also did not fill out section 3 of the SOA when dealing with a number of his customers and in doing so breached the license requirements on the respondent. Additionally on 1 April 2004 the respondent received a complaint about the applicant in regard to unprofessional and unethical conduct in breach of the Privacy Act.
- 132 The respondent maintains that in 2003 a number of complaints were made about the applicant's conduct and even though the applicant was retrained following these complaints to re-acquaint him with the behaviour expected of him the applicant was caught twisting a number of customers after successfully completing this retraining.
- 133 Specifically, the respondent maintains that the applicant repeatedly, and despite warnings and retraining engaged in conduct which was both illegal and unethical and the applicant sold insurance policies to existing and new policyholders knowing that he was acting illegally, improperly and unethically. The respondent claims that when the applicant sold insurance policies to existing policyholders he misled them about their existing cover, their prospective cover and the similarities and differences between them and policyholders were advised that they were upgrading their insurance cover, rather than purchasing materially different insurance cover. The respondent also maintains that the applicant claimed sales commissions on insurance policies in circumstances where he knew he should not have claimed a commission, at times the applicant did not advise the prospective purchasers of a policy that he would be claiming a commission and thereby profited from his misconduct. The respondent maintains that the applicant did not advise prospective purchasers of the respondent's insurance policies of the effect of providing incomplete or inaccurate information to the respondent and the respondent claims that the applicant deliberately and knowingly concealed his misconduct by not completely and accurately recording the advice provided to policyholders and by adopting a practice of advising policyholders to cancel their existing policies after a significant lapse of time (often 30 days) without disclosing that they had been advised to do so by him. In summary, the respondent argues that the applicant engaged in unprofessional and unethical conduct, high pressure sales techniques and acted in breach of privacy legislation and requirements.
- 134 The respondent argues that the applicant knew that his engagement as an independent contractor would be brought to an immediate end in the event that he twisted customers and the applicant was aware that twisting was regarded seriously by the respondent such that the applicant could have been in no doubt about the consequences if the applicant was caught engaging in twisting.
- 135 The respondent maintains that the applicant has no outstanding entitlement to commission or payments under any other of its incentive schemes and the respondent relies on the **witness** statements of Mr Gurney dated 8 August and 28 November 2005 in this regard.
- 136 The respondent maintains that the applicant was not denied procedural fairness given the manner of his termination. When the applicant's misconduct was discovered he was interviewed by Mr Hard and Mr Alport and the respondent argues that at this meeting he was given an adequate opportunity to know the substance of the allegations against him and to respond to these allegations. The respondent argues that the procedure followed by the respondent afforded the applicant a fair go all around and was fair and proportionate to the seriousness of the applicant's misconduct (see *Forest Products, Furnishing & Allied Industries v Bunnings Forest Products* 74 WAIG 1792 per Beech SC; *Edwards JF v President of the Legislative Council and Another* 75 WAIG 2059 per the Full Bench; *Carole Ann Barrick v Qantas Flight Catering Limited* [Print Q6686]; *Fischer v Telstra Corporation Limited* [Print R2558] (Ross VP, Duncan DP and Redmond C); *Maluk v Sutton Tools Pty Ltd* [Print R0426]; and *Rose v Telstra Corporation Limited* [Print Q9292]).
- 137 The respondent is claiming costs in relation to this application and submits that in the event that the commission is not persuaded to award costs against the applicant on the basis of the written submissions the respondent wants the opportunity to make oral submissions on this issue.
- 138 The respondent argues that the applicant's application was frivolous and vexatious as it was untenable and could not possibly succeed and the respondent submits that the applicant was on notice from an early stage that the respondent would be seeking costs if it was successful in defending this claim. After this application was filed the respondent set out in detail the nature of the complaints made against the applicant and informed the applicant that it would seek costs if this matter was to go further. In February 2005 the applicant was given the opportunity to review relevant documentation in relation to the applicant's alleged misconduct and the applicant did not respond to that offer and on 18 February 2005 the respondent set out a summary of its case against the applicant. In March 2005 the respondent provided the applicant with a complete copy of documents relevant to the complaints against the applicant and the breaches he had committed of his statutory duties and on 13 July 2005 the respondent wrote to the applicant setting out in detail the nature of the case against the applicant, it enclosed a bundle of business records and outlined the applicant's breaches of the Corporations Act, the respondent explained in detail the nature of the breaches committed by the applicant and the respondent invited the applicant to discontinue his application on the basis that each party would bear their own costs. The respondent also informed the applicant at the time that if he did not discontinue the respondent would seek an order that the applicant pay its costs from the earlier of the expiry or rejection of its offer. The applicant did not respond to this letter. As the applicant was represented at this time and was able to take legal advice about the complaints against him and issues raised by the respondent, the respondent argues that in the circumstances the Commission is justified in ordering that the applicant pay the respondent's costs (see *Mr BM Drake v B.P. Refinery (Kwinana)* 75 WAIG 2431 and 80 WAIG 625).

Findings and conclusions

Credibility

139 I listened carefully to the evidence given by each witness. I have concerns about the evidence given by the applicant. In my view parts of the evidence given by the applicant was self-serving and deliberately tailored by him to justify his own position. I find that the applicant was evasive at times when asked straightforward questions and he was reluctant to answer a number of questions put to him under cross-examination when the issues being put to him did not further his case. Furthermore, I find that on a number of occasions the applicant gave inconsistent and contradictory evidence. For example, when cross-examined about his interactions with Ms Higgs the applicant denied that he contacted her mother for Ms Higgs' bank account details (transcript pp 259 and 260) and then later conceded that he did so on one occasion (transcript page 261). The applicant stated in evidence in chief that he asked Mr Gomes about what he could expect to earn and was told "between forty to sixty thousand" (transcript page 29) and in cross-examination the applicant denied that Mr Gomes gave him a range of possible earnings (transcript page 116). The applicant denied that he was advised that his contract with the respondent would be brought to an end if he misled a customer about what a policy covered and the benefits and premiums of that policy and if he was caught twisting a customer (transcript pp 174 and 175) yet he later conceded that he was told by the respondent that if he was engaged in twisting his contract with the respondent would be brought to an immediate end (transcript page 266). I reject the applicant's claims that he was unable to understand some of the questions asked of him because English is not his first language. The applicant has two university qualifications, the documents he filled out for clients and when undertaking training, which were tendered during the proceedings, in my view demonstrate that the applicant had a reasonable standard of literacy in English and in my view the applicant was able to articulate his views when it was in his interests to do so. In the circumstances I find the applicant to be an unreliable witness and conclude that his evidence should be treated with caution.

140 I find that the evidence given by all of the other witnesses in these proceedings was given honestly and to the best of their recollection and in my view each witness gave evidence which was considered and in the main, consistent. I therefore have no hesitation in accepting their evidence.

141 In the circumstances, where there is any inconsistency in the evidence given by the applicant and the respondent's witnesses I prefer the evidence given by the respondent's witnesses.

Was the Applicant an Employee or Independent Contractor?

142 It is not for the respondent to show that the applicant was not an employee but for the applicant to show, on the balance of probabilities, that he was an employee (*Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd t/as Florida Exclusive Pools* (1996) 77 WAIG 4 at 8 per Fielding SC). If the applicant is found not to have been employed by the respondent under a contract of service then the Commission has no jurisdiction to deal with the applicant's claim that he was unfairly dismissed and that he was denied a benefit under his contract of employment with the respondent.

143 A number of relevant indicia are to be taken into account when determining the employment relationship. In *Gregory Patrick Millar v JB & BL Nominees Pty Ltd t/a Southern Cross Traders* (2005) 85 WAIG 3802 at 3809 Smith, C stated the following:

"I observed in *Howe v Intercorp Services Pty Ltd trading as WestVision Painting Company* [2001] WAIRC 2643 at [24] and [25]; 81 WAIG 1212 at 1214 that:

"The relationship of employer and employee is a contract of service where an employee contracts to provide his or her work and skill (typically to enable an employer to achieve a result). An independent contractor works in his or her own business on his or her own account. Whilst the authorities do not establish a conclusive test for determining whether a person is an employer, regard must be had to the whole of the relationship. In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 Mason J at 24 and Wilson and Dawson JJ at 36 held that a prominent factor is the degree of control which the person (who engages the other) can exercise over the person engaged to perform work. The High Court also held that the existence of control is not the sole criteria, other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to provide exclusive services, provision for holidays, deduction of income tax, delegation of work, the right to suspend or dismiss, the right to dictate the place of work and hours of work. Further, Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* at 26 to 27 also observed that in some cases the organization test can be a further factor to be weighed (along with control), in deciding whether the relationship is one of employment or of independent contractor. The organization test is whether the party in question is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not for a superior (*Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 per Lord Wright at 169).

Whilst regard can be had to whether the parties regarded their contractual relationship one of employee/employer or independent contractor, if the evidence shows otherwise the parties cannot alter the truth of that relationship by putting another label on it (*Massey v Crown Life Insurance Co* (1978) 1 WLR 676 and *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (1983) 2 NSWLR 601)."

The distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own" (*Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 per Windeyer J at 217; see also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 per McHugh J at 366; approved by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [40]."

144 In this decision at 3810 Smith, C also stated the following:

"In *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 Stephen J at page 404 observed in relation to land salesmen who were remunerated solely by commission in the case before him:

"... the employers had at least equal skill and knowledge to that possessed by their land salesmen and yet voluntarily refrained from the exercise of control over those salesmen, relying instead upon the existence of mere "self-governing" conventions and giving the salesmen "almost total freedom", the most striking instance of which was their ability to take extended leave without prior permission.

It is, to my mind, of little significance that these employers, when dealing with persons working for them who are remunerated by commission, do not, in the particular circumstances of this case, impose upon those persons what the majority refer to as "a detailed regimen". When the work involved is that of the persuasion of buyers the manner in which it is performed must perforce vary from salesman to salesman; each employs his preferred techniques which experience has taught him and any attempted imposition of a uniform method of work might well prove very disadvantageous in the outcome. The nature of the work is precisely of that kind in which it might be expected that an

employer would deal with his expert and experienced salesmen in very much the way the respondents did; I would not for that reason regard those salesmen as other than employees."

Stephen J then went on to observe at page 405 in relation to the matter before him that the salesmen remained very much a part of the employer's organisation and were subject to control by their employer in a number of respects. He then noted at page 407 that the salesmen were not supervised in their work and observed:

"This lack of supervision is in large measure accounted for by the nature of their work and their careful selection and resultant skill and responsibility, coupled with the fact that payment by commission itself provides adequate incentive so as to safeguard the interests of the respondents."

145 In *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction Forestry Mining and Energy Union of Workers* (2004) 85 WAIG 5 the Industrial Appeal Court dealt with the issue of whether or not two workers were employees or independent contractors. Steytler, J stated the following at 8:

"That brings me to the second question, whether the workers Kevin Bartley and Craig Fowler were employees of the appellant or independent contractors.

The principles to be applied in answering a question of this kind are not in doubt.

Traditionally, the so-called "control test", measuring the degree of control which the person engaging the worker is able to exercise over the worker, has been regarded as important: see, for example, *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 and *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561.

In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24, Mason J said that:

"A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it: *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at p 571; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at p 402; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at p 404. In the last-mentioned case Dixon J said:

"The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's orders and directions."

...

"Similarly, in that case, Wilson and Dawson JJ said (at 35):

"The classic test for determining whether the relationship of master and servant exists has been one of control, the answer depending upon whether the engagement subjects the person engaged to the command of the person engaging him, not only as to what he shall do in the course of his employment but as to how he shall do it: *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762. The modern approach is, however, to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances."

In *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 40 - 41 Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ pointed to the increasing difficulty in applying the control test in more modern times. In the course of referring to the history of that test, they quoted (at [43]) the following passage from Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury*, 2nd ed (1979), pp 72 - 73:

"The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one."

McHugh J pointed out, in that case at 50 [71], that "The right to supervise or direct the performance of a task cannot transform into a contract of service what is in substance an independent contract ...".

Hollis was a case which involved an issue of vicarious liability. There, the Court placed some emphasis on the question whether the workers in that case (they were couriers) were carrying on a trade or business of their own or were serving the employer in its business. Distinctions of this kind go back some time in this context. In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48 (in a passage since quoted in *Hollis* at 39) Dixon J said, of an independent contractor, that:

"[t]he work, although done at [the principal's] request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal."

Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, in *Hollis*, after considering what had been said by Dixon J, went on to say (at 39):

"This statement merits close attention. It indicates that employees and independent contractors perform work for the benefit of their employers and principals respectively. Thus, by itself, the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee. However, Dixon J fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor. These notions later were expressed positively by Windeyer J in *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217. His Honour said that the distinction between an employee and an independent contractor is 'rooted fundamentally in the

difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'. In *Northern Sandblasting* (1997) 188 CLR 313 at 366, McHugh J said:

"The rationale for excluding liability for independent contractors is that the work which the contractor has agreed to do is not done as the representative of the employer."

Where the parties have defined their relationship by a clause in a contract made between them, that clause will be given weight (if it is not a sham), although it will not be determinative. In *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407, the Privy Council said (at 409) that a term of this kind cannot be given effect if it contradicts the effect of the agreement as a whole. Their Lordships applied the following statement by Lord Denning MR in *Massey v Crown Life Insurance Co* [1978] 2 All ER 576 at 580:

"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 upon it ... On the other hand, if their relationship is ambiguous and is capable of being one or the other [that is, either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them."

This passage was cited with approval by the Privy Council in *Narich Pty Ltd v Commissioners of Pay-roll Tax (NSW)* [1983] 2 NSWLR 597 at 607 (see also *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 at 126).

In *Stevens*, at 37, Wilson and Dawson JJ said that "the actual terms and terminology of the contract will always be of considerable importance". More recently, in *Hollis*, at 45, Gleeson CJ and Gaudron, Gummow, Kirby and Hayne JJ reiterated (citing *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 150 - 151; *Adam v Newbigging* (1888) 13 App Cas 308 at 315; *Ex parte Delhasse; In re Megevand* (1878) 7 Ch D 511 at 526, 528, 532 and *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 at 699) that such terms are not of themselves determinative as parties cannot deem the relationship between themselves to be something it is not."

The terms of the contract

- 146 The applicant's contractual arrangement with the respondent between August 2002 and June 2004 was governed by two written contracts and both contracts, which were signed by the applicant and the respondent, expressly provide that the applicant would be engaged by the respondent as an independent contractor (see the preamble to these contracts - Exhibits A1 and A2).
- 147 I reject the applicant's evidence that he was unaware at the time he signed his first contract that his relationship with the respondent was to be as an independent contractor. As I accept the evidence of Mr Hard I find that the applicant would have been advised by Mr Gomes at his initial interview that the relationship between the parties was on the basis that the applicant would be an independent contractor and I find that when the applicant's contract was given to him at the training course he attended in August 2002 the applicant was again made aware that the relationship between the applicant and the respondent was to be on an independent contractor basis. There was no evidence that the applicant was unhappy to sign a second contract with the respondent in June 2003 as a TR on an independent contractor basis and there was no evidence that the applicant took issue with operating as an independent contractor for the duration of his relationship with the respondent under both contracts signed by the applicant and the respondent.
- 148 The applicant gave evidence that he was aware of the basis upon which an independent contractor contracts with a principal and that he had worked as a contractor prior to commencing work with the respondent and the applicant conceded that he had a registered business through which he claimed business expenses for the duration of his relationship with the respondent.
- 149 The terms of the contract between parties are to be given weight if it is not a sham and in this instance I find that the relationship between the parties was not a sham. I find that the preamble and terms of the applicant's TR contract reflect that the applicant intended to be and was to operate as though he was an independent contractor to the respondent and I find that the applicant conducted himself under a business arrangement as contemplated by the terms of this contract with the respondent (see paragraph 160).
- 150 In all of the circumstances it is therefore my view that the terms of the contractual arrangement between the applicant and the respondent point to the applicant being under a contract for service with the respondent.

Mode of remuneration

- 151 It was not in contest and I find that at the time the applicant's contractual relationship with the respondent ceased the applicant was remunerated on a commission only basis from his sales and that of the representatives in his territory and that in addition to a bonus payment made at the discretion of the respondent the applicant was regularly paid the commission owing to him on the basis of information contained on weekly returns filled out by the applicant. If the applicant did not sell policies in any week, apart from ongoing commissions from previous sales, the respondent did not pay the applicant any monies. As employees working under a contract of service can also be remunerated on the basis of commission only payments and as these payments can be irregular I find that the mode of remuneration applying to the applicant under his contract with the respondent to be a neutral factor.

Hours

- 152 I find that the applicant did not have set hours and that the applicant determined the amount of hours he worked which varied according to the meetings he scheduled with his clients. Whilst I accept that the applicant usually attended meetings organised by the SR in charge of his area on Monday and Tuesday mornings of each week I find that attendance at these meetings was voluntary and was not a requirement under the applicant's contractual arrangement with the respondent. Although it appears that it was in both the applicant's and the respondent's interests for the applicant to attend these meetings I find that the attendance at these meetings was not a pre-condition to the applicant's ongoing relationship with the respondent and I reject the applicant's claim that he was advised that unless he attended these meetings he would be terminated. I also find that there was no requirement that the applicant regularly attend the respondent's premises as a place of work. In my view the flexibility that the applicant had in relation to the hours he worked and the lack of a fixed place of work is indicative of the applicant being under a contract for service.

Leave

- 153 I find that the applicant had no entitlement to any leave and was not paid or entitled to sick, annual or long service leave nor was any provision made in the commission paid to the applicant for these entitlements. This arrangement is indicative of a contract for service.

Taxation

- 154 I find that the commission paid to the applicant by the respondent was a gross amount and an amount for GST was also paid to the applicant in relation to this commission. I find that the applicant was responsible for paying his own tax and GST on his earnings, the applicant's business lodged BAS confirming the applicant's earnings and when filing income tax returns I find that the applicant made substantial deductions for expenses incurred by him whilst selling the respondent's products including car and work related expenses (see Exhibits R1 to R5 and R7). In my view these arrangements are consistent with the applicant being under a contract for service.

Control test

- 155 The respondent acknowledged that when selling the respondent's products the applicant was required to conduct himself in a particular manner and fill out and lodge forms in accordance with guidelines determined by the respondent and the applicant was trained by the respondent to meet the regulatory requirements on the respondent so that the respondent could retain its license to sell its products. To that extent I accept that the applicant was under the respondent's control. Notwithstanding these constraints on the applicant when he sold the respondent's products I find that in the main it was up to the applicant to determine how he sold the respondent's products to clients and where and when he conducted this business. I also accept that the applicant was not supervised in relation to his day to day conduct when selling the respondent's products. When considering this indicia I find that as there was limited control over the way in which the applicant performed his day to day work then this indicia points to a contract for service.

Organisation test

- 156 I find that the applicant was integral to the respondent's operations. The applicant reported to his allocated SR and the applicant allocated prospective clients to the representatives in his territory or he kept leads for himself after being given leads by the respondent and that these leads constituted approximately 90 per cent of the applicant's contacts. I find that if the applicant did not sell the respondent's products or co-ordinate the sales of the representatives for whom he was responsible and also train these representatives then this would create difficulties for the respondent as its earnings base would be compromised. It is therefore my view that as the applicant sold the respondent's products, he reported to a SR that was contracted to the respondent and as a TR he assisted, trained, encouraged and regularly met with representatives in his area this indicates that the applicant was an integral part of the respondent's organisation. I therefore find that this arrangement points to the applicant being under a contract of service.

Workers' compensation

- 157 The applicant was covered by the respondent's workers' compensation insurance policy however as I accept Mr Gurney's evidence that the respondent was required to and did take out workers' compensation insurance for the independent contractors who worked with the respondent then I find this points to the applicant being under a contract for service.

Superannuation

- 158 The respondent did not make superannuation contributions on behalf of the applicant which an employer is required to do by law in relation to its employees. I therefore find that the lack of this payment lends weight to the applicant being under a contract for service.

Provision and maintenance of equipment

- 159 The respondent generated and provided most of the resources that the applicant used to sell the respondent's products including forms and information documents which the applicant gave to his customers and these resources were paid for on a monthly basis by the applicant. The applicant maintained and paid his own vehicle expenses to undertake his work and he claimed his vehicle expenses as a business deduction when completing his taxation returns. I accept that no payments were made by the respondent in return for the applicant's costs in this regard and expenses incurred by the applicant when travelling to country areas were not reimbursed by the respondent except in unusual circumstances. In my view these arrangements are indicative of the applicant being under a contract for service.

Was the applicant carrying on his own business?

- 160 There was a substantial amount of evidence confirming that the applicant was conducting his own business during his relationship with the respondent. The applicant had a registered business name of 'Erwin's Eternally' which he used when selling the respondent's products, the applicant paid GST on his income and filled out BAS in the name of his registered business and the applicant deducted a substantial amount of expenses in his annual taxation returns as a business proprietor would normally do so when running a business. The applicant was required to and paid all costs associated with postage, telephone, advertising and all insurances, superannuation and other expenses incurred in connection with the running of his business and I also find that the applicant funded some of the training courses he and his representatives attended. As the applicant was effectively running his own business for his benefit between August 2002 and June 2004 I find that this business arrangement is indicative of the applicant being under a contract for service.

Obligation to work

- 161 The contract signed by the applicant in June 2003 confirms that the applicant could perform work for others during his relationship with the respondent and Mr Hard also gave evidence that from time to time some of the respondent's representatives performed work elsewhere in addition to working with the respondent. In my view this arrangement is indicative of a contract for service arrangement.

Conclusion

- 162 Taking into account the authorities relevant to the determination of the relationship between the applicant and the respondent and the above findings and when reviewing the totality of the relationship between the applicant and the respondent I am satisfied and I find that there is an abundance of evidence confirming that the applicant's working arrangement with the respondent prior to and at the time the applicant ceased working with the respondent was as an independent contractor. In the circumstances I find that the applicant was not an employee as defined in s7(1) of the Act and the Commission therefore does not have the jurisdiction to deal with this application and this application will be dismissed.

- 163 If I am wrong in reaching this conclusion, which I do not concede, and the applicant was employed under a contract of service I am required to determine whether in all of the circumstances the applicant was unfairly terminated and whether he is owed benefits under his contract of employment with the respondent.

- 164 This dismissal was summary in nature as the applicant was required to cease working with the respondent with immediate effect the day after he met with Mr Hard and Mr Alport on 10 June 2004. The onus is therefore on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities, however, there is an evidential onus upon the employer to prove that summary dismissal is justified (see *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679) The question of whether a person is guilty of

misconduct justifying summary dismissal is essentially a question of fact and degree (*Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819). In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed:

“Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee’s work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.”

- 165 A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (see *Shire of Esperance v Mouritz* (1991) 71 WAIG 891 and *Byrne v Australian Airlines* (1995) 61 IR 32). In *Shire of Esperance v Mouritz* (op cit), Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.
- 166 On the facts as I find them I am satisfied, at least on balance, that the respondent has demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal. I also find that the respondent conducted a full and appropriate investigation into the applicant’s actions prior to his termination and I am satisfied that in the circumstances of this case the applicant was afforded “a fair go all round” (see *Undercliffe Nursing Home v Federated Miscellaneous Workers’ Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).
- 167 I find that in August 2002 the applicant commenced working with the respondent as a representative and that as a result of the applicant’s success in this role the respondent offered the applicant the opportunity to become a TR. I find that in June 2003 the applicant accepted a position as a TR and he signed a new contract confirming this arrangement and I find that around this time the respondent gave the applicant training relevant to the role of a TR.
- 168 I accept the evidence of Mr Gurney and Mr Hard that there are a number of legislative requirements and constraints on the respondent and its representatives and in relation to the retention of the respondent’s license to sell its products and I find that from August 2002 onwards the applicant was comprehensively and regularly trained about these legislative requirements and how to conduct himself when selling the respondent’s products. I also find that prior to and after the respondent obtained its license in September 2003 the respondent trained its TRs and representatives to meet the requirements of retaining this license. I find that the applicant successfully completed all of the training undertaken by him as well as the re-training he was required to undertake in October 2003 as a result of complaints from customers about the applicant’s behaviour.
- 169 I find that the applicant was aware that twisting customers was inappropriate and that the applicant was aware that if he was caught twisting customers this could lead to the termination of his contract with the respondent and I find that this issue was also discussed during the re-training session the applicant attended in October 2003. I also accept Mr Hard’s evidence that the issue of the inappropriateness of twisting customers was raised directly with the applicant in early 2004 (see Exhibit R8-A attachments FG-4 and FG-5).
- 170 I find that the respondent conducted an appropriate investigation into the applicant’s actions in the lead up to his termination and I find that this investigation came about as a result of two complaints made about the applicant in early 2004, Ms Higgs and Mr Best, and also because of negative feedback from customers about the applicant gathered by the respondent as part of a regular review of the applicant’s sales. I find that because of these concerns other customers who had also been sold policies by the applicant were contacted for feedback. I find that as a result of information obtained from this further review undertaken by Mr Hard and Mr Alport the respondent became aware that the applicant was not selling the respondent’s policies in accordance with the legislative requirements on the respondent and the applicant. Specifically this included the applicant twisting some of his customers (see Exhibit R13 attachment HH-13.12.28 to 42).
- 171 On the basis of the feedback the respondent obtained from its investigation into the applicant and given the complaints made by Ms Higgs and Mr Best I find that it was open for the respondent to conclude that the applicant had acted contrary to the respondent’s code of ethics and other legislative requirements and I find that by twisting customers and not adequately filing out SOA forms the applicant was acting contrary to the requirements on the respondent and the applicant under the respondent’s license. In the circumstances I find that the respondent had sufficient reason to terminate the applicant under clause 6 of its contract with the applicant which provides that the arrangement between the parties can be brought to an end with one week’s notice being given.
- 172 After the respondent completed its investigation I find that Mr Hard and Mr Alport had a meeting with the applicant on 10 June 2004 and I find that at this meeting Mr Hard and Mr Alport comprehensively set out the areas where the applicant’s performance was deficient and I find that the applicant’s inappropriate interactions with specific customers were discussed including the twisting of customers and the applicant incorrectly filling out SOA forms. Given my views on witness credit I reject the applicant’s statement during evidence in chief that he was not given details about the respondent’s specific concerns about his behaviour at this meeting and in any event the applicant contradicted this statement in re-examination when he named a number of the clients and specified issues which were raised with him during this meeting. I find that the applicant was advised at this meeting, which I find lasted for at least one and a half hours, that his behaviour towards some of his customers was unacceptable and that his conduct towards some of his clients was putting the respondent’s license at risk.
- 173 After the applicant’s contract was terminated the respondent became aware of additional complaints about the applicant selling existing customers new policies which amounted to the twisting of these customers. Even though these complaints were received after the applicant ceased working with the respondent in my view these complaints lend weight to the respondent’s view that it had sufficient grounds to terminate the applicant’s contract as at 11 June 2004 (see Exhibit R13 attachment HH-13)
- 174 I acknowledge that there were some procedural defects in the process adopted by the respondent to effect the applicant’s termination. I have a concern that no notice was given to the applicant about the meeting held on 10 June 2004 and I am also concerned that no indication was given to the applicant that this meeting was to be disciplinary in nature. It is my view however that as the applicant was on notice in late 2003 that if he was found to have been acting inappropriately towards

customers and contrary to the legislative requirements on the respondent and its representatives and that these actions could lead to the applicant's contractual arrangement with the respondent being terminated the applicant should have been aware that his behaviour in 2004, when he sold new policies to a number of existing customers, was putting his contractual arrangement with the respondent at risk. Additionally I find that the applicant was given sufficient opportunity to respond to the allegations raised by Mr Hard and Mr Alport at the meeting held on 10 June 2004 and I take into account that the applicant was warned by the respondent in late 2003 about his inappropriate behaviour and he was advised that any further action by the applicant which was contrary to the legislative requirements on the applicant and its representatives could lead to the respondent ending its contractual arrangement with the applicant (see Exhibit R13 attachment HH-13.4.1). I find that the applicant was well aware that twisting customers was illegal and could lead to the immediate termination of his contractual arrangement with the respondent and I find that the applicant was aware of the necessity to properly fill out a SOA when selling a new policy to an existing customer and of the obligations on him with respect to a customer's privacy. It is therefore my view that even if the applicant had been given notice of the meeting held on 10 June 2004 this would not have affected the outcome of the applicant's termination given the serious nature of the applicant's actions toward the respondent's customers in the lead up to his termination and the fact that the applicant was aware of the consequences if he was caught twisting customers (see *Shire of Esperance v Mouritz* (op cit) and *Byrne v Australian Airlines* (op cit)).

175 In all of the circumstances of this case I therefore find that the applicant has not demonstrated that he was unfairly dismissed when he was terminated on 11 June 2004.

Was the applicant denied a benefit under his contract with the respondent?

176 The applicant claims that he is owed benefits under his contract of employment with the respondent. In an application for contractual benefits under s29(1)(b)(ii) of the Act, the onus is on the applicant to establish that the subject of the claim is a benefit to which the applicant was entitled under his or her contract of employment. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).

177 As I have found that the applicant was not an employee of the respondent there is therefore no jurisdiction for the Commission to deal with this claim. However, if I am wrong in reaching this view, which I do not concede, it is my view the applicant has not made out any of the claims he is seeking under his contractual arrangement with the respondent.

178 The applicant is claiming that under his contract with the respondent he was entitled to an amount of \$10,000.00 which he stated remained in his agency account and was owing to him, \$5000 for acting in Mr Alport's position for two weeks in April 2004, \$5000 in lieu of attendance at a convention at the Gold Coast, \$21,000 as a bonus for 1 July 2003 to 31 December 2003, \$20,000 as a bonus for 1 January 2004 to 30 June 2004 and a platinum award.

179 I find that the applicant has not demonstrated that he is owed the bonus amounts he is seeking. Mr Gurney gave evidence about the basis upon which the applicant was entitled to a bonus for two cycles in 2003 and 2004 and gave evidence about why the applicant had not met the specified requirements to receive a bonus for these two periods and that the applicant was therefore not entitled to the bonus he is claiming. As I accept Mr Gurney's evidence in preference to the evidence given by the applicant where there is any inconsistency I reject the applicant's evidence that he fulfilled the requirements to be paid a bonus. I therefore find that the applicant did not meet the requirements for being paid a bonus during those periods. Even though the applicant relied on figures detailed in bulletins produced by the respondent about his earnings and those of the representatives in his territory I accept the respondent's evidence that these figures were incomplete. On this basis these claims fall away. The applicant is claiming \$5000 in lieu of an attendance at a seminar at the Gold Coast. As the applicant has not demonstrated that it was a term of his contractual arrangement with the respondent that he was entitled to a payment in lieu of attendance at this conference and as I am not satisfied on the evidence that the applicant has demonstrated that he was entitled to attend this conference in any event this claim is rejected. The applicant is claiming \$5000 for higher duties when acting in Mr Alport's position. I find that the applicant has not demonstrated that he had an entitlement under his contract with the respondent that he be paid for undertaking higher duties and I find that his evidence that he undertook Mr Alport's duties was vague and unconvincing. Apart from an assertion by the applicant that he was owed money from his agency account the applicant did not provide any evidence confirming that he was owed money from his agency account and as I accept Mr Gurney's evidence in preference to the evidence given by the applicant where there is any inconsistency I find that all outstanding monies held in the applicant's agency account has since been forwarded to the applicant. I have insufficient evidence before me to conclude that the applicant was due a platinum award under his contractual arrangement with the respondent. On this basis I reject all of the applicant's claims that he is owed benefits under his contract of employment with the respondent.

Costs

180 The respondent made submissions about costs and claims that it is entitled to costs on the basis that it believes that this application was frivolously and vexatiously instituted by the applicant. The general policy in industrial jurisdictions is that costs ought not be awarded except in extreme cases (see *Denise Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (1992) 73 WAIG 26 at 27). When taking into account this authority I am not satisfied that the circumstances of this matter are such as to warrant an order for costs against the applicant.

181 In considering the applicant's claim that he was an employee not an independent contractor it is my view that the applicant's claim was not totally devoid of merit when assessing the indicia relevant to whether or not the applicant was an employee or an independent contractor. Additionally as I have found that there were some procedural defects in the way in which the applicant was treated by the respondent when the contractual arrangement between the parties was severed it is my view that in all of the circumstances that an award of costs should not be made against the applicant.

182 The respondent requested the opportunity to put further submissions to the Commission in the event that the Commission rejected the respondent's claim for costs. To that end I will list this matter for any further submissions that either party may wish to put to the Commission on this particular issue.

2005 WAIRC 03131

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ERMIR ERWIN SEHOVIC	APPLICANT
	-v-	
	COMBINED INSURANCE COMPANY OF AMERICA T/AS COMBINED INSURANCE COMPANY OF AUSTRALIA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	THURSDAY, 24 NOVEMBER 2005	
FILE NO/S	APPL 888 OF 2004	
CITATION NO.	2005 WAIRC 03131	

Result Application for discovery granted in part

Order

WHEREAS by letter dated 14 October 2005 the respondent applied for an Order for Discovery from the applicant and the Commission listed this matter for hearing on 18 November 2005; and

WHEREAS at the hearing the respondent requested that an order issue in relation to the discovery of documents listed in the letter sent to the Commission and the applicant on 14 October 2005 and gave an undertaking that all financial documents supplied by the applicant would remain confidential to the parties and that the respondent would photocopy any documents supplied by the applicant; and

WHEREAS at the hearing the applicant advised the Commission that he did not have any of the documents detailed at points 4 and 5 of the respondent's proposed order for discovery and he advised the Commission that documents relevant to point 3 of the proposed order would be included in the information he would supply in relation to his tax returns; and

FURTHER the applicant requested that the respondent provide him with a copy of the details of his agency account and the income generated by him throughout his relationship with the respondent as well as details of all policies sold by the applicant; and

WHEREAS the respondent's representative undertook to obtain instructions in relation to the applicant's request for these documents by the close of business Monday 21 November 2005; and

WHEREAS having considered the parties submissions the Commission advised the parties that an Order would issue that the applicant discover all papers and records used to prepare his Business Activity Statements and Income Tax Returns for the financial years 2002/2003 and 2003/2004 to the Commission by no later than 28 November 2005 so that these documents can be forwarded to the respondent and that these documents are to remain confidential to the parties; and

FURTHER that the Commission would order that the applicant provide a summary of the jobs he applied for after he ceased working with the respondent by no later than 28 November 2005; and

WHEREAS the respondent did not provide the information it undertook to provide in relation to the documents that the applicant requested by the due date and the Commission formed the view that an Order should issue that the respondent provide to the applicant details concerning his agency account, the income received by him and details of the policies the applicant sold when he worked with the respondent; and

WHEREAS after receiving the minute of proposed order the respondent's representative advised the Commission on the afternoon of 22 November 2005 that it would provide the following details to the applicant:

- a) Mr SehoVIC's agency account, and, if available, what income was generated from it;
- b) The nature of policies that Mr SehoVIC sold;
- c) The income that Mr SehoVIC earned from the sale of policies during the final 12 months of his engagement; and

WHEREAS having considered the respondent's advice to the Commission, the Commission was disposed to review the orders set out in the minute of proposed order;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

- 1) THAT the applicant is to discover all papers and records used to prepare his Business Activity Statements and Income Tax Returns for the financial years 2002/2003 and 2003/2004 to the Commission by no later than 4.00pm on 28 November 2005 for forwarding to the respondent and that these documents are to remain confidential to the parties.
- 2) THAT the applicant is to provide to the respondent a summary of the jobs he applied for after he ceased working with the respondent by no later than 4.00pm on 28 November 2005.
- 3) THAT the respondent is to provide to the applicant details of the applicant's agency account and if available, the income generated from this account, the income paid to the applicant by the respondent during the final 12 months of his relationship with the respondent and a list of the policies sold by the applicant during the final 12 months of his relationship with the respondent and the dates these policies were sold, by no later than 4.00pm on 28 November 2005.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2006 WAIRC 04113

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ERMIR ERWIN SEHOVIC **APPLICANT**

-v-
COMBINED INSURANCE COMPANY OF AMERICA T/AS COMBINED INSURANCE
COMPANY OF AUSTRALIA **RESPONDENT**

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 4 APRIL 2006
FILE NO/S APPL 888 OF 2004
CITATION NO. 2006 WAIRC 04113

Result Dismissed

Order

WHEREAS on 22 March 2006 the Commission issued Reasons for Decision in this matter; and
WHEREAS as the respondent requested the opportunity to put further submissions to the Commission in the event that the Commission rejected the respondent's claim for costs the matter was to be set down for further hearing; and
WHEREAS on 31 March 2006 the respondent's representative advised the Commission that the respondent no longer wished to proceed with its claim for costs;
NOW HAVING heard Mr E Sehovic on his own behalf and Mr A J Power of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders –
THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2005 WAIRC 03063

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GREGORY DAVID SMITH **APPLICANT**

-v-
CRT REAL ESTATE PTY LTD TRADING AS RURAL AND METRO REALTY **RESPONDENT**

CORAM SENIOR COMMISSIONER J F GREGOR
HEARD 2 MAY 2005, 11 AUGUST 2005, 10 OCTOBER 2005,
DELIVERED TUESDAY, 15 NOVEMBER 2005
FILE NO. APPL 216 OF 2005
CITATION NO. 2005 WAIRC 03063

CatchWords **Termination of employment - contractual entitlements - right to commission payments - effective cause of sale - *Industrial Relations Act 1979* s29(1)(b)(ii)**

Result Contractual benefits awarded

Representation

Applicant Mr G.D. Smith appeared in person

Respondent Mr D.M. Jones appeared for the Respondent

Reasons for Decision

- 1 On or about the 25th February 2005 Gregory David Smith (the Applicant) applied to the Commission for Orders pursuant to s29(1)(b)(ii) of the *Industrial Relations Act, 1979* (the Act) claiming an entitlement to a benefit under a contract of employment between him and CRT Real Estate T/A Rural and Metro Realty (the Respondent). The parties agree that the Applicant was employed by the Respondent in May 2004. It is also not disputed that he was engaged as a sales representative listing and selling real estate. It is also common ground that the real estate in question was rural property and in particular the sale of farming or pastoral properties. It is also common ground that sale of properties of this nature is somewhat specialist in the real estate industry.
- 2 The evidence of the Applicant not disputed by the Respondent is that the Applicant had discussions with Mr Ray Armstrong who in 2004 was the licensee of the Respondent. As a result of those discussions they negotiated terms of employment and it was agreed that the Applicant was to receive 50% of all net commissions received by the Respondent from all properties listed and sold by the Applicant. The Applicant asserts therefore there is nothing in these terms of employment which would have precluded the Respondent from paying to him the agreed portion of commission upon the completion of sales introduced by him prior to the termination of his employment with the Respondent.

- 3 When the relationship ended the Applicant had been involved in the listing and sale of 2 properties. One known as Blackhill Station Sandstone, being pastoral leases 3114/1031, the other was Windimurra Station which is located near Sandstone in the Murchison District. It is also a pastoral lease.
- 4 The evidence indicates that the Applicant secured the sale using the Real Estate Institute of Western Australia (REIWA) approved exclusive selling agreement with an agreed selling fee of 3.5% of the sale price in respect of Blackhill with a similar arrangement for the Windimurra Station except the selling fee was 3%.
- 5 What the Applicant claims is that in August 2004 he drove to Mt Magnet in Western Australia to meet Mr Frank Nichols and an associate to carry out inspections of 3 properties one of which was Blackhill Station and another was Windimurra. A few days later the Applicant met with Mr Nichols in Perth to write up an offer on the REIWA approved offer and acceptance contract with an appendix that included a plant schedule to purchase the property in the name of Frank Athelstan Nichols and/or a Nominee. The need for the identification for Nichols or a Nominee was because Mr Nichols made it known to the Applicant that he would set up a company which ultimately could be the purchaser of the properties and therefore to cover that eventuality the name of the purchaser was shown on the document as Frank Athelstan Nichols or in the alternative a Nominee.
- 6 The following day the Applicant presented the offer to the vendors by fax and communicated with them variously on options in regard to selling, rejecting and counter offering. There was a counter offer and this was returned duly signed and an amended offer and acceptance was sent to the Applicant. Following that there was further discussions with the purchaser, who by this time, was out of the State and the counter offer was presented. The purchaser accepted the counter offer thereby, according to the Applicant, having a valid and duly signed an issue of offer and acceptance in regard to the property. The Blackhill Station property was to be sold for \$580, 000 and the purchaser was Frank Athelstan Nichols and or his Nominee. The same set of circumstances applied to the sale of Windimurra Station except that the sale price was eventually settled in the vicinity of \$2 million dollars, to the same purchaser.
- 7 What the Applicant says is that even though he concedes that there were some further dealings between the purchaser and representatives of the Respondent that nevertheless, he was still the effective cause of sale and that he in terms of his employment agreement with the Respondent was entitled to 50% of the commission it received, exclusive of GST. This was consistent with his entitlement to be paid such commission for all properties sales, listed and sold by him. There was nothing in those terms of employment which should have precluded the Respondent from paying him the full commission upon the completion of employment. That being the case he is owed for the sale of the Blackhill Station \$8173.00 being 50% of 3.1 % of the sale price exclusive of GST and for the Windimurra Station sale he is owed \$28, 090.91 being 50 % of 3% of the sale price exclusive of GST. The fact that there was failure to pay deposit in respect to one of the properties and other changes to the documents created by him does not change the reality of the situation that even though the contract may not be the same he was still the effective cause of the sale of the properties.
- 8 The Respondent has a different view of the events. While it concedes that the Applicant did introduce the purchaser, his execution of his obligations in the creation of the documentation fell short of an appropriate standard. As a result there was friction between the Respondent and the purchaser so that the purchaser wanted to withdraw from the sale and in fact the deposits were not paid. It was only through the intervention of the Respondent through its State Manager Mr Robert Copley that the sale was saved. This meant the Applicant was not the effective cause of sale of the property. The contract of sales that he had negotiated was negated by express instruction of the parties as the provision of finance could not be achieved within the time set out under the contract. This meant that both of the contracts became otiose and the parties started afresh to negotiate a new contract. The Applicant had by this time left the employ of the Respondent to start with another real estate company and he was unavailable to take part in these negotiations which were taken over by Mr Copley.
- 9 According to Mr Copley's evidence the negotiations were difficult and took place over an extended period on one day. At the end of that day new contracts were drawn up. The first contracts being abandoned. They differed in important ways from the offer and acceptance which is embodied in the Applicant's documentation in that there was a different buyer and that the buyer was not shown as Frank Athelstan Nichols or Nominee. The buyer was Westag Holdings Pty Ltd as Trustee for the Westag Holdings Trust (Westag).
- 10 In the negotiation with Westag Mr Copley had created a new contract with significantly changed the conditions of sale; for instance there was a different buyer, there was an immediate payment of deposit, the settlement date had changed and the finance was unconditional. There was a change in the list of special conditions. The special conditions were set out in a schedule to the contract and referred to, inter alia, various warranties and arrangements between the parties for applying for the Minister's consent, rates and taxes to be paid. The deposit was not refundable subject to the Minister's consent to transfer the lease. There was the necessity to pay a substantial weekly sum from the 1st October 2004 until the settlement for work to be completed as directed. There was also an acknowledgement that the contract dated 16 September 2004 was the only valid contract between the parties.
- 11 The proceeding is a sufficient summary of the facts. There is no need to produce detailed summaries of the evidence. The Applicant gave detailed evidence in person. He was subject to a long and searching cross examination by Mr Jones who appeared for the Respondent. It must be said that the outcome of that cross examination did not indicate any change in the Applicant's position as expressed in his evidence in chief for which clearly, by Exhibit 5, he was thoroughly prepared.
- 12 The Commission also heard evidence from Mr Copley who gave detailed evidence about his role in the proceedings. In support of the Applicant, Mr Armstrong, who was at one stage the licensee of the Respondent, gave evidence as to the fees relating to outstanding commissions and that the standard practice in the industry was that salespersons be paid in full any amounts owing.
- 13 The Commission also had the benefit of evidence from Mr Jeremy Riley Hughes. Mr Hughes evidence is important in the disposition of this case. It is clear that Mr Hughes was introduced to give evidence by the Respondent as an expert. He has been in the Real Estate industry for 33 years and is well aware of the customs and practice in the industry. In a detailed exposition he explained to the Commission how the relationship between representatives and the Principals are conducted. Without labouring the detail of his evidence he made the point that it must be realised that the representative is not a separate agent he is an employee of a company and if he actually obtains business by obtaining a listing eventually he should receive a reward for a sale that was completed. Mr Hughes said with sales completed after the employment relationship is finished the industry practice would recognise that even though some contracts had to be re-negotiated by the Principal after the person responsible has left there should be a recognition of a commission split of the listings and the fact that they were the same buyers and the same properties. Had there been different buyers that may have been a different situation. Mr Hughes explained to the Commission that a buyer can be introduced and REIWA recognises a valid introduction. For instance taking the buyers onto the property entitles the representative to a percentage of commission whoever sells it.
- 14 As to the credibility of the witnesses there is no question that each of the persons who gave evidence impressed the Commission as to their truthfulness and frankness in explaining their various points of view. Each of the witnesses is therefore a credible witness of truth and I so find.

- 15 The issues that need to be resolved have been subject to treatment in the courts before.
- 16 In my own decision in *William Thomas John Valli v Royal International (WA)* (1997) 77WAIG3497 I canvassed the authorities to be applied. In particular I referred to *Sheelagh Leonie Dupont v Peter Hamilton O'Reilly and Elizabeth Anne O'Reilly T/A O'Reilly Real Estate* (1990) 70WAIG2421. In that case that Martin C summarised the applicable law. He quoted at length the Full Bench of the Commission in Matter 279 of 1983 which I have no need to repeat in detail other than to say that the rule is where a sale results through the efforts of a sales representative he is genuinely said to be the effective cause of the sale. The test is whether that he can show the relationship of buyer and seller is a direct result of his efforts. If so, in general, he is entitled to his commission even if there were substantial negotiations between the parties or a formal contract of sale is concluded without his assistance; unless the continuity between the original relation brought about by him has been entirely severed and he took no part in the proceedings which reinitiated the relationship and lead to the conclusion of the deal. The matters was the subject of discussion in the high court in *LJ Hooker Ltd v WG Adams Pty Ltd* 138 CLR 52 where Barwick CJ observed:
- "It is true that an agent to procure a purchaser of property in stated of terms may earn the commission payable to him in various ways. But the commission is not fully earned unless there is a sale which has resulted wholly or partially from the efforts of the agent. The most common way of performing the agent's task is to introduce to the principal a person who becomes the purchaser under a binding contract of sale. In terms of causation, the Applicant has thus been an effective cause of the sale. It is nothing to the point in such a case that that person would have become the purchaser without the intervention of the agent: or that the principal's own efforts were also an effective cause of the sale."*
- So the crucial factor is a meaning of the words effective cause of sale. This too has been discussed in the courts in *Burchell v Gowrie and Blockhouse Collieries Ltd* (1910) AC614 where Gibbs J indicated that if the relation of the buyer and seller is really brought about by the act of the agent he is entitled to the commission although the actual sale has not been effected by him. This means that when one considers the effect of the authorities that the representative must show that his acts were the *causa causans* of the sale or was the effective cause of the sale.
- 17 I will turn to apply this law to the facts here and need to discuss the contractual situation. This is necessary because the Commission's jurisdiction under s29(1)(b)(ii) is limited. President Sharkey discussed these issues in *Perth Finishing College Pty Ltd v Susan Watts* (1989) 69 WAIG 2307 in which he referred to *Reginald Simons v Business Computers International Pty Ltd* (1985) 65 WAIG 2039. The jurisdiction established under s29(b)(ii) is judicial, it is not arbitral or legislative. This limits the jurisdiction to ascertaining existing rights by determination of whether or not an employee has been denied benefit which is not a benefit under an order or award to which the employee is entitled under a contract of service. There are situations where there are contracts which are not made under an order or award of the Commission which are the product of negotiations which are not necessarily exhaustive remedies which are to apply in the resolution of a dispute between the parties. Although the Commission's jurisdiction is judicial there is always room to grant relief which has at its roots the ascertainment of rights and obligations which can fairly be implied as terms of contract.
- 18 This is an important concept for this case because it means that an employee is not necessary obliged to reply upon an express term either oral or written where the law otherwise recognises that there could be room for implication of the term relied upon which is what the Applicant in this case does. The concepts to be applied were discussed by the High Court in *Byrne v Australian Airlines* and *Frew v Australian Airlines* 131 ALR 422 but in particular the principles for the implication of terms in a contract had been set out by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1978) 52 ALJR 20.
- 19 It should be further added that the implying of the term into a contract can be contrasted with a rectification of the contract. In each case the problem is caused by deficiency in the expression of the consensual agreement that means a term which should have been included has not been. With the implication of term presumes the parties would have agreed upon it had they turned their minds to it. It is not that they actually agreed to it.
- 20 This means that the Courts are prepared to imply terms but on the condition that this contribute to business efficacy to the contract. The principles that have been set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1978) 52 ALJR 20 are 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.*
- 21 The proceeding is sufficient scan of the law that is to be applied and determined in this case.
- 22 It seems there are a number of findings which need to be made. Firstly, was the Applicant the effective cause of the sale? Secondly, were the parties to the contract eventually made the same parties? What could be implied into the Applicant's terms of contract?
- 23 I will deal with this last question first.
- 24 It seems from the case law that it is an obvious finding that the rights to commission are not coterminous with the contract of employment if there is a sale made later which was commenced prior to the end of the employment relationship. It is clear law that this is the case. If such an event happens the question is how much of the commission is the person is entitled under the contract of employment to be paid.
- 25 In normal circumstances if there was nothing more done and the sale continued with no intervention by the Principal the person who introduced the sale would be entitled to their full commission. In circumstances where there has been an intervention the question is whether the person who introduces the sale that is the effective cause of the sale is entitled to anything.
- 26 In this case there were no arrangements made between the parties as to what would happen in the circumstance. The Commission need to examine that circumstance bearing in mind that when acting under the powers conferred by s29 the Commission is not sitting as an arbitral authority to which the injunctions in s26 apply but is sitting judicially where it must discover the real meaning of the contract and the effect of its terms.
- 27 Helping answering this question is the evidence of Mr Hughes. Mr Hughes is introduced as a person of long standing in the industry and an expert in that context. He says that it is acceptable in the industry that when there are interventions by a Respondent into a sale after the contract of employment of the representative who introduce the sale is ended, and then a reasonable split of the commission is negotiated. That type of implication of term fits with the conditions necessary to ground

implications as set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1978) 52 ALJR 20. It is reasonable and equitable that there is some commission paid to the person that introduced the sale. It does give business efficacy to the contract and the contract is not effective if such an implication is not made. It is obvious that it goes without saying. The evidence of Mr Hughes supports this contention. The implied term is capable of clear expression. That is the commission would be divided on an equitable basis. It does not contradict any express term of contract. Therefore it follows that the Applicant is entitled to have implied into his contract of employment a reasonable commission based upon a sale he introduced is inescapable. I find that the Applicant has a contract of employment with an implied term of which he is entitled to reasonable commission if a sale of which he is the effective cause is not completed before he leaves the employment of the Respondent and the Respondent later completes the sale.

- 28 I think there has been some confusion in this case between the contention of the Applicant that the key matter is the effective cause of the sale and the contention of the Respondent that the contract changed. Therefore they are different contracts in so far as there was a new sale.
- 29 In my view that is not the law. The law clearly deals with whether a sale is completed not whether a contract is completed. Clearly there will be many instances where there will be changes to a contract after the person who introduced the sale has left and those changes can range from major to minor. It is within that continuum that one looks to establish what is a reasonable amount of commission that the person who introduced the sale should get. The parties could have and should have been able to determine what was reasonable compensation in this case and it is not contrary to *Reginald Simons v Business Computers International Pty Ltd* (1985) 65 WAIG 2039 for the Commission to do so the parties having failed to.
- 30 First I deal with the issue of whether the contract was made with the same person. The evidence which I accept is that of the Applicant. He says that he entered the name Frank Athelstan Nichols or his Nominee because Mr Nichols had told him that he would be setting up a company which would eventually become party to the sale. The irrefutable evidence is that Mr Nichols set up Westag to be a party to the sale and for all intents and purposes that name merely replaces either Nichols or the Nominee and it is the true Nominee of Mr Nichols. Therefore the sale that the Applicant made was to the same party with whom the final contracts were made by Mr Copley.
- 31 It remains to be decided what was a reasonable commission, having found that the contract was with the same person, that the employee was entitled to have implied into his term of contract on a sale completed after his term of employment had finished with the Respondent and for which he was the effective cause of sale.
- 32 This depends upon the amount of work that was done by the Respondent compared to the amount of work which was done by the person who introduced the sale. Mr Copley's evidence is that he applied himself over a day in the vicinity of 6 hours of negotiations in which he says resurrected a deal which had every chance of going wrong and if it had not been for his interventions he said the sales would have fallen through completely. In juxtaposition the Applicant found the purchaser, took the purchaser to the properties, negotiated with the purchaser, did the preparation of documents and made a contribution in that way to the sale.
- 33 I think in the circumstances it ought to be found that a reasonable amount of commission which the parties ought to have agreed was that the Applicant should have received 60% of the commission to which he was entitled which is \$4903.00 for the Blackhill Station and \$13,390.00 from the Windimurra Station sales.
- 34 The Commission will issue orders that the Applicant by an implied term is entitled to a reasonable commission for 2 sales for which he was the effective cause which were completed after he left the employment of the Respondent and for which he is entitled to a contractual benefit in the sum of \$18,293.00. Minutes of Proposed Order will issue accordingly.

2005 WAIRC 03247

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GREGORY DAVID SMITH

APPLICANT

-v-

CRT REAL ESTATE PTY LTD TRADING AS RURAL AND METRO REALTY

RESPONDENT

CORAM

SENIOR COMMISSIONER J F GREGOR

DATE

THURSDAY, 8 DECEMBER 2005

FILE NO/S

APPL 216 OF 2005

CITATION NO.

2005 WAIRC 03247

Result	Contractual Benefits Awarded
Representation	
Applicant	Mr G.D. Smith appeared in person
Respondent	Mr D.M. Jones appeared for the Respondent

Order

HAVING heard Mr G.D. Smith in person and Mr D.M. Jones on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT CRT Real Estate Pty Ltd trading as Rural and Metro Realty pay Mr G.D. Smith \$21,504.54 within 14 days.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2006 WAIRC 03619

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KATHLEEN ANNE VALE	APPLICANT
	-v- FULLER AUCTIONS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
HEARD	MONDAY, 23 JANUARY 2006	
DELIVERED	THURSDAY, 2 FEBRUARY 2006	
FILE NO.	U 48 OF 2005	
CITATION NO.	2006 WAIRC 03619	

Catchwords	Industrial law – termination of employment – harsh, oppressive and unfair dismissal – application referred outside of 28 day time limit – relevant principles to be applied – Commission satisfied principles met - acceptance of referral out of time granted – <i>Industrial Relations Act 1979</i> (WA)
Result	Application to be received out of time granted
Representation	
Applicant	Ms K A Vale
Respondent	Mr L Krollig

Reasons for Decision

- 1 Ms Kathleen Anne Vale (“the applicant”) made application to the Commission pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* (“the Act”) alleging she had been harshly, oppressively and unfairly dismissed by Fuller Auctions (“the respondent”) on 5 August 2005. The application was lodged in the Western Australian Industrial Relations Commission (“the Commission”) on 9 September 2005, some 7 days out of time. The critical issue for consideration by the Commission is whether it would be unfair not to accept this application lodged outside of the 28 day period required under the Act. In considering this application the Commission has had regard for the Industrial Appeal Court decision in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, at 686, in which the following principles were outlined:
- “1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
 2. Action taken by the applicant to contest the termination, other than applying under the Act, will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
 3. Prejudice to the respondent including prejudice caused by the delay will go against the granting of an extension of time.
 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
 6. Consideration of fairness between the applicant and other persons in a like position are relevant to the exercise of the Courts’ discretion.”
- 2 Such a determination is a discretionary decision by the Commission which ought to be confirmed in the negative unless it would be unfair not to do so. Central to such determinations by the Commission is the concept of fairness. Having regard to this concept, fairness must involve fairness to all taking into account the views of the employee, the employer and the question of public interest.

Background

- 3 It was common ground that the applicant commenced employment with the respondent on a three month trial in May 2005 and was terminated on 5 August 2005. She was employed as a shop assistant in the customer service and sales section of a new and second hand furniture business. The Commission’s file records that the applicant lodged a Form 2, Notice of application in the Registrar’s Office on 9 September 2005.

Applicant’s evidence and submissions

- 4 The applicant gave evidence that the Form 2, Notice of application was late in being filed as during the period concerned she was evicted from her home as a result of rental arrears. The applicant gave evidence that her 13 year old son had run away from home, and had been for some weeks failing to attend school. The applicant explained that during the period concerned her life was “in turmoil”. The applicant gave evidence that during the period she sought legal advice on a number of housing related issues all of which led to a delay in the lodging of the application in the Commission. The applicant gave evidence that on the day she was terminated she was approached by Mr Krollig for the respondent, regarding an incident that had occurred the previous day at work. The applicant admitted that the incident related to a difference of opinion with another employee. The applicant gave evidence she approached the respondent and questioned him as to whether she was going to be dismissed. It was common ground in evidence from both the applicant and respondent that Mr Krollig’s response was that the applicant would not be terminated but she was to be put off. On the evidence of the applicant at no stage was she given an opportunity to respond or put her side of the story. It was the applicant’s submission that she had been unfairly treated particularly when the respondent indicated he had an independent witness to the incident that had occurred the previous day. The applicant gave evidence that the respondent refused at all times to name the witness and would not listen to the applicant’s concerns regarding the incident.

Respondent's evidence and submissions

- 5 Mr Krollig for the respondent gave evidence that the applicant was on a three month trial and had at the commencement of her employment been provided with a position statement which clearly outlined the nature of her employment. Mr Krollig submitted that it was unfair for the applicant to rely on events outside of the context of work, events which are of a personal nature in such proceedings. The respondent gave evidence that the applicant did not meet the standards required of a person working in liaison/services. Mr Krollig gave evidence that there had been a number of issues that were of concern and the applicant having agreed at the outset of employment to work in accordance with certain work standards did not live up to those standards or perform them at the required level. In the submissions of the respondent the applicant was given three chances and at all times was provided with every opportunity to improve. Mr Krollig in evidence doubted if there would be any prejudice to the respondent if the application were to be accepted out of time but did submit that to travel from Bunbury to Perth for further proceedings would be of disadvantage.

Conclusion

- 6 When the application was first filed in the Commission both the applicant and respondent were located in Bunbury. Thereafter the applicant moved to Broome, on to Halls Creek, Katherine and finally Darwin causing significant delays to the listing of these proceedings. The applicant however continued to pursue her claim by way of regular contact with the Commission's chambers. On the evidence currently before me the Commission finds the applicant was terminated on 5 August 2005. The Commission finds that in the applicant's case special circumstances did exist which led to a delay in lodging the application in particular, circumstances which led to the applicant being evicted from her home, her 13 year old son leaving home and truancy from school and subsequent delays through seeking of legal advice relating to housing matters.
- 7 The Commission finds that the prejudice to the applicant outweighs any prejudice caused to the respondent if the application were to be accepted out of time. On the respondent's own evidence there was little if any disadvantage caused as a result of the application being accepted except for any difficulties that might result from the scheduling of the application for conciliation in Perth. Given this hearing was listed by way of three way video conference linking the Commission in Perth, with the applicant in Darwin and the respondent in Bunbury the Commission finds such express concern by the respondent to be tenuous.
- 8 The Commission has been persuaded that the applicant has provided an acceptable explanation for the delay in lodging the application, sufficient to enable the exercise of my discretion pursuant to s.29(3) of the Act. On the basis of what was before the Commission in these proceedings and on the basis of equity, good conscience and the substantial merit of the case, I am prepared to exercise my discretion to extend the prescribed period for filing the application and conclude that it would be unfair not to exercise its discretion and grant an extension of time within which to file this application.
- 9 An order will now issue to that effect.

2006 WAIRC 03914

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	KATHLEEN ANNE VALE	APPLICANT
	-v-	
	FULLERS AUCTIONS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	WEDNESDAY, 8 MARCH 2006	
FILE NO	U 48 OF 2005	
CITATION NO.	2006 WAIRC 03914	

Result	Application to be received out of time granted
Representation	
Applicant	Ms K A Vale
Respondent	Mr L Krollig

Order

WHEREAS this is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* filed beyond the 28 days allowed by the Act;

AND WHEREAS a hearing was held on 23 January 2006;

AND WHEREAS the Commission has considered the application in light of the test set out in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (IAC) 84 WAIG 683 and concluded that in the circumstances, it would be unfair not to accept the application notwithstanding that it was referred to the Commission out of time;

AND WHEREAS it became clear to the Commission that the respondent had been incorrectly named;

AND WHEREAS the Commission has formed the view that it was appropriate to amend the respondent's name;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby orders -

- (1) THAT the respondent's name be deleted and replaced by Abbey Bay Pty Ltd as Trustee for the Krollig Family Trust trading as Fuller Auctions;
- (2) THAT the application to receive the referral out of time be and is hereby granted.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2006 WAIRC 04081

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KATHLEEN ANNE VALE	APPLICANT
	-v-	
	ABBEY BAY PTY LTD AS TRUSTEE FOR THE KROLLIG FAMILY TRUST TRADING AS FULLER AUCTIONS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	WEDNESDAY, 29 MARCH 2006	
FILE NO	U 48 OF 2005	
CITATION NO.	2006 WAIRC 04081	

Result	Application discontinued
Representation	
Applicant	Ms K A Vale
Respondent	Mr L Krollig

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;
AND WHEREAS this matter was listed for hearing on 23 January 2006 to deal with the issue of the application being lodged out of time;
AND WHEREAS the Commission accepted the out of time application;
AND WHEREAS on 9 February 2006 the Commission convened a conference for the purpose of conciliating between the parties;
AND WHEREAS at the conclusion of the conference agreement was reached between the parties;
AND WHEREAS on 15 March 2006 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 discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

SECTION 29(1)(B)—Notation of—

Parties		Number	Commissioner	Result
Alison Hewson	Yamatji Marlpa Barna Baba Maava Aboriginal Corporation	APPL 652/2005	Senior Commissioner J F Gregor	Discontinued
Anthony Michael Carlton	Placer Dome Kalgoorlie Limited	U 255/2005	Commissioner J L Harrison	Discontinued
Anthony Occhiuto	Genesis Recruitment Pty Ltd	U 107/2006	Commissioner S Wood	Application discontinued
Austin Baldacchino	GMF Contractors Pty Ltd	U 306/2005	Senior Commissioner J F Gregor	Discontinued
Barbara Ann Aramowicz	Carepoint Industrial Health Services Pty Ltd	U 191/2005	Commissioner J L Harrison	Discontinued
Brendan Michael Sinclair	Wesfarmers Energy Ltd	U 50/2005	Commissioner P E Scott	Dismissed
Brent Hasson	Pundit Pty Ltd As Trustee For Bruce Rock Engineering Trust T/A Bruce Rock Engineering & Bridgestone Tyre Centre Bruce Rock	U 199/2005	Commissioner S M Mayman	Application discontinued
Brianna Paige Middleton	Subway Claremont	U 269/2005	Commissioner S Wood	Application discontinued
Bruce Bentley	Primary Securities Ltd	U 187/2005	Commissioner S J Kenner	Order issued
Bryan Vincent Forrest	Classic Hire Pty Ltd (ABN 39-166-015-316)	U 126/2006	Commissioner J L Harrison	Discontinued

Parties		Number	Commissioner	Result
Christopher Morris	Westlea Holdings Pty Ltd Trading As Courier Australia A.C.N. 096 682 423	U 298/2005	Commissioner J L Harrison	Discontinued
Daryl William Longbottom	South West Industrial Plastics	U 8/2006	Commissioner S M Mayman	Application discontinued
David Mccoosh	B.S.A. (Broadcast Services Australia)	APPL 695/2005	Commissioner J L Harrison	Discontinued
Dawood Aziz	Group 4 (tempo) Security	U 232/2005	Commissioner S Wood	Application discontinued
Douglas Rodney Williams	Ausdrill Limited	U 213/2005	Senior Commissioner J F Gregor	Discontinued
Duncan J Co-Cliff	Department Of Education And Training	APPL 504/2005	Commissioner P E Scott	Application dismissed for want of jurisdiction
Edward Edwards	Genesis Recruitment Pty Ltd	U 106/2006	Commissioner S Wood	Application discontinued
Frank Jones	Envotec Pty Ltd (ABN 24 007 140 310)	APPL 766/2005	Senior Commissioner J F Gregor	Discontinued
Gino Curciarello	Unique Express	B 79/2006	Commissioner J L Harrison	Discontinued
Giovanni Francesca	Eksms Pty Ltd ATF The EKS Management Services Unit Trust	U 154/2005	Commissioner S J Kenner	Order issued
Gordon James Cuthell	Mr Kim Szabo C/- Carpetwize/floorzone	B 50/2006	Commissioner S J Kenner	Application discontinued by leave
Greer Lian Neville	DMG Radio (Perth) Pty Ltd, Trading As Nova 93.7FM	U 158/2006	Commissioner P E Scott	Application Withdrawn by Leave
Helen Cochrane	Raspa Nominees Trading As Premier Hotel	APPL 463/2005	Commissioner S Wood	Application discontinued
Helen Roughley	Coles Express	B 341/2005	Commissioner S M Mayman	Application discontinued
Henrikus Johannes Terwal	Uniradiology - Westminster	APPL 918/2005	Commissioner J L Harrison	Discontinued
Jacqueline Rowley	Complete Catering Company Pty Ltd	U 338/2005	Commissioner S J Kenner	Application discontinued by leave
James Paul Watts	A.E. Campanella JFD Keet (Directors IAE Pty Ltd)	B 29/2006	Commissioner S J Kenner	Application discontinued by leave
Jennifer Rayner	Cuddles Child Care Centre	U 81/2005	Commissioner S M Mayman	Application discontinued
John Christopher Gibson	Enza Holdings Pty Ltd T/as Novaks Tavern	U 43/2005	Commissioner S J Kenner	Application dismissed for want of prosecution
John Whitaker	Sanofi-Aventis Group	U 303/2005	Commissioner P E Scott	Application Dismissed
Judith Anne Mathews	Australia Perth Commercial College T/a Perth Commercial College Pty Ltd	APPL 1251/2004	Commissioner J L Harrison	Discontinued
Julie Kidd	Visy Industrial Packaging	U 282/2005	Commissioner S Wood	Application discontinued
Karen Lee Malone	Ritzline Pty Ltd Trustee For John Callaway Family Trust Goldtown Investment Pty Ltd Trustee Claydon Family Trust, Trading As "Guildford Hotel"	U 89/2006	Commissioner S J Kenner	Application discontinued by leave
Kathleen Anne Vale	Abbey Bay Pty Ltd As Trustee For The Krollig Family Trust Trading As Fuller Auctions	B 48/2005	Commissioner S M Mayman	Application discontinued
Kathleen Hill	Biniris Aust Pty Ltd	B 353/2005	Commissioner P E Scott	Application Dismissed
Laurie Duncan	Carringtons Traffic Services	U 3/2006	Commissioner S J Kenner	Application discontinued by leave

Parties		Number	Commissioner	Result
Lina Csorogi	J Corporation	B 249/2005	Commissioner S M Mayman	Application discontinued
Linda Joye Allan	Rover Football Club Inc	B 4/2006	Commissioner S J Kenner	Application discontinued by leave
Lisa Anne Timewell	Betts Group Pty Ltd, A.C.N. 008 675 929. T/a Bettskids	U 281/2005	Commissioner J L Harrison	Discontinued
Marcia De Burgh	Bedford Bowling Club	U 278/2005	Commissioner J L Harrison	Discontinued
Marissa Angelique Marriott	Choice One	U 309/2005	Commissioner S Wood	Application discontinued
Mark Jovicic	The Midland Timber Co.	U 208/2005	Commissioner S Wood	Application discontinued
Michael Ian McMichan	Dicandilo Steel City	U 264/2005	Commissioner S Wood	Application discontinued
Micheal John Thomas	Caroline Mullin, AAA Honda Recycles	U 150/2005	Commissioner J H Smith	Dismissed
Michelle Joanne Read	Wesfarmers Energy Ltd	U 51/2005	Commissioner P E Scott	Dismissed
Mr C S Panton	Mr Steven Blackie	U 293/2005	Commissioner P E Scott	Application Dismissed
Neville Stevens; Helen Stevens	Guilderton Country Club Inc; Guilderton Country Club Inc	APPL 526/2005	Commissioner J L Harrison	Discontinued
Paul Newman	AMCOM Pty Ltd	APPL 571/2005	Commissioner S M Mayman	Application discontinued
Peter Ernest Horvath	Abesque Pty Ltd	B 33/2006	Commissioner P E Scott	Application Dismissed
Peter Gilet	Annalise Ayers, Kanwork	U 299/2005	Commissioner P E Scott	Dispute resolved
Richard Anthony Cust	Electrical Distributors Of Western Australia	U 265/2005	Senior Commissioner J F Gregor	Discontinued
Richard Mark Townend	Tyco Australia Pty Ltd T/a ADT Security	U 310/2005	Commissioner P E Scott	Dismissed
Robert Wayne Gray	Placer Dome Kalgoorlie Limited	U 259/2005	Commissioner J L Harrison	Discontinued
Robyn Anne Webb	Womens Health Resource Centre	U 38/2006	Commissioner S J Kenner	Application discontinued by leave
Robyn Gail Bitmead	The Albany & Districts Skills Training Committee Incorporated	U 323/2005	Commissioner P E Scott	Application Dismissed
Roger Beckett	Eaton Enterprises Pty Ltd ACN 060 723 426 T/a Freight Tech Damage Prevention Technology	B 290/2005	Commissioner S Wood	Application discontinued
Roger Beckett	Eaton Enterprises Pty Ltd ACN 060 723 426 T/a Freight Tech Damage Prevention Technology	U 290/2005	Commissioner S Wood	Application discontinued
Rosalba Vicario	Itranex Ltd And All Finance Shop (WA) Pty Ltd	APPL 31/2005	Commissioner S M Mayman	Application discontinued
Rowie Coe	Hungry Jack's P/I (WA)	U 334/2005	Commissioner P E Scott	Dismissed
Roxanne Lee Hutchinson	Ron & Janet Mackay Record Mania	U 26/2006	Commissioner S Wood	Application discontinued
Royce Neville Newton	Kalgoorlie Mining Work	U 24/2006	Senior Commissioner J F Gregor	Discontinued
Russell John Jones	Don Russell Homes Pty Ltd	B 291/2005	Commissioner S Wood	Application discontinued
Sally Margaret Richardson	Cowaramup Creek Farm	U 257/2005	Senior Commissioner J F Gregor	Discontinued
Sarah Resnik	Tennant Creek Gold Ltd	U 238/2005	Senior Commissioner J F Gregor	Discontinued
Shaun Kevin Wright	Realmark Pty Ltd T/a Remax Realmark - Strata	APPL 724/2005	Commissioner S M Mayman	Application discontinued
Simon Nolan	Elite Environmental Industries	U 86/2006	Commissioner P E Scott	Application Dismissed

Parties		Number	Commissioner	Result
Sonia Jane Gardner	Glenys Hilton	U 117/2006	Commissioner S J Kenner	Application discontinued by leave
Stephen Arnold	Katanning Stock And Trading	B 344/2005	Commissioner P E Scott	Applications Dismissed
Stephen John Jefferies	Swan Transit Services Pty Ltd	U 77/2006	Commissioner S J Kenner	Application discontinued by leave
Steven Fryer	Roche Jr Mining	U 209/2005	Senior Commissioner J F Gregor	Discontinued
Steven Fryer	Roche Jr Mining	B 209/2005	Senior Commissioner J F Gregor	Discontinued
Steven Van Doorn	Southern Cross Container Management Pty Ltd	B 32/2006	Commissioner S J Kenner	Application discontinued by leave
Susan Jane Cash	Arrix Integrated	U 10/2006	Commissioner J L Harrison	Discontinued
Sylvia Lessis	JB Hi Fi Group Pty Ltd ACN 088 101 268	U 54/2006	Commissioner J L Harrison	Discontinued
Terrence Corrie	Project Airconditioning Pty Ltd	APPL 885/2005	Senior Commissioner J F Gregor	Discontinued
Thomas Dickson	Fortwest Holdings Pty Ltd T/as Famous Classic Car Insurance	APPL 622/2005	Senior Commissioner J F Gregor	Discontinued
Troy Daniel Murphy	Chandler Macleod	U 222/2005	Commissioner S J Kenner	Application dismissed for want of prosecution
Victoria M Chapman	VM Pty Ltd Trading As Interceramics	APPL 1519/2004	Commissioner S J Kenner	Application discontinued by leave
William Geoffrey Carter	Narymal Pty Ltd T/as Duxton Hotel Perth	U 349/2005	Commissioner S Wood	Application discontinued
William Geoffrey Carter	Duxton Hotel Perth - Narymal Pty Ltd	B 271/2005	Commissioner S Wood	Application discontinued

CONFERENCE—Matters referred—

2006 WAIRC 04021

DISPUTE INVOLVING ISSUANCE OF WRITTEN WARNINGS TO UNION MEMBER.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

BHP BILLITON IRON ORE PTY LTD

RESPONDENT

CORAM HEARD

COMMISSIONER S WOOD

WEDNESDAY, 1 FEBRUARY 2006, THURSDAY, 2 FEBRUARY 2006, FRIDAY, 3 FEBRUARY 2006, WEDNESDAY, 15 FEBRUARY 2006

DELIVERED

FRIDAY, 24 MARCH 2006

FILE NO.

CR 149 OF 2005

CITATION NO.

2006 WAIRC 04021

CatchWords

Written and final warnings - Should warnings be withdrawn - - Inappropriate behaviour towards supervision and others – Industrial Relations Act 1979 s.44

Result

Application dismissed

Representation

Applicant

Ms J Boots of Counsel

Respondent

Ms G Archer of Counsel and with her Ms J Denkha of Counsel

Reasons for Decision

1 This is an application pursuant to section 44 of the *Industrial Relations Act 1979* ("the Act"). The matter was referred for hearing and determination in the following terms:

1. The applicant union's member, Ms Sally Williams, has been employed by the respondent for the last 16 years as a truck driver, and currently works on the Whaleback mining site in Newman.
2. The respondent issued Ms Williams with two warning letters on 14 January 2005 and 19 July 2005. The latter being a letter of final warning.
3. The applicant says there was no basis for either or both of those letters to be issued to Ms Williams and seeks to have both letters withdrawn.
4. The applicant says further that, in issuing those letters, the respondent did not have any basis for relying on previous counselling notes, reprimands or warnings; with the exception of a note of 16 August 2000 which was given to Ms Williams.
5. The respondent contends that it had valid grounds for issuing both those letters to Ms Williams and that the grounds for issuing both letters appropriately included reference to previous counselling notes, reprimands and warnings."

2 The two warning letters read as follows:

WRITTEN WARNING - 14 JANUARY 2005

"This will confirm the outcome of discussions held with you on Thursday 6 January 2005 regarding your inappropriate and unacceptable behaviour.

The discussion was regarding an incident that occurred on A Shift's 1st Day Shift, Wednesday 5 January 2005, where you made accusations at the Safety Information Meeting against your Supervisor, G Jones, over the way he had handled a supposed recent safety issue.

There was in fact no safety issue, as you had incorrectly suggested, therefore there was no requirement to raise an incident report. The Leading Hand had inspected the area at SP 26 and found it to be left in a safe condition. You also made the allegation that B Shift had left ROM 2 unsafe, which was also found not to be the case.

It is obvious that you did not take seriously our discussion on 6 January 2005 when I advised you that the Company would not accept your inappropriate behaviour.

Once again at the SIM's meeting on Thursday 13 January 2005, you displayed your inability to follow Company standards and procedures by announcing to the shift that G Jones will not follow up on safety issues that are recorded in the Quarry Managers book. This intimidating behaviour must cease.

Your accusations were unfounded, and your aggressive manner in front of the entire shift on 5 January 2005, where you showed an unwillingness to listen and continued to interrupt, was inappropriate, unacceptable and in breach of the Company's Standard of Conduct and Non Harassment Policy, copies of which are attached.

Quite clearly these policies state that the Company will not tolerate offensive behaviour, which includes offensive behaviour towards others, verbal abuse, course language and intimidating behaviour.

We encourage you to raise genuine safety concerns, however this must be done through your Supervisor in a civil and respectful manner. Should you not be satisfied that the issue has been resolved by your Supervisor, the Issue Resolution Process should be followed, again in a civil manner and without personal attacks on other employees.

You continue to choose not to follow the Issue Resolution Process and this will likely result in your issues not being resolved in a timely manner.

In order to have any issues resolved in future, you must follow the following process:

- If you have an issue, you will first discuss it with your immediate Supervisor as soon as practical
- If the issue is not resolved, the matter will be referred to the next level of Supervision, i.e. Superintendent and then Manager.
- If not settled at this level the matter may be referred to the WA Industrial Relations Commission, provided that all reasonable attempts have been made at local level to resolve the matter.

It is your duty as a Safety Representative to consult and cooperate with Managers and mine employees (Mines Act Sect 53 (1)f) and this should be done in accordance with the Company's Standard of Conduct.

You are advised that should you again be involved in a similar incident involving inappropriate and unacceptable behaviour, more serious disciplinary action will be taken.

J McDonald

Acting Mining Superintendent"

FINAL WARNING – 19 JULY 2005

"We refer to the disciplinary inquiry held on 11 July 2005 about various recent instances of unacceptable behaviour by you at work. We are also in receipt of your letter dated 18 July 2005, in response to that inquiry.

At the inquiry, the Company raised with you its continuing concerns about your behaviour at work. In particular the Company raised some recent issues including:

- Several instances (previously raised with you) concerning your behaviour towards your supervisor, Geoff Jones;
- An incident involving unacceptable behaviour towards Barbara Abbott (independent investigator) during a meeting between you and Ms Abbott;
- An incident involving unacceptable behaviour towards Mick Carroll during a safety meeting on 22 June 2005.

You received a reprimand in August 2004 and warnings in January 2005 in relation to your behaviour towards Mr Jones. Prior to these there have been numerous other occasions where you have been counselled or warned about your behaviour at work. These instances have generally involved your failure to follow instructions or procedures, or your engaging in insubordinate, derogatory or rude behaviour toward others, particularly (but not only) your supervisor.

In light of this history the Company has been disappointed to learn of recent incidents of unacceptable behaviour towards Ms Abbott and Mr Carroll. Your conduct in these incidents displays:

- a failure to follow instructions including a follow the process for resolving issues, which you have been previously directed to follow;
- a failure to heed your previous warnings;
- rudeness, disrespect and derogatory conduct towards others.

Your continued failure to follow instructions and your behaviour towards others is of serious concern. Considering your previous warnings, the more recent events discussed with you at the inquiry on 11 July 2005, and your letter of response dated 18 July 2005, the company has considered whether or not to terminate your employment. The decision reached by the Company has been to issue a final warning.

In the inquiry on 11 July 2005, the Company emphasised to you that further unacceptable behaviour by you at work will not be tolerated. You are required to behave in a respectful manner, to use a calm tone of voice, and avoid shouting. Derogatory or insulting remarks towards others, and especially your supervision, will not be tolerated. If you engage in any further unacceptable behaviour in the workplace, whether a failure to follow instructions, unacceptable behaviour towards others, or other unacceptable conduct at work, there is a serious risk of termination of your employment.

As discussed during the meeting on 11 July 2005, you are encouraged to take part in counselling or training to assist you to improve your communication skills and behaviour at work. As discussed at the meeting, the Employee Assistance Program is available to you. EAP is a professional local counselling service and the contacts are Peita Littleton (9175 2766) or Lynne Craigie (9175 3661). Alternatively, you indicated at the meeting and in your letter dated 18 July 2005 that you had already discussed the possibility of communications skills training with Mr Gary Wood (CFMEU), and if you believe a particular course or training in communication skills would assist you to improve your behaviour at work, the company is prepared to consider bearing the cost for this.

Yours sincerely

Dean White

Manager Mining”

- 3 Ms Williams has worked for BHPB for approximately 17 years. Since 2000 she has held various union positions and has also been a safety representative and chaired the site safety committee. Her safety representative role was an elected role and finished in September 2005. Ms Williams worked on A-shift and Mr Jones supervised that shift. At one stage Ms Williams was offered a transfer of shift as she considered her then supervisor, Mr McKendry, was harassing her. She chose to work on A-shift as, at that time, she considered Mr Jones to be a nice bloke.
- 4 The matter came on for hearing in Newman on 1 to 3 February 2006. The matter was adjourned part-heard and re-listed in Perth, at the request of the parties, on 15 February 2006. Prior to hearing the parties were directed to establish agreed facts. This proved difficult and instead the applicant at hearing handed up an amended chronology of facts. Some of this document was further amended under cross-examination. The respondent provided to the Commission a chronology of events with multiple attached documents. I do not need to go to all the details of those chronologies. Both parties confirmed during closing submissions that they seek the Commission to make findings concerning the matters contained in the two warning letters and a decision as to whether those letters should be withdrawn.
- 5 Let me then turn to each of the incidents contained in the two warning letters. It is clear both from the warning letters and the two chronologies provided by the parties that there is an extensive history to the relationship. Evidence was led by both parties which covered much of this history. Ms Williams disputes each aspect of counselling or warning in this history except two incidents which relate to swearing on the two-way radio and not wearing a safety helmet. It is the case that while the history of events may have some value in understanding the character of the relationship between Ms Williams and the company, and in understanding the more specific issues raised in the warning letters, the matters in dispute are the matters of the warning letters.
- 6 I make this point because it is my impression, gained at hearing from the evidence of Ms Williams, that Ms Williams has, and has had, a wider grievance with the manner in which she has been dealt with in the workplace. Indeed the evidence is that some matters have earlier been brought to the Commission. I do not deal with those matters as I do not deal with any broader grievance or grievances which Ms Williams may have. They are not the subject of this dispute. I make this comment also because the Court was full with observers throughout most of the hearing, and it is the case that some of the matters covered during hearing, will not be canvassed in this decision and will not be the subject of findings by the Commission.
- 7 Evidence for the applicant was given by Ms Sally Williams, a truck driver, Mr Gary Cornell, Production Worker, Mr Timothy Cumbers, Plant Operator and Mr Mark Needham, Production Worker. Evidence for the respondent was given by Mr Geoffrey Jones, A-Shift Supervisor, Mr Chris Dunbar, Mines superintendent for bauxite mine for Alcan Gove in the Northern Territory, Ms Barbara Abbott, an independent investigator, Mr Stephen Reid, Team Leader, Mine Foreperson, Mr Barry Howell, Safety Training Officer, Mr Michael Carroll, Mining Superintendent and Mr Jeffrey White, Manager, Whaleback Mining.
- 8 At the centre of this matter is the relationship between Ms Williams and her A-Shift Superintendent, Mr Jones. More specifically, the matter is about how Ms Williams in her role as a safety representative, has acted toward Mr Jones during safety information meetings. Safety Information Meetings (SIM) occur pre-shift and last up to about 10 minutes. Generally the meeting is conducted by the Superintendent, who in concert with other supervision will do the talking. The meeting also allows the safety representative to raise issues before the shift crew; generally about safety incidents or reports and actions arising from these. There is time at the end of the meeting for attendees to raise questions.
- 9 Mr Jones' main complaint against Ms Williams is that she makes comments in the SIM which demean him. Mr Jones wants Ms Williams to stop this behaviour. He lodged a grievance [Exhibit A7] about her behaviour towards him. In that grievance Mr Jones says, "I feel that Sally has harassed me in front of our co-workers on a number of occasions: He goes on to list "a few of the various incidents I have documented". He then concludes:

"These are a few examples of what Sally continues to do at the Sims meeting. Sally has accused me of harassment, victimisation and discrimination in the past when I have questioned her about her need to go to the safety office. She has accused me of being a liar, of covering up incidents and of not giving a stuff about safety. She has also questioned my ability to make decisions about safety, in front of the shift. If anybody is being harassed, it is I. Her continuing aggression towards me is uncalled for, and has a detrimental effect on myself and the morale of the shift. I don't see that I should have to tolerate her trying to belittle me or put me down in front of the workgroup. If Sally has an issue with me she should ask to address the issue with me privately or take it up with the issue's resolution process.

It is with reluctance I bring this to your attention but I feel something has to be done with this woman as she is getting out of control."

- 10 The respondent contracted Ms Barbara Abbott to investigate Mr Jones' grievances. Ms Williams is then alleged to have engaged in 'unacceptable behaviour' during her meetings with Ms Abbott. This concern was raised by the respondent in the final warning letter as was an incident between Ms Williams and Mr Carroll on 22 June 2005.
- 11 I consider the best way to deal with the evidence is to deal with each incident referred to in the warning letters, chronologically. In summary the allegations are that:
- At a pre-shift meeting on 16 August 2004 Ms Williams accused Mr Jones of being useless, and always having to run to Mr Carroll to make a decision.
 - At a pre-shift meeting on 18 August 2004 Ms Williams acted inappropriately towards Mr Jones by saying several times at the end of the meeting "what no questions" and shaking her head.
 - At a pre-shift meeting on 23 August 2004 Ms Williams accused Mr Jones or management of trying to get out of filling out hazard register forms.
 - At the SIM on 6 January 2005 Ms Williams wrongly accused Mr Jones of not following up on unsafe incidents concerning windrow at SP26 and ROM 2, and covering up for B shift.
 - At the SIM on 13 January 2005 Ms Williams intimidated Mr Jones by accusing him of not following up on safety issues recorded in the Quarry Manager's book.
 - At the interview with Ms Abbott Ms Williams' behaviour was unacceptable
 - At the SIM on 22 June 2005 Ms Williams' told Mr Carroll to shut up and that supervisors did not care about safety.
- 12 As can be seen from the above, with the exception of the investigation by Ms Abbott, each complaint relates to safety concerns and each complaint relates to Ms Williams' behaviour and comments to supervisors in front of other employees.

16 August 2004

- 13 The matter arose due to two successive drive-offs from a refuelling station when the refuelling hose had not been disconnected. Ms Williams had raised concerns after the first such incident. Mr Jones was reporting the second incident to the SIM on 16 August 2004.
- 14 Ms Williams' evidence is:
- "And I says, "Well, maybe if someone had have come and spoken to me about my hazard form I could have told them that." And he says, "I told you before, Sally, Mick Carroll's making that decision." And I said, "Oh, I forgot you couldn't make a decision." And he goes, "I'll see you later outside." And I just went, "Oh, yes. Yeah." And so that's what that was. I don't - - a lot of that was more in frustration because the months previous to that I had put in a hazard form - - hazard register form about (Transcript p.43)
-
- I did say those words but I - - not in the context that they're written.
-
- I wasn't trying to be derogatory.
-
- it was more in frustration" (Transcript p.45-46).
- 15 Ms Williams agreed after some cross-examination that she did say, "Oh, you're useless" to Mr Jones. She says that she said this in frustration (Transcript pp129-130). She says that her comment was more sarcastic than anything else and that she said this in front of the shift crew.
- 16 Mr Jones' evidence is that at that meeting he raised the fact that there was an issue at checkpoint where a truck had driven away from checkpoint with a hose still attached to the truck. Ms Williams then said, "Yeah, I told you there's a problem at checkpoint but you won't fix it". Mr Jones' evidence is that, "she's more or less made me out I was a fool for not getting the - - the hose fixed up in the first place." Mr Jones says that:
- "the problem was noted in the checkpoint where there needed to be changes to the hosing system, but I can't actually make those changes on my shift because I don't - - I look after only shift. Those decisions affects all four shifts, have got to be made from my next level of supervision." (Transcript p.258)
- 17 He explained this to the meeting. He says that Ms Williams went on to say, in front of the meeting, "You can't make decisions for yourself, you've got to keep running to Mick Carroll." He says, "From memory I think she said it a couple of times". After the meeting they continued the discussion and Mr Jones says Ms Williams told him that he could not make a decision himself. Mr Jones also says that Ms Williams called him "useless" during that meeting and in front of the shift.
- 18 Under cross-examination Mr Jones agreed that Ms Williams had previously submitted a hazard form about an earlier drive off. She wanted to know what had been the follow up to the hazard form. When Mr Jones indicated that the matter was with Mr Carroll, Mr Jones agreed that Ms Williams said, "Oh, I forgot you couldn't make a decision". Mr Jones then said he would talk to Ms Williams outside and Ms Williams replied "Oh, useless" or "you're useless". Mr Jones says that he took the comments personally. He agrees that Ms Williams might have felt frustrated, but he objects to the personal attack in front of the shift.
- 19 Mr Needham says that he has never heard Ms Williams say to a supervisor, "I forgot you can't make a decision, you're useless".
- 20 Mr Cornell says that he has not heard Ms Williams say that Mr Jones is useless. He has heard Ms Williams say that Mr Jones cannot make a decision. He says this was 'outside' (Transcript p.188). He says he has said this as well.
- 21 Mr Reid's evidence is that at that meeting Ms Williams said to Mr Jones, in a mocking tone, "Well, you - - oh, that's right, Geoff, you can't make decisions, can you?" Mr Jones replied, "Well, I can only make decisions for the shift. I can't make them for the whole site" (Transcript p.357).
- 22 The evidence of Mr Needham and to a lesser extent Mr Cornell's evidence is not consistent with Ms Williams' evidence. She admits she told Mr Jones he could not make a decision. This was after Mr Jones told her that the decision was one for Mr Carroll to make. Mr Needham says he never heard Ms Williams say that. Mr Reid says Ms Williams made the comment in a mocking tone. Ms Williams says she did not mean to be derogatory, but that the comment was made in frustration. Mr Jones says that Ms Williams more or less made him out to be a fool for not getting the hose fixed up. Clearly the comment was made in front of the SIM and I so find. I find also that the comment was made in a sarcastic or mocking tone. As for the "useless" comment, Mr Jones under cross-examination says that Ms Williams' comment to him, in front of the shift, was "Oh, useless"

or "you're useless". It would appear he took this to mean that Ms Williams was referring to him as useless. Ms Williams admits she said Mr Jones was useless in front of the shift crew. I consider the comment to be clearly derogatory and I understand why Mr Jones would have taken it personally. The comment is made worse by having been made in front of the whole crew.

18 August 2004

- 23 Mr Jones' evidence is that at the end of a SIM he would normally ask if there are any questions. He did not do so on this occasion. He says that Ms Williams said, as she was walking out the door, "What, no questions? What, no questions? What, no questions?" He considered this, "was just another way of her trying to belittle me in front of the shift" (Transcript p.261). He maintained this view under cross-examination and said, "The way she put it across, it's putting me down in front of the shift" (Transcript p.289).
- 24 Mr Cornell says that Ms Williams did say at the end of one meeting, 'what no questions?'
- 25 Ms Williams denies that she said those words and considers that it would sound silly to say such words (Transcript p.132). The first time she heard about this allegation was when Ms Abbott read it to her (Transcript p.94).
- 26 I accept the evidence of Mr Jones and Mr Cornell over that of Ms Williams. I consider it probable that Ms Williams did say several times in front of the SIM and towards the end of the meeting, "What, no questions?" I consider it probable that this comment was made as a challenge to Mr Jones.

23 August 2004

- 27 Ms Williams addressed the SIM on this day. She indicated to the employees that if they see a hazard they should fill out a hazard register form. Mr Jones disagreed and took the view that if a hazard, once identified, could be fixed straightaway, then this should happen and there was no need to complete a hazard register form. Ms Williams says she agreed with this point. She denies that she said, "This is why I have never seen these forms before as they are trying to get out of filling them out". (Transcript p.133)
- 28 Mr Jones' evidence is that Ms Williams informed the shift that if they see a hazard they should write up a hazard register form. Mr Jones disagreed and said that supervision should be informed so they could fix it straightaway. If that cannot happen then a form is completed. Mr Jones says he cannot remember exactly what Ms Williams said, but she replied that the forms had to be put in. He says that Ms Williams went on to say, in front of the shift, "Oh, yeah, just another way of us trying to get out of filling in - - filling in form - - filling in hazard register forms". Mr Jones was consistent in his evidence about the incident under cross-examination.
- 29 Under cross-examination Mr Cornell says that Ms Williams said something similar to the effect that "they're (meaning management) trying to get out of filling out the hazard register forms." (Transcript p.186).
- 30 I accept Mr Jones' evidence over that of Ms Williams. I consider it probable that Ms Williams did say that, in effect, supervision was trying to get out of filling out hazard register forms. Mr Cornell's evidence lends weight to this view. Mr Jones took this to be a challenge to him in front of the shift crew.

6 January 2005

- 31 On 6 January 2005 Ms Williams says that Mr Jones addressed the meeting, advised them of an incident on D-shift and to give way to the loader. Ms Williams says she indicated that the signs at ROM2 were dirty, had been reported in the morning and had not been cleaned by the afternoon. Additionally, there was digging out at the bottom of ROM2, but the entrance to ROM2 had not been blocked by a windrow. She queried why the signs, which were an incident, had been reported in writing, but not the state of ROM2. Mr Jones said the latter was not an incident. Ms Williams said she considered it to be an incident. She stated that if the earlier SP26 incident had been written up then all staff would have known. Mr Jones said that he had told her before that he did not consider it to be an incident. Ms Williams said that she did consider it to be an incident. The meeting then ended.
- 32 Ms Williams says that after the meeting she spoke separately to Mr Jones, explained why she had raised the matter and said there should be a windrow at the opening to ROM2. She told him employees had been working at the top of ROM2 the previous day. They disagreed whether a windrow needed to be placed at the entrance. Later that day, at crib time, she spoke to Steve Reid, a leading hand, and he sent an operator to ROM2 to close the opening. Under cross-examination Ms Williams maintained that she did not say that supervision was covering up near misses. She says she would have been sacked if she said something like that (Transcript p.135).
- 33 Ms Williams agrees that Mr White was at this meeting. She cannot remember whether he told her after the meeting that, in his view, the way she spoke to Mr Jones was not appropriate (Transcript p.136). Ms Williams' evidence is that later that day she attended a meeting with Mr McDonald, a deputy superintendent, Mr Jones and Mr Tim Cumbers (Ms Williams' representative). Mr McDonald had earlier told her the meeting was to discuss her inappropriate behaviour at the SIM and that the meeting was to be called as Mr White, "wants it". At the meeting she says Mr Jones reported that Ms Williams had told the shift that "Geoff Jones is covering up safety like he did before". She told Mr Jones he was lying. Ms Williams says she told Mr Jones that she had spoken to Steve Reid and he had sent Ross Hamilton to block off ROM2. She says that nothing was said at the end of the meeting about the status of the situation.
- 34 Mr Jones says that Ms Williams said that ROM2 stockpile was left in an unsafe condition, in that it was left opened at the top and the loader and trucks were working down below. He says this was not the case as there was a windrow at the top of the stockpile. Ms Williams wanted a windrow at the entrance to the stockpile. Mr Jones said that Steve Reid, his leading hand at the time, checked the site and that there was a windrow 15 metres back from the edge where digging had occurred.
- 35 Mr Jones says that Ms Williams said, "Yeah, that's B-shift again leaving the - - leaving the place in an unsafe condition". She accused him of covering up the incident in front of the shift. She said that it should have been reported as a near miss, as should have been the earlier incident on SP26.
- 36 Under cross-examination Mr Jones insisted that Ms Williams did accuse him of covering up the incident. He says Ms Williams would not accept his explanation and kept going on about it.
- 37 Mr Jones says, in cross-examination
"the only reason those two windrows were put in the entrance to SP26 and ROM2 was the fact that Sally had raised concern with it. They thought to err on the side of safety they'll put a windrow at the entrance to both stockpiles."
(Transcript p.281)
- 38 Mr White's evidence is that he attended the SIM. Ms Williams raised a near miss event from the previous shift on the ROM2 stockpile. Mr Jones said it was not a near miss as there was a windrow in place. Ms Williams interrupted constantly. She basically shouted and moved her arm in an aggressive style. Mr Jones attempted to put his case forward. Ms Williams said

Mr Jones was covering up for B-Shift. Mr White says that the people around him were not comfortable with the exchange. He stepped forward and called a halt to the meeting and told everyone to go to work.

- 39 Mr White asked to have Ms Williams brought back into the room and he had a discussion with her, Mr Jones and Mr Reid. He told her that he was disappointed with what he had heard and that those sorts of issues should be resolved one on one. He says Ms Williams continued to put forward her view of the safety issue and was not listening properly to what he had to say. He says that he was trying to focus on how Ms Williams had conducted herself in front of the group. He considers that Mr Jones felt embarrassed and intimidated by the incident.
- 40 Under cross-examination Mr White agreed that Ms Williams had raised an issue with ROM2 and SP26. Ms Williams indicated that if an incident report had been done then B-shift would have seen what needed to be done. Ms Williams wanted incident reports to be raised for these matters. There was a dispute over whether they were incidents and whether windrows were required at the entrances to the stockpiles. He reiterated that Ms Williams had said that Mr Jones was covering for B-shift. Mr White said he inspected the windrow and in his view the placement of the windrow was adequate. He is not sure whether Mr Cumbers went and placed another windrow at the entrance to ROM2.
- 41 I prefer the evidence of Mr White and Mr Jones to that of Ms Williams. I am confident that Ms Williams did say that Mr Jones was covering up for B-shift. This is a serious allegation about safety in the workplace. It is understandable why Mr Jones would be affronted by the allegation. It is apparent also that Ms Williams did not respond appropriately to Mr Jones disagreeing with her view.

13 January 2005

- 42 Ms Williams said she spoke to Mr Jones on 9 January 2005. They had some discussions about Safe Act Observations (SAO) and the correct procedure for handling those. She queried how matters are followed up and Mr Jones advised that he advised the oncoming shift so they could fix it. Ms Williams suggested it be put in the Quarry Manager's book and the book could be signed off when the matter is actioned. Mr Jones agreed. Ms Williams then asked how he was going to advise the shift crew of the procedure. She says she said:

"Oh, but, you know, how are we going to let the guys know when we come back on the SIMs?" And I go, "Oh, I know. You start early on that morning so maybe when you come in you can check the quarry manager's book and then when I bring it up at the - - at the SIMs and I ask you if you'd checked it you're gonna go - -" and I went like that. And he goes, "Oh, okay." (Transcript p.12)

- 43 Ms Williams says that on 13 January 2005, after she had completed a presentation on misfires, she explained the procedure for the Quarry Manager's book and asked Mr Jones if he had checked on it and he replied he had not. Ms Williams says she then simply wrote down the words, "No, he didn't, to check later". Under cross-examination Ms Williams denied that she said Mr Jones would not check up on the Quarry Manager's book. She says the chronology of events in paragraphs 33 to 38 would not be correct.
- 44 Ms Williams says that after she received the written warning of 14 January 2005, she disputed it. She had a meeting with Mr Jones, Mr Cumbers and Mr Burridge (a leading hand) and asked for the warning to be removed. She complained that at their discussion on 9 January 2005 they had already agreed on what was to occur at the 13 January SIM meeting. The letter was not withdrawn. On 30 January 2005 Ms Williams met with Mr Carroll, Mr Jones and Mr Cumbers about the warning letter. Ms Williams advised Mr Carroll about what had happened on 6 and 13 January 2005 and he told her he would consult Mr McDonald and talk to Mr Jones, then get back to her. Mr Carroll later brought a letter to her home [Exhibit A3].
- 45 Ms Williams then attended a meeting with Mr White, Mr Carroll and Mr Cumbers to have the warning letter withdrawn. Ms Williams says she covered the meeting of 6 January 2005. The warning letter was not withdrawn and Ms Williams says she did not have the chance to take the matter further.
- 46 Mr Jones says that Ms Williams and he discussed prior to this meeting how hazards are followed up to ensure they are fixed. Ms Williams suggested they be put in the Quarry Manager's book and signed off. Mr Jones replied, "That's not a problem, we'll put it in the quarry manager's book and I can check next day and find out if it's actually been done."
- 47 At the SIM meeting on 13 January 2005 Ms Williams asked if he had checked in the Quarry Manager's book to see if the hazard had been signed off. Mr Jones says he replied that he had not yet but would do so. He says Ms Williams then said, "Oh, that'd be right, he hasn't checked up on it, on safety".
- 48 Under cross-examination Ms Boots put Ms Williams' version of events to Mr Jones. He rejected this and insisted that she said words to the effect that he would not follow up on the Quarry Manager's book. He found that "offensive" as he had just told her that he would check up on the issue.
- 49 Mr Cornell's evidence is that he did not hear Ms Williams say that Mr Jones does not follow up on issues in the Quarry Manager's book (Transcript p.177). Under cross-examination he says that he has heard Ms Williams say that Mr Jones does not follow up on the Quarry Manager's book (Transcript p.188).
- 50 I prefer Mr Jones' evidence to that of Ms Williams. I consider it probable that Ms Williams did accuse Mr Jones of not following up on safety, by not following up issues in the Quarry Manager's book. Mr Jones was offended by the comment, which was made in front of the shift crew.

Williams / Abbott Interviews

- 51 It is common ground that Ms Abbott met with Ms Williams on two occasions. It would seem that each discussion lasted approximately two hours. Ms Williams attended the first interview with Mr Gary Woods, her union representative. The evidence of Ms Abbott is that during the second interview she could see Mr Woods outside the room talking to Mr Keith Ritchie, Manager, Employee Relations, for BHPB Iron Ore. Mr Woods was not called to give evidence. It is common ground also that Ms Abbott asked Ms Williams to provide additional written material supporting her views and Ms Williams declined to do so.
- 52 Ms Williams says she did not see Mr Jones' grievance [Exhibit A7] until Ms Abbott spoke to her and then Ms Williams 'just had a read through'. Ms Williams wrote querying the process of the investigation [Exhibit A8] and received a reply on 10 March 2005 [Exhibit A9].
- 53 Ms Williams' evidence is that Ms Abbott met her in Newman, Ms Abbott spoke to her about Mr Jones' grievance. Ms Williams had a glance at Mr Jones' grievance document. Ms Williams told Ms Abbott, "You know, where did - - where did he get that from because I can't even understand what he's talking about". Ms Williams says that on the first day it was mainly about Mr Jones' grievance and she responded to those allegations. She is not sure whether she gave Ms Abbott some of her grievances on that day or the next day. Ms Williams says that she could not get through all her issues with Ms Abbott. She only got through about one third or half of her issues. Ms Abbott was looking at her watch and telling Ms Williams they did

- not have much time left. This it would seem occurred towards the end of the second meeting. Ms Williams told Ms Abbott that she was there for Mr Jones and to discredit her.
- 54 Ms Williams denies that she behaved in a manner that was threatening or intimidating. Ms Williams says that she considered Ms Abbott was there for the company, not her. She told Ms Abbott this. Ms Williams says that Ms Abbott rushed her and was looking at her watch. Ms Williams says she raised this with Ms Abbott and told her:
- “You know, I haven't even gone through half of this thing, I've still got lots there to do. So, you know, when you're looking at your watch like that ...(indistinct)... ” and I said to her, “You know, if I was paying you to do this for me I would expect that you'd sit there and you'd listen to everything I say,” I said, “But I'm not paying you, BHP is paying you.”(Transcript p.32)
- 55 Under cross-examination Ms Williams says that she could not understand a lot of Mr Jones' allegations and still does not understand them. She said that lots of times she asked questions on safety and she does not think at any time that she acted in an abusive, aggressive or intimidating manner.
- 56 Ms Williams received a copy of Ms Abbot's report. She advised Mr Woods that she did not agree with the report and says that Mr Woods was to meet with Mr Ritchie from BHPB to discuss this. This meeting never happened and Ms Williams says she received no follow up until the discussions with Ms Butkus and others which led to the final warning.
- 57 Ms Abbott's evidence is that Ms Williams' demeanour during interview was as follows:
- “If I did try to give advice as to when we needed to conclude talking about one issue to move onto the next, Ms Williams became quite angry and stated that she wanted to talk about what she wanted to talk about, and not what I wanted to talk about.” (Transcript p.330)
- 58 She says Ms Williams behaved in a threatening manner towards her. She says:
- “Ms Williams was quite loud - - and - - and raised her voice, and when she became agitated about, you know, whether this was reasonable or not, and yes, loudness coupled with body language and language was quite threatening.” (Transcript p.333)
- She went on to say:
- “Ms Williams was so forceful in her presentation of the issues that she - - that she wanted put on the table. In my experience as an investigator, I've never had somebody take over and decide how the investigation was going to run in quite the way that Ms Williams did so.” (Transcript p.339)
- 59 The evidence of Ms Abbott in cross-examination is important. She says under cross-examination:
- “Mm hm. And you indicated initially in your evidence that you had most of the time had a good rapport with Ms Williams?---Yes.
- However, in your report at 3.2 you said that Ms Williams makes demands in an intimidating and threatening manner?---That's true.
- Well, when you were giving evidence about that - - that point, I'll just find what was said - - threatening was raising her voice?---Combined with body language and some language, yes.
- MS BOOTS: Okay. Body language. What do you mean by body language?---Pointing, gesturing, rising - -
- How is that threatening?--- - - out of the chair. When you're sitting in close proximity it was quite threatening.
- So gesturing can be threatening?---It can be, yes.
- Raising your voice, you consider that threatening?---Yes.
- You didn't - - you didn't stop the interview - - ?---No.
- - and say, “Ms Williams, I can't continue”?---No.
- The interview continued - - ?---Yes.
- - and you scheduled a further interview the next day?---Yes.
- Can I suggest that your description of intimidating and threatening might be a bit over the top?---I don't believe so.
- It would be fair to say, wouldn't it, that - - if I've understood your evidence, that Ms Williams - - well, perhaps I'll put this to you. Do you - - would you agree with a comment that Ms Williams has some difficulty getting her point across in a succinct manner?---Yes.
- And that she would want to describe a situation or a point by describing a number of circumstances around that - - ?---Yes.
- - before actually making the point?---True.” (Transcript pp 344-345)
- 60 Ms Abbott goes on to say under cross examination that:
- “Mm. So your statement then that Ms Williams - - I'll just - - was the inference from your statement - - that Ms Williams - - I'll just have to find the right paragraph - - I think it's 3.2 again, that:
- “In the interview Ms Williams made demands on the interview process in a threatening manner. She refused direction and insisted on conducting the process her way, claiming if it wasn't done that way it wasn't fair.”
- You - - can I suggest to you you're putting that in a very negative light for Ms Williams? You agree that's very negative?--It may sound negative, but it's the truth.
- Couldn't you equally have said “Ms Williams declined to provide written grievances and wished to discuss the matter verbally”?---That's not the whole scenario, though.
- Mm?---That's just part of the problem that we had - -
- Okay?--- - - so my statement covers more than that.
- But that was the main issue in relation to process, wasn't it?---It's one of the issues.
- Well, what was the other issue?---The other issue was when Ms Williams was talking about answering an allegation and I would ask her to conclude the matter so we could move on - -
- Yes?--- - - she would become very loud and - - and vocal about needing to continue her way, not my way.” (Transcript p.351)
- 61 The exchange with Ms Abbott is different in context and character. It is a personal interview with an investigator. The issue is whether Ms Williams acted as alleged. Ms Williams said repeatedly in her evidence that she expected Ms Abbott to listen to

her. She complained that during the sessions Ms Abbott attempted to counsel her about her behaviour or communication. She felt that Ms Abbott was not on her side and not independent.

- 62 It is hard to accept, having seen Ms Williams and Ms Abbott give evidence, and having read Ms Abbott's report, that Ms Abbott either did not listen to Ms Williams, did not give her an opportunity to put her case or was simply there for Mr Jones. It is the case that Ms Williams was given the opportunity, following the interview, to bring forward more material and chose not to do so. There was no adequate explanation by Ms Williams at hearing why she chose this path. It seems that she either lacked trust in management or lacked confidence in the process. I note that in some earlier matters that Ms Williams either did not continue to pursue the issue, or alternatively if the matter was brought to the Commission, the matter was after a time closed. I make nothing of this other than Ms Williams, if she has an ongoing grievance or grievances, have seemed not to pursue them to finality or to use the opportunities made available to her. The matter I am determining at present is the exception.
- 63 There are aspects of the report and in evidence where Ms Abbott, it would appear has attempted to counsel or communicate with Ms Williams about her manner of communication. This is as opposed to simply determining, on the material collected and the interview held, whether Mr Jones' allegations have substance and why. The complaint of the applicant would seem to be that such a practice either led Ms Williams to the view that Ms Abbott's exercise was not professional or independent. I do not share the view that this somehow diminished the validity of Ms Abbott's report.
- 64 However, of more relevance is whether Ms Williams' conduct during those interviews was as Ms Abbott described, namely loud and threatening. The issue of whether the allegations by Mr Jones are proven is now a matter for me. Mr Wood was the other person present during the first interview. He was not called to give evidence. He was outside during the second interview. At hearing Ms Williams displayed that she was quite upset by the Abbott process. She was insistent that Ms Abbott should have been listening to her grievances. I cannot believe that after approximately four hours of discussion and having seen Ms Abbott and Ms Williams, that Ms Abbott could have not listened to Ms Williams' grievances. I accept the evidence of Ms Abbott unreservedly over that of Ms Williams. I find that Ms Williams did act during those interviews in a manner not appropriate. She acted in a loud and forceful manner and Ms Abbott considered the behaviour to be threatening.
- 65 The applicant alleges that she was not aware of Mr Jones' allegations until the time of Ms Abbott's interview. I think this is so, and it would have been better to have allowed Ms Williams to know the full allegations prior to the interview. However, it is clear from the evidence under cross-examination that Ms Williams was appraised of the full allegation at interview and had a full opportunity to put her case.

22 June 2005 Meeting

- 66 This matter concerns an allegation that Ms Williams at the meeting told Mr Carroll to 'shut up' and that supervisors do not care about safety. Mr Carroll did not take action on this issue. A complaint was raised by an employee at the meeting about Ms Williams' alleged comments. Ms Williams then heard about the issue at the 11 July disciplinary meeting.
- 67 Ms Williams says that the context of her words were that the presentation by McMahon was really good and the group present discussed having others hear the presentation. Ms Williams said it depends on who does it as, "if supervision does it the guys aren't going to listen to them because they're going to think supervision don't care about safety?"
- 68 It is clear from Ms Williams' own evidence that this allegation is true. Ms Williams says:
 "No. I told him he should shut up because at the time he was talking to the MacMahons - - the MacMahons guys had just finished speaking and Mick Carroll says, "We always encourage our employees to - - to bring up safety concerns, to report hazards and all that." So Mick Carroll had just finished saying that and I says - - well, that's when I said, "Oh, you should shut up." I says - - I says, "How can you say that because every time I bring up something about safety or ask questions on safety I end up with a written reprimand?" or something like that. So that's the reason why I said that and I says, "All you do is walk - - is talk the talk." I says, "All youse do is just youse talk about safety but when we do bring it up," I says, "youse don't do anything about it so don't go telling me that you encourage us to do it. How can you be encouraging us to do it when each time I do bring up something about safety I end up with a written reprimand?""
 (Transcript p.37)
- 69 Mr Carroll says that he did not take much offence at being told to be quiet by Ms Williams. He did take offence at being told that supervisors did not care about safety. He says Ms Williams told him to be quiet after he had said that he wanted employees to come forward with solutions to safety issues not just problems. He says he said, "Just don't chuck the problem with the supervisor and then walk off and say, 'hey, you fix it'. I need solutions out there". In his diary note for that day he wrote that he told Ms Williams that he took offence to her comment but he did not comment further as he did not want to disrupt the meeting. Mr Carroll says that he took offence to the later remark. He says that he is 'pretty passionate about safety'.
- 70 Mr Carroll says he rates the issue as a 4 or 5 on a scale of 1 to 10 when 10 is the high point of seriousness. Given the history of notes and counselling about how Ms Williams spoke to people, particularly supervision, I would have expected that this might have been redressed more quickly. Hence on its face I have to question the seriousness of the interaction between Mr Carroll and Ms Williams, in Mr Carroll's eyes. There was an interchange between them in court over the question of her transfer to A-shift which would suggest they had a robust and reasonable relationship.
- 71 Mr Carroll is an experienced Mining Superintendent. He says that he knows Ms Williams well. He did not raise with her the comment she made to him on 22 June 2005. He did not talk to her, counsel her or warn her. He says that he was offended by the comment. I accept this evidence. It is given in the context that he cares about safety and does not wish anyone under his watch to be harmed. He was not challenged on that evidence in anyway. But the comment was not considered at the time to be worthy of correcting or any disciplinary approach. I do not consider it reasonable then for the company to add it to Ms Williams' list of misdemeanours to justify the issuing of a final written warning. The comment, however, does add to the picture of a similar pattern of behaviour by Ms Williams towards supervisors.

Closing Submissions

- 72 Ms Boots submitted that the procedures adopted by the company to investigate complaints were inadequate. Ms Williams was called to meetings without knowledge of the purpose of the meetings. Ms Williams asked for information or details of the complaints and did not receive them. Ms Williams' version of events was invariably not preferred over that of the complainant or management. The company did not take a broader approach to investigating the complaints. Ms Williams wrote to Ms Butkus [Exhibit A12] and asked for a range of information. She says she did not receive the information.
- 73 Ms Boots says that in relation to the letter of 14 January 2005, the circumstances giving rise to the notice were never investigated properly. Additionally, the allegations are wrong. The letter accuses Ms Williams of fabricating safety incidents. However, windrows were placed at SP26 and ROM2 as a compromise. This is the evidence of Mr White. Ms Williams denied also that she accused Mr Jones of covering up for B-shift. As for events on 13 January 2005, Mr Jones agreed that Ms

- Williams and he had discussed, on 9 January 2005, implementing a procedure which was to be announced at the SIM. Ms Williams denies that she said that Mr Jones would not follow up on the Quarry Manager's book. The investigation was not broad; the supervisor's word was simply preferred over that of the employee.
- 74 As for the final warning, Ms Boots says that Ms Williams was never apprised of the detailed allegations prior to the disciplinary inquiry. Mr Carroll did not consider taking any action on the comments made to him. Ms Abbott's inquiry started as an investigation of Mr Jones' grievances and ended up as a general assessment of Ms Williams in the workplace. The allegation of intimidatory behaviour relates to Ms Abbott saying that Ms Williams spoke loudly, gestured when talking and body language. Ms Abbott was not intimidated or threatened so as to stop either 2 hour session. Ms Williams had reservation about Ms Abbott's loyalties and her independence. Ms Abbott's report is more descriptive than actually finding any grievance proven. Ms Abbott does state that Mr Jones is inconsistent in his dealings with staff, and that this is unfair. Mr Jones was also never advised of the outcome of Ms Abbott's investigation. This calls into question why the report was commissioned. Each of the grievances raised by Mr Jones relates to safety issues raised by Ms Williams. Mr Jones wanted Ms Williams to raise the safety issues with him first, not at the SIM. Ms Williams did this on 9 January 2005 and it still caused a problem. Mr Jones wanted safety matters to be fixed quickly rather than do paperwork. Ms Williams favoured a documentary approach. Ms Williams was a good safety representative.
- 75 Ms Boots submitted that there is no system for issuing notices or warnings. There are no objective criteria against which they are assessed. If a supervisor believes a warning is warranted then he issues one. Mr Jones was inconsistent in doing so. He would not have issued Ms Williams with a warning for not having a safety helmet but she mentioned it so he did. He is also inconsistent in accepting derogatory remarks. Ms Boots submitted also that there should be real doubt about the validity of the historical notices.
- 76 Ms Archer submitted that since 1999 Ms Williams had challenged management directives and began belittling soft targets like Mr Jones. She used safety as a tool to make management jump. Ms Archer submitted that Ms Williams either does not get, or does not care, that the method she uses to achieve safety causes mental harm to others. Ms Abbott says that she has not, in all her experience, had someone who took over as Ms Williams did. Her report explains the difficulties she experienced with Ms Williams. Her processes did incorporate procedural fairness. Ms Williams was given the opportunity to know and address the allegations against her. Ms Archer submitted that Ms Williams continues to lack insight into the damage her behaviour is doing, would not take responsibility for it, and continues to behave in that way. She is also developing a habit of responding to complaints by making unfounded complaints herself. Ms Williams' evidence concerning her safety risk assessment for driving past personnel cleaning reflectors, coupled with Mr Cornell's evidence, is clear proof that Ms Williams uses safety as a tool.
- 77 Ms Archer says that Ms Williams' employment history shows a pattern of increasingly bad behaviour. Ms Archer's submissions went through the history which she says displays that Ms Williams was responsible for the actions for which she was counselled, and displays an inability to communicate in a calm and sensible way. It does not display that supervision harassed Ms Williams, but took steps to avoid winding up Ms Williams. At other times Ms Williams chose not to follow up matters. Supervision was also entitled to know and to ask Ms Williams whereabouts at work; this is common ground.
- 78 As to the incidents covered by the warning letters, Ms Archer submitted that Ms Williams admitted that she called Mr Jones useless, and she had to admit this as it is in her own correspondence [Exhibit A16]. She admitted she said this in a sarcastic tone in front of the crew. She was reprimanded for this [Exhibit A15]. Ms Archer says that it is illuminating as to what Mr Jones had to deal with on a day to day basis. Ms Williams thought there was nothing wrong with her actions. Mr Jones attempted to deal with the issue one on one after the meeting and Ms Williams continued to accuse him of not being able to make a decision. Mr Cumbers' evidence contradicts Ms Williams' evidence and should not be believed.
- 79 Ms Archer submitted that for the 18 August 2004 incident, Mr Cornell's evidence contradicts Ms Williams' evidence. He says Ms Williams said, 'What, no questions?' Again on 23 August 2004, Mr Cornell says he heard Ms Williams say on an occasion something to the effect of 'They got out of filling them out'. As to the incident on 6 January 2005 the evidence of Mr Jones, Mr White and Mr Cornell make it clear that Ms Williams did accuse Mr Jones of covering up for B-shift. Ms Williams denies it and says she would have been sacked if she said that. The windrows were put in to keep the peace, not because the situation was unsafe.
- 80 Again, in relation to the incident concerning the Quarry Manager's book, the evidence of Mr Jones and Mr Cornell contradicted Ms Williams' evidence. Ms Williams had access to a three tier process of review to seek address for the warning letter. As to the issue on 22 June 2005, Ms Archer submitted that the word Ms Williams admitted using was actually worse than what Mr Carroll recorded her saying. Mr Carroll was offended by the comments and made a diary note. Mr Carroll is now criticised for that but it is clear that not every breach by Ms Williams is actioned.
- 81 Ms Archer submitted that as to the alleged inconsistent treatment by Mr Jones, Mr Jones is an old-fashioned chap who prefers women not to swear. There is a big gap between that and finding inconsistent treatment on his part. Mr Jones never wrote up Ms Williams for swearing. Ms Williams admitted that Mr Jones did not write her up for every breach of the rules. The internal review processes did on occasion result in no action being taken or warnings being written up. There was no malice towards Ms Williams by way of the respondent's witnesses. Mr Jones is a non-confrontational and even-tempered person. Mr White gave clear evidence as to what he considered when issuing a final warning. The application should be dismissed.

Conclusions

- 82 In short, each allegation against Ms Williams I find to be true. It would be easy to take each matter in isolation and diminish their overall importance. Similarly it would be easy to take the view that Ms Williams was justifiably following up on safety. I do not accept the submission that Ms Williams used safety as a tool to make management jump. However, what is clear is that Ms Williams' manner of dealing with such issues was wrong. It was wrong because she acted in a derogatory and aggressive manner in putting her views. She did this in front of the shift crew. It demeaned Mr Jones and Ms Williams was either oblivious to this or did not care. Later, when queried about the series of allegations, Ms Williams continued to act inappropriately. She continues to have little insight into the effects of her behaviour.
- 83 It is important that I say something further about the evidence given. I accept unreservedly the evidence of Mr Jones over that of Ms Williams. It is a complaint of the applicant that the procedures followed by the respondent were invariably inadequate and simply accepted supervisions' recall of events over that of Ms Williams. Both Mr Jones and Ms Williams spent some time giving evidence and were cross-examined carefully. I have had a full opportunity to assess both witnesses and their evidence. I have no doubt that Mr Jones is a sincere, non-confrontational and fair-minded individual. The evidence for the respondent supports this view. Ms Williams elected to be on his shift as she thought he was a nice guy. Mr Cornell says he is 'reasonable' and would 'pass on a push', though he has seen 'better'. Mr Jones has been told to be more consistent in his treatment of employees and seems to accept this. This finding arises in Ms Abbott's report. The evidence of Mr Cornell is that he has sworn or abused or called Mr Jones far worse than Ms Williams and had not received any reprimand, Mr Cornell says that other colleagues have received warnings for being derogatory towards Mr Jones, "Only since the management or

Geoff Jones has heard that Sally's bringing it to Commissioner Woods, that one person that I only know of has got a note to file, that's Piggy Ralston" (Transcript p.179).

- 84 Yet it is not the case that Mr Jones' complaint is that Ms Williams swore at him. Mr Jones says, in answer to the Commission, that he does not like women swearing. That was a direct and honest answer which in the flow of the hearing Mr Jones could have expected would not have assisted his case. He readily admitted the point. Mr Cornell's evidence is that Ms Williams was harassed and victimised and continually got notes to file that others did not receive. He says, "My own personal opinion, I don't think Geoff Jones likes being told by Sally, being a woman, being told by a woman what to do about safety issues and stuff like that". The view would seemingly be backed up by the comment made by Mr Jones in his grievance, namely, "I feel something has to be done with this woman as she is getting out of control". It would be wrong, in my considered view, to see this matter from the perspective that Mr Jones treated Ms Williams unfairly because she is a vocal woman who stands up for safety, or that he did not like her swearing. A review of Mr Jones' diary notes and actions cannot lead to such a conclusion. Mr Jones was also entitled to know where Ms Williams was located at work or her need to go to the safety office. Ms Williams' complaint that a supervisor wanted to know her whereabouts or what she is doing, and this somehow constituted harassment, cannot be sustained.
- 85 The real focus of Mr Jones' complaint is apparent in his grievance. He says, "Her continuing aggression towards me is uncalled for, and has a detrimental effect on myself and the morale of the shift. I don't see that I should have to tolerate her trying to belittle me or put me down in front of the workgroup. If Sally has an issue with me she should ask to address the issue with me privately or take it up with the issues resolution process". The first warning letter of 14 January 2005 tells Ms Williams to deal with her supervisor in, 'a civil and respectful manner', and to avoid 'personal attacks'. The final warning letter repeats a similar message and states, 'Derogatory and insulting remarks towards others, and especially your supervision, will not be tolerated'. For the reasons expressed earlier I am confident that Mr Jones' complaints are valid and sincere. He wanted her behaviour to stop.
- 86 I have focussed somewhat on Mr Cornell's evidence. There can be no doubt that Mr Cornell sought to give support to Ms Williams in his evidence. He put up a good case for her. He also on matters of fact faithfully gave evidence as to what he heard Ms Williams say. Mr Cumbers and Mr Needham also sought to give a general level of support to Ms Williams. I do not accept the evidence of Mr Cumbers. His differing approach to addressing questions in evidence in chief as opposed to cross-examination is more one of partisanship than giving faithful evidence. I will deal with the evidence of Ms Williams and Ms Abbott shortly. I otherwise have no complaint about the evidence given by any witness, except that Mr Reid had to be instructed at one time to direct himself to the questions asked.
- 87 Ms Abbott's evidence is important. Her role seemed to play a part in the fact that Ms Williams was issued with a final warning in July 2005. I say it in this way because her report dated 11 May 2005, at clause 3.2 became part of the complaints against Ms Williams that led to the final warning being issued. Ms Abbott was a good witness whose evidence was undiminished in cross-examination. I have included the details of some of this cross-examination in the decision because it gives a clear record of how she came to her conclusion in clause 3.2. The evidence has the ring of truth having seen Ms Williams give evidence. Ms Williams was clearly unhappy about her experience with Ms Abbott. Ms Abbott's approach to the task would appear normal. Ms Williams was adamant that somehow Ms Abbott was there to listen to all that Ms Williams had to say, and it would seem, how she chose to say it. Ms Boots makes the point that Ms Williams has difficulty getting her point across in a succinct manner. This is the case, but she is also insistent upon getting it across in the manner of her choosing. Therein lies a difficulty.
- 88 It is clear from Ms Williams giving of evidence that she considers safety to be of great importance. This is of course the case and should be so. However, the point is more how she chooses to deal with others in getting her point across. Ms Williams admitted eventually that she did say Mr Jones was useless. But she does not even now see that as objectionable. In fact, she at times in evidence has justified her poor behaviour on the basis that she was frustrated. Again this may be understandable at times but she has not taken the next step to perceive how this behaviour has affected others. There has been at times almost a righteousness about her behaviour rather than any sense of insight or apology. This continued even after she was warned to stop such behaviour. I consider in these circumstances that the final warning was inevitable. I have no doubt that Ms Williams has been aggressive and demeaning toward Mr Jones in pursuit of safety issues. This has occurred too frequently, even though Ms Williams was warned, and has occurred in front of the shift crew. It has had a very negative effect on Mr Jones and had to be corrected. The difficulty has been that Ms Williams has lacked a sense of insight into the problem. This was displayed in reasonably full measure before Ms Abbott. It was also displayed at hearing. I do not detect any sense of animosity towards Ms Williams. I would hope that the counselling/training she is receiving will assist her.
- 89 Finally, Ms Boots has made several complaints about the processes adopted for investigation. Ms Williams has at most times maintained that she was not aware of the issues. I doubt this. However, I have not dealt with all the processes. I do not consider that even if the processes for investigation were flawed, and I do not so find, that it would change the fact that Ms Williams did act as alleged. In this way the substance is more relevant than the process.
- 90 For the reasons given I would dismiss the application.

2006 WAIRC 04023

DISPUTE INVOLVING ISSUANCE OF WRITTEN WARNINGS TO UNION MEMBER.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

BHP BILLITON IRON ORE PTY LTD

RESPONDENT

CORAM

COMMISSIONER S WOOD

DATE

FRIDAY, 24 MARCH 2006

FILE NO

CR 149 OF 2005

CITATION NO.

2006 WAIRC 04023

Result	Application dismissed
Representation	
Applicant	Ms J Boots of Counsel
Respondent	Ms G Archer of Counsel and with her Ms J Denkha of Counsel

Order

HAVING heard Mr J Boots of Counsel on behalf of the applicant and Ms G Archer of Counsel and with her Ms J Denkha of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality And Miscellaneous Workers Union Of Western Australian Branch	Delron Cleaning Pty Ltd	Harrison C	C 250/2003	16/01/2004 1/04/2004	Redundancy of Ms Monteleone	Discontinued
Australian Manufacturing Workers Union	Industry Partners	Gregor SC	C 30/2006	17/03/2006	Dispute regarding termination of employment of union member	Concluded
Australian Manufacturing Workers Union	Super Cheap Auto Pty Ltd - Distribution Centre	Gregor SC	C 11/2006	17/02/2006	Dispute regarding employee on sick pay	Concluded
Civil Service Association Of Western Australia Incorporated	Director General, Department Of Justice	Scott C	PSAC 4/2005	20/01/2005	Dispute regarding the decision to terminate employment of union member	Concluded
Civil Service Association Of Western Australia Incorporated	Chief Executive Officer, Department Of Environmental Protection	Scott C	PSAC 63/2003	15/01/2004 27/01/2004 4/02/2004 12/05/2004	Dispute re: Transfer	Concluded
Civil Service Association Of Western Australia Incorporated	Director General, Department Of Education And training	Kenner C	PSAC 37/2005	23/09/2005	Dispute re employment conditions of union member.	Discontinued
Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing And Allied Workers Union Of Australia, Engineering & Electrical Division, WA Branch	Hamersley Iron Pty Ltd	Kenner C	CR 81/2004	5/11/2004 13/03/2006	Discrimination and unfair treatment of a Union member	Application dismissed for want of prosecution

Parties		Commissioner	Conference Number	Dates	Matter	Result
Disability Services Commission	Civil Service Association Of Western Australia Incorporated	Scott C	PSAC 13/2004	28/04/2004 12/05/2004 19/08/2004 18/10/2004 18/01/2005 29/03/2005 18/07/2005	Criteria progression	Concluded
Liquor, Hospitality And Miscellaneous Union, Western Australian Branch	National Foods Milk Limited	Wood C	C 203/2005	18/01/2006 9/02/2006 13/03/2006	Dispute regarding casual staff and the status of their employment to be made permanent	Concluded
The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch	BHP Billiton Iron Ore	Wood C	C 26/2006	8/03/2006	Dispute regarding the standing down of union member	Concluded
The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch	Aqueous Metallurgy Pty Ltd	Gregor SC	C 37/2006	N/A	Dispute regarding award issues	Concluded
The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch	Alcoa World Alumina Australia	Gregor SC	C 77/2005	17/05/2005 18/10/2005 9/12/2005	Dispute regarding bonus payment to union member	Concluded
The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers, Western Australian Branch	Savannah Engineering, BHP Billiton Iron Ore Pty Ltd	Wood C	C 144/2005	11/08/2005 2/09/2005	Dispute regarding employment issues of union member	Concluded
The Construction, Forestry, Mining And Energy Union Of Workers	Leighton Kumagai Joint Venture	Kenner C	C 187/2005	3/11/2005 11/11/2005 24/11/2005	An application to the Commission requesting resolution of a dispute between the parties regarding right of entry	Recommendation issued
The Construction, Forestry, Mining And Energy Union Of Workers	AMMS Engineering And Maintenance Services	Wood C	C 7/2006	17/02/2006	A dispute regarding alleged unfair dismissal of union members	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Construction, Forestry, Mining And Energy Union Of Workers	Go-Crete Pty Ltd	Gregor SC	C 36/2006	28/03/2006	Dispute regarding right of entry to site	Concluded
The Construction, Forestry, Mining And Energy Union Of Workers	Gendredge Pty Ltd	Kenner C	C 168/2005	3/10/2005	Dispute re termination of employment	Order issued
The Shop Distributive And Allied Employees' association Of Western Australia	Pure Clear Water Supply Pty Ltd	Harrison C	C 31/2006	N/A	Dispute regarding payment delay of outstanding amount	Discontinued
The State School Teachers Union Of W.A. (Incorporated)	Paul Albert, Director General, Department Of Education And Training	Harrison C	C 180/2005	27/10/2005 11/11/2005 6/12/2005	A dispute regarding the alleged victimisation of a union employee	Discontinued
Transport Workers' Union Of Australia, Industrial Union Of Workers, Western Australian Branch	BHP Billiton Iron Ore Ltd	Wood C	C 17/2006	20/02/2006 7/03/2006 30/03/2006	Dispute regarding the standing down of a union member	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2006 WAIRC 03966

BREADCARTERS' (METROPOLITAN) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

BAKERS INDUSTRY EMPLOYERS ASSOCIATION OF WESTERN AUSTRALIA

RESPONDENT

CORAM

COMMISSIONER J H SMITH

DATE

THURSDAY, 16 MARCH 2006

FILE NO/S

APPL 15 OF 2006

CITATION NO.

2006 WAIRC 03966

Result

Respondent's name substituted

Representation

Applicant

Mr N J Hodgson

Respondents

Ms M Saraceni (of counsel for the Respondent)

Mr J Uphill (as agent for whom warrants have been filed)

Order

Having heard Mr Hodgson on behalf of the Applicant, Ms Saraceni of counsel on behalf of the Respondent and Mr Uphill as agent on behalf of the Respondents for whom warrants have been filed, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the name of the Respondent be deleted and that be substituted therefor the name, Baking Industry Employers' Association of Western Australia.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2006 WAIRC 04014

HOTEL AND TAVERN WORKERS' AWARD, 1978 (NO R31 OF 1977)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESLIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN
BRANCH**APPLICANT**

-v-

WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED
(UNION OF EMPLOYERS) AND OTHERS**RESPONDENT****CORAM**

COMMISSIONER J L HARRISON

DATE

FRIDAY, 24 MARCH 2006

FILE NO/S

APPL 19 OF 2006

CITATION NO.

2006 WAIRC 04014

Result

Application divided

Order

WHEREAS on 16 February 2006 the applicant applied to vary the *Hotel and Tavern Workers' Award 1978 (No R31 of 1977)* ("the Award") to incorporate test case standards, to standardise the Award in line with other orders of the Commission and to modernise and update the Award; and

WHEREAS at a hearing before the Commission on 17 March 2006 the parties advised the Commission that agreement had been reached on a number of issues and that some issues required further discussion; and

WHEREAS the parties requested that the application be divided into two parts between the agreed matters and those requiring further discussion between the parties; and

WHEREAS after hearing from the parties the Commission formed the view that the application should be divided and the parties consented to that occurring;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s27(1)(s) of the *Industrial Relations Act 1979*, hereby orders -

- (1) THAT application 19 of 2006 be divided into two parts to be numbered 19 of 2006 and 19A of 2006 respectively.
- (2) THAT application 19 of 2006 be that part of application 19 of 2006 that relates to the matters agreed by the parties and contained in the amended schedule forwarded to the Commission on 15 March 2006 and as amended at the hearing.
- (3) THAT application 19A of 2006 be that part of application 19 of 2006 relating to the contents of the existing Clause 17. – Holidays of the Award.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2006 WAIRC 04012

RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD, 1979 (NO R38 OF 1978)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESLIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN
BRANCH**APPLICANT**

-v-

RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN
AUSTRALIA INC. AND OTHERS**RESPONDENT****CORAM**

COMMISSIONER J L HARRISON

DATE

FRIDAY, 24 MARCH 2006

FILE NO/S

APPL 17 OF 2006

CITATION NO.

2006 WAIRC 04012

Result

Application divided

Order

WHEREAS on 13 February 2006 the applicant applied to vary the *Restaurant, Tearoom and Catering Workers' Award 1979 (No R48 of 1978)* ("the Award") to incorporate test case standards, to standardise the Award in line with other orders of the Commission and to modernise and update the Award; and

WHEREAS at a hearing before the Commission on 17 March 2006 the parties advised the Commission that agreement had been reached on a number of issues and that some issues required further discussion; and

WHEREAS the parties requested that the application be divided into two parts between the agreed matters and those requiring further discussion between the parties; and

WHEREAS after hearing from the parties the Commission formed the view that the application should be divided and the parties consented to that occurring;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s27(1)(s) of the *Industrial Relations Act 1979*, hereby orders -

- (1) THAT application 17 of 2006 be divided into two parts to be numbered 17 of 2006 and 17A of 2006 respectively.
- (2) THAT application 17 of 2006 be that part of application 17 of 2006 that relates to the matters agreed by the parties and contained in the amended schedule forwarded to the Commission on 15 March 2006, as amended at the hearing.
- (3) THAT application 17A of 2006 be that part of application 17 of 2006 which contains the matters in dispute namely:
 - (a) the amendments proposed by the Restaurant and Catering Industry Association of Employers of Western Australia Inc in its supplementary Notice of Answer and Counter Proposal lodged in the Commission on 14 March 2006 that relate to the existing Clause 54. – School Canteen Workers of the Award;
 - (b) the contents of the existing Clause 17. – Holidays of the Award; and
 - (c) the content of the classifications contained in Clause 6.- Definitions of the Award.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2006 WAIRC 03935

J & K HOPKINS ENTERPRISE AGREEMENT 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RUBYLAKE HOLDINGS PTY LTD T/AS J & K HOPKINS

APPLICANT

-v-

TRANSPORT WORKERS' UNION OF AUSTRALIA, WA BRANCH

RESPONDENT

CORAM

COMMISSIONER J H SMITH

DATE

FRIDAY, 10 MARCH 2006

FILE NO/S

AG 280 OF 2005

CITATION NO.

2006 WAIRC 03935

Result

Order issued to amend the name of the Respondent

Representation

Applicant

Mr J N Uphill (as agent)

Respondent

Mr N J Hodgson

Order

Having heard Mr Uphill as agent on behalf of the Applicant and Mr Hodgson 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 be deleted and that be substituted therefor the name, Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

2004 WAIRC 13407

DISPUTE REGARDING STRIKE ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE A/CHIEF EXECUTIVE, PUBLIC TRANSPORT AUTHORITY

APPLICANT

-v-

THE AUSTRALIAN RAIL TRAM AND BUS INDUSTRY UNION OF EMPLOYEES WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM

COMMISSIONER J H SMITH

DATE

WEDNESDAY, 24 NOVEMBER 2004

FILE NO/S

C 228 OF 2004

CITATION NO.

2004 WAIRC 13407

Result	Interim Order made
Representation	
Applicant	Mr C Gillam
Respondent	Mr R Christison

Order

WHEREAS the Applicant filed on 24 November 2004 an application for an order under s 44 of the *Industrial Relations Act 1979* ("the Act") that the Respondent refrain from taking any industrial action.

AND WHEREAS on 24 November 2004 the Commission convened a conference pursuant to s 44 of the Act.

AND WHEREAS the Respondent has advised the Commission that its members who are employed as transit guards propose to hold a stop work meeting on 25 November 2004 to discuss what direction the transit guards wish to take about the roster which the Applicant has hung to commence on 28 November 2004 ("the roster") as the Respondent is in dispute with the Applicant about the following issues in respect of the roster:

- (a) 12 hour gap between shifts;
- (b) lines with more than three consecutive train riders;
- (c) an arrangement as to who is appointed to the Currabine roster;
- (d) blocking of shifts;
- (e) number of day shifts; and
- (f) 12 vacant lines ("the issues in dispute").

AND WHEREAS the Respondent has advised the Commission that further industrial action may be taken if the Applicant does not participate in negotiations in relation to the issues in dispute prior to the roster commencing.

AND WHEREAS the Applicant says that the Respondent has only raised the issues in dispute on 22 November 2004 and it says the roster was developed in consultation with the Respondent rostering committee and employees have been afforded an opportunity to raise these issues prior to the roster being hung.

AND WHEREAS the Respondent says that discussions and communication of information between the parties has been inadequate.

NOW pursuant to the powers vested in it pursuant to s 44 of the Act, the Commission hereby orders that –

Whilst this order remains in force:

- (a) the Respondent, its officers, agents, employees and members are not to take any industrial action;
- (b) the Respondent, its officers, agents, employees and members are required to ensure that continuity of passenger train services is not disrupted;
- (c) the Respondent, its officers, agents and employees are required to inform its members who are transit guards of this order and direct its members who are transit guards to comply with this order no later than 10:00 am on 25 November 2004;
- (d) the roster is not to commence until a period of 14 days has elapsed from 28 November 2004;
- (e) the Applicant's representatives and the Respondent's representatives are to meet on Monday, 29 November 2004, to commence discussions in respect of the issues in dispute;
- (f) the parties are to report back to the Commission in relation to their discussions in a s 44 conference that will be convened on 1 December 2004;
- (g) the Respondent is to provide to the Applicant by close of business 25 November 2004 a document setting out the Respondent's details and contentions in respect of the issues in dispute;
- (h) this order will remain in force for a period of 21 days from the date of this order;
- (i) there be liberty to both parties to apply to vary this order on 24 hours notice.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

2005 WAIRC 03146

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

LEIGHTON KUMAGAI JOINT VENTURE

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 28 NOVEMBER 2005
FILE NO.	C 187 OF 2005
CITATION NO.	2005 WAIRC 03146

Result	Recommendation issued
Representation	
Applicant	Ms K Scoble of counsel
Respondent	Mr M Hotchkin of counsel

Recommendation

WHEREAS the applicant made application to the Commission for an urgent s 44 conference under the Industrial Relations Act 1979 ("the Act") on 2 November 2005.

AND WHEREAS the Commission convened a compulsory conference under s 44 of the Act on 3 November 2005;

AND WHEREAS at the conference the Commission was informed by the applicant that the parties were in dispute in relation to the right of entry of accredited officials of the applicant to enter premises at the various sites at which construction of the New Metro Rail Project is being undertaken by employees of both the respondent and of its various contractors;

AND WHEREAS the applicant informed the Commission that in correspondence received from the respondent it had been advised that the respondent intended to impose restrictions upon the right of entry of duly accredited officials of the applicant which restrictions were inconsistent with the applicant's statutory rights under Division 2G of the Act to enter premises where relevant employees work and was attempting to impose upon accredited officials under the Act restrictions on their rights of entry more consistent with right of entry provisions contained in the Workplace Relations Act 1996 (Cth) ("the WR Act") and a certified agreement made under the WR Act applicable to the respondent's operations;

AND WHEREAS the respondent informed the Commission that by reason of interruptions at its various work sites as a consequence of the entry of accredited officials of the applicant and concerns of the respondent as to the true purposes of the applicant's officials in gaining and seeking to gain entry to the various work sites that it has sought to request of the applicant, prior to granting entry to its sites, particular information as to the identity of officials seeking to enter; the purpose for which entry is sought; in respect of whom such entry is sought; and advanced notice of such entry being sought;

AND WHEREAS the Commission suggested to the parties having heard from them that consideration may be given by them to an agreed procedure in relation to entry of accredited officials of the applicant to the respondent's various sites and at the suggestion of the parties the Commission undertook an inspection of the project Perth city sites to gain an appreciation of the issues surrounding right of entry and critical aspects of the project's operations, which inspections took place on 11 November 2005;

AND WHEREAS a further s 44 compulsory conference was convened by the Commission on 24 November 2005 to further progress the matters in dispute between the parties as a result of which the Commission advised the parties that it would issue a recommendation in relation to the matters in dispute in an endeavour to assist the parties in resolving the dispute;

NOW THEREFORE the Commission having regard for the interest of the parties directly involved, the public interest, and to prevent the further deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Act, hereby recommends:

- (1) THAT where an accredited official of the applicant seeks to enter the premises controlled by the respondent under Division 2G of the Act they will, as far as is practicable, give 24 hours notice of the intention to enter either orally or in writing to either the Project Manager Mr Damian Ryan or the Project Director Mr Robert Wallwork. It is to be expected that notice will be given in the ordinary course. In the event of an urgent matter arising in any particular case and such notice cannot be practicably given, then as much notice as possible will be given prior to the right of entry being exercised.
- (2) THAT the notification of the right of entry in par 1 above will advise of the particular official(s) seeking the right of entry; the identity of the particular employer concerned and its location on the project; and the purpose specified in Division 2G of the Act for which the right of entry is sought.
- (3) THAT if the purpose for which a right of entry is sought is to investigate any suspected breach of the Act, the Long Service Leave Act 1958, the Minimum Conditions of Employment Act 1993, the Occupational Safety and Health Act 1984, The Mines Safety and Inspection Act 1994 or an award, order, industrial agreement or employer - employee agreement that applies to any employee of such employer, then:
 - (a) the applicant will identify the relevant statute or other industrial instrument suspected to have been breached; and
 - (b) outline the broad nature of the suspected breach for example, under payment of wages, unsafe scaffolding and the like.
- (4) THAT the accredited official(s) of the applicant will exercise their right of entry through the designated entry points to the sites known as the "authorised gates".
- (5) THAT the accredited official(s) of the applicant exercising a right of entry are to comply with all site safety rules, regulations and site entry requirements and undertake to not intentionally and unduly hinder either the relevant employer or employees during working hours and to at all times act in a proper and professional manner.
- (6) THAT the respondent recognise and respect the applicant's right of entry under Division 2G of the Act and it will not refuse, or intentionally and unduly delay, hinder or obstruct an authorised official(s) of the applicant exercising a right of entry in accordance with the Act and this Recommendation.
- (7) THAT the applicant not attempt to hold discussions with or otherwise interrupt the work of employees other than those for whom a right of entry is exercised under the Act without the knowledge of the respondent.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2006 WAIRC 04071

DISPUTE REGARDING EMPLOYMENT POSITION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT**-v-**DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH IN HIS
INCORPORATED CAPACITY AS THE WA COUNTRY HEALTH SERVICE UNDER S7 OF
THE HOSPITAL**RESPONDENT****CORAM**

COMMISSIONER P E SCOTT

DATE

MONDAY, 27 MARCH 2006

FILE NO.

PSAC 10 OF 2006

CITATION NO.

2006 WAIRC 04071

Result Recommendation issued*Recommendation*

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and
 WHEREAS on Monday the 27th day of March 2006, the Public Service Arbitrator convened a conference for the purpose of
 conciliating between the parties; and
 WHEREAS the Arbitrator issued a recommendation for the resolution of the dispute between the parties,
 NOW THEREFORE the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby
 recommends:

1. THAT in full and final resolution to the industrial dispute, the applicant and respondent agree to a settlement in the following terms:
 - Mr Trevor Canning submits his resignation to take effect from the 31st March 2006. The respondent agrees to accept the lesser period of notice without penalty. All accrued entitlements will be paid out with effect from this date.
 - The respondent agrees to pay Mr Trevor Canning an amount equal to 4 months (16 weeks) pay at his current rate of pay.
2. THAT that nothing in this settlement constitutes or is deemed to constitute an admission of liability by the employer in respect of the industrial dispute; and
3. THAT this agreement constitutes the full and final settlement of all matters pertaining to Mr Canning's employment with WA Country Health Service; and
4. THAT that the terms of the recommended settlement remain confidential.

(Sgd.) P E SCOTT,
 Commissioner,
 Public Sector Arbitrator.

[L.S.]

2006 WAIRC 04090

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TROY EDWARDS

APPLICANT**-v-**

BDF INVESTMENTS TRADING AS THE TYRE FACTORY

RESPONDENT**CORAM**

COMMISSIONER S M MAYMAN

DATE

FRIDAY, 31 MARCH 2006

FILE NO

U 145 OF 2005

CITATION NO.

2006 WAIRC 04090

Result Change name of respondent**Representation****Applicant**

Mr T.D. Edwards

Respondent

Mr R. Gifford (as agent)

Order

WHEREAS an application was lodged in the Commission pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;
 AND WHEREAS the matter was listed for conference on 15 March 2006;
 AND WHEREAS the parties agreed that the respondent had been incorrectly named in the application;
 AND WHEREAS the parties agreed to amend the respondent's name;

AND WHEREAS the Commission formed the view that it was appropriate to make the amendment;
 NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me, and by consent, hereby orders –
 THAT the name Ian Diffen The Tyre Factory be deleted and BDF Investments trading as The Tyre Factory inserted in lieu thereof.

(Sgd.) S M MAYMAN,
 Commissioner.

[L.S.]

2006 WAIRC 03648

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BRUCE BENTLEY	APPLICANT
	-v-	
	PRIMARY SECURITIES LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	MONDAY, 6 FEBRUARY 2006	
FILE NO.	U 187 OF 2005, B 187 OF 2005	
CITATION NO.	2006 WAIRC 03648	

Result	Direction issued
Representation	
Applicant	Ms V Hodgins of counsel
Respondent	Mr D Schapper of counsel

Direction

HAVING heard Ms V Hodgins of counsel on behalf of the applicant and Mr D Schapper of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the applicant file and serve particulars of its claim by 21 February 2006.
2. THAT the respondent file and serve particulars of its notice of answer within 14 days of service of the applicant's particulars.
3. THAT each party shall give an informal mutual discovery by serving its list of documents within 7 days thereafter.
4. THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
 Commissioner.

[L.S.]

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Aurora Stone Pty Ltd / CFMEUW Industrial Agreement 2005 - 2008 AG 245/2005	20/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	Aurora Stone Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Australasia Gypsum Pty Ltd T/A WACI Wall and Ceiling Contractors/CFMEUW Industrial Agreement 2005-2008 AG 148/2005	12/12/2005	The Construction, Forestry, Mining And Energy Union Of Workers	Australasia Gypsum Pty Ltd T/a WACI Wall & Ceiling Contractors	Senior Commissioner J F Gregor	Agreement Registered
Bradken Resources Pty Ltd - Western Australia - Welshpool Enterprise Bargaining Agreement 2006 AG 42/2006	24/03/2006	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, And Allied Workers Union Of Australia, Engineering & Electrical Div.	Bradken Resources Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Brownbuilt Pty Ltd, Welshpool, WA Agreement 2006 AG 39/2006	24/03/2006	Brownbuilt Metalux Industries	Automotive, Food, Metals, Printing and Kindred Industries Union of Workers Western Australian Branch	Senior Commissioner J F Gregor	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Buttercup Bakeries Malaga (WA) Breadroom, Distribution and Maintenance Enterprise Agreement 2005 AG 16/2006	15/03/2006	Transport Workers' Union Of Australia, Industrial Union Of Workers, Western Australian Branch	Quality Bakers Australia Limited Trading As Buttercup Bakeries - Malaga WA	Commissioner J H Smith	Registered
City of Perth (Outside Workforce) Agreement 2005 AG 18/2006	10/03/2006	City Of Perth	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch And Others	Commissioner J H Smith	Registered
City of Stirling Mechanical Staff Enterprise Bargaining Agreement March 2006 AG 56/2006	5/04/2006	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing And Allied Workers' Union Of Australia, Engineering & Electrical Division, WA Branch	City Of Stirling	Commissioner J H Smith	New agreement registered
Com-AI Windows/CFMEU W Industrial Agreement 2005 - 2008 AG 24/2006	24/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	Com-AI Windows Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Department for Community Development Agency Specific Agreement 2006 PSAAG 4/2006	28/03/2006	Civil Service Association Of Western Australia Incorporated	Department For Community Development	Commissioner P E Scott	Agreement Registered
Department of Corrective Services Killara Youth Support Service (Juvenile Justice Officers) Agency Specific Agreement 2006 PSAAG 2/2006	28/03/2006	Civil Service Association Of Western Australia Incorporated	Commissioner For Corrections	Commissioner P E Scott	Agreement Registered
DESAIR & AMWU, Malaga, Sheet Metal Enterprise Bargaining Agreement 2006 AG 33/2006	24/03/2006	Direct Engineering Services Pty Ltd Trading As Desair	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch	Senior Commissioner J F Gregor	Agreement Registered
Foster's Australia North Fremantle Agreement 2006 AG 32/2006	24/03/2006	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch	Foster's Australia North Fremantle & Another	Commissioner S J Kenner	Agreement registered
Fusion Recruitment Group - TWU Enterprise Bargaining Agreement 2006 AG 40/2006	24/03/2006	Transport Workers Union Of Australia	Fusion Recruitment Group Pty Ltd	Commissioner J H Smith	Agreement registered
G & A Carpet Choice/CFMEUW Industrial Agreement 2005 - 2008 AG 21/2006	24/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	G & A Floor Coverings Operating Trust Trading As G & A Floor Coverings	Senior Commissioner J F Gregor	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Integrated Workforce - TWU Enterprise Bargaining Agreement 2005 AG 277/2005	15/03/2006	Transport Workers' Union Of Australia, Industrial Union Of Workers, Western Australian Branch	Integrated Group Limited	Commissioner J H Smith	Registered
Introduction of Social Trainer Level 2 Industrial Agreement 2006 PSAAG 1/2006	10/03/2006	Civil Service Association Of Western Australia Incorporated	Director General Disability Services Commission	Commissioner P E Scott	Agreement Registered
J & K Hopkins Enterprise Agreement 2005 AG 280/2005	10/03/2006	Rubylake Holdings Pty Ltd T/as J & K Hopkins	Transport Workers' Union Of Australia, Industrial Union Of Workers, Western Australian Branch	Commissioner J H Smith	Registered
KBR Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 2006 AG 51/2006	22/03/2006	KBR Water Services Pty Ltd	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, And Allied Workers Union Of Australia, Engineering & Electrical Div	Commissioner S Wood	Agreement registered
Metso Minerals (Wear Protection) Maintenance Agreement 2005 AG 26/2006	24/03/2006	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch	Metso Minerals (wear Protection)	Senior Commissioner J F Gregor	Agreement Registered
Mills Sign & Painting Service/CFMEUW Industrial Agreement 2005 AG 29/2006	20/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	E P Hall Family Trust Number 2 Trading As Mills Sign And Painting Service	Senior Commissioner J F Gregor	Agreement Registered
Phoenix Design & Construction/CFM EUW Industrial Agreement 2005 - 2008 AG 22/2006	24/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	Phoenix Design & Construction Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Powerwest Constructions Pty Ltd New Metro Rail Southern Suburbs Rail Project, Structural Project Agreement 2005 AG 2/2006	20/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	Powerwest Constructions Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Printing (Community Newspaper Group) Production Employees (Enterprise Bargaining) Agreement 2006 AG 20/2006	22/03/2006	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch	Community Newspaper Group	Commissioner S Wood	Agreement registered
Prospector and Avon Link on Train Customer Service Officers Enterprise Agreement 2006 AG 44/2006	24/03/2006	The Australian Rail, Tram And Bus Industry Union Of Employees, West Australian Branch	Delron Cleaning Pty Ltd T/as Delron Hospitality Management	Commissioner J H Smith	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority (Transwa) Enterprise Agreement 2006 AG 36/2006	17/03/2006	Public Transport Authority	The Australian Rail, Tram And Bus Industry Union Of Employees, West Australian Branch	Commissioner J H Smith	Agreement registered
Public Transport Authority Employees Enterprise Agreement 2006 AG 37/2006	21/03/2006	Public Transport Authority	The Australian Rail, Tram And Bus Industry Union Of Employees, West Australian Branch	Commissioner J H Smith	Agreement registered
Public Transport Authority Railcar Drivers (Transperth Train Operations) Enterprise Agreement 2006 AG 31/2006	24/02/2006	Public Transport Authority	The Australian Rail, Tram And Bus Industry Union Of Employees, West Australian Branch	Commissioner J H Smith	Registered
Public Transport Authority Railways (Trades) Enterprise Agreement 2006 AG 38/2006	23/03/2006	Public Transport Authority	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, And Allied Workers Union Of Australia, Engineering & Electrical Div. And Another	Commissioner J H Smith	Agreement registered
St John of God Hospital Geraldton (HSU) Caregiver Agreement 2006 AG 41/2006	27/03/2006	Health Services Union Of Western Australia (union Of Workers)	St John Of God Health Care Geraldton (A Division Of St John Of God Health Care Inc.)	Commissioner P E Scott	Agreement registered
St John of God Hospital Murdoch (HSU) Caregiver Agreement 2006 AG 34/2006	9/03/2006	Health Services Union Of Western Australia (Union of Workers)	St John Of God Hospital Murdoch (A Division Of St John Of God Health Care Inc)	Commissioner P E Scott	Agreement Registered
Stegbar Pty Ltd (Wangara WA) Enterprise Agreement 2006 AG 43/2006	24/03/2006	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, And Allied Workers Union Of Australia, Engineering & Electrical Div.	Stegbar Pty Limited	Senior Commissioner J F Gregor	Agreement registered
Tip Top Bakeries (Canning Vale) and Transport Workers' Union Industrial Agreement 2005 AG 272/2005	15/03/2006	Transport Workers' Union Of Australia, Industrial Union Of Workers, Western Australian Branch	George Weston Foods Limited Trading As Tip Top Bakeries (Canning Vale)	Commissioner J H Smith	Registered
Total Corrosion Control/CFMEUW Collective Agreement 2004 AG 48/2006	24/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	Total Corrosion Control Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Triple T Commercial/CFM EUW Industrial Agreement 2004 AG 47/2006	24/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	Triple T Commercial Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered
Tyco Water Pty Ltd, Kwinana Pipe Plant, Enterprise Bargaining Agreement 2006 AG 27/2006	20/03/2006	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, And Allied Workers Union Of Australia, Engineering & Electrical Div.	Tyco Water Pty Ltd	Senior Commissioner J F Gregor	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
United Group Rail Services Limited Bassendean Enterprise Agreement 2006 AG 50/2006	24/03/2006	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union Of Workers - Western Australian Branch	United Group Rail Services Limited	Senior Commissioner J F Gregor	Agreement Registered
Zinco/CFMEUW Industrial Agreement 2005 AG 30/2006	20/03/2006	The Construction, Forestry, Mining And Energy Union Of Workers	Beachstar Enterprises Trading As Zinco	Senior Commissioner J F Gregor	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2006 WAIRC 03975

AGAINST THE DECISION TO REPRIMAND AND DEDUCT A DAYS PAY FROM HIS SALARY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ROBERT BATTEN

APPELLANT

-v-

MINISTER FOR EDUCATION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER P E SCOTT - CHAIRMAN
 MR C FLOATE - BOARD MEMBER
 MR P WISHART - BOARD MEMBER

DATE

MONDAY, 20 MARCH 2006

FILE NO

PSAB 12 OF 2005

CITATION NO.

2006 WAIRC 03975

Result

Appeal to the Public Service Appeal Board Dismissed

Order

WHEREAS this is an appeal pursuant to section 80I of the Industrial Relations Act 1979; and

WHEREAS on the Thursday, the 15th day of March 2006 the Appellant's representative filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby orders:

THAT this appeal be, and is hereby withdrawn by leave.

[L.S.]

(Sgd.) P E SCOTT,
 Commissioner,
 On behalf of the
 Public Service Appeal Board.

RECLASSIFICATION APPEALS

2006 WAIRC 04001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER ERNEST BULLEN

APPELLANT

-v-

WORKER'S COMPENSATION & INJURY MANAGEMENT COMMISSION

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
 COMMISSIONER P E SCOTT

DATE

TUESDAY, 21 MARCH 2006

FILE NO

PSA 48 OF 2005

CITATION NO.

2006 WAIRC 04001

Result Appeal to be amended

Order

WHEREAS this is a reclassification appeal made pursuant to the Industrial Relations Act 1979; and
 WHEREAS on Thursday, the 13th day of October 2005, the appellant lodged with the Commission a Notice of Appeal to the Public Service Arbitrator which sought reclassification to Class 1; and
 WHEREAS during the course of a conference convened on Monday, 20th day of March 2006, the appellant formally sought an amendment to the appeal to read "reclassification to Class 1 and/or temporary special allowance"; and
 WHEREAS the respondent agreed to such an amendment;
 NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be formally amended to the reclassification to Class 1 and/or Temporary Special Allowance.

(Sgd.) P E SCOTT,
 Commissioner,
 Public Service Arbitrator.

[L.S.]

2006 WAIRC 04026

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	FIONA LEIGH WINFIELD	APPELLANT
	-v-	
	PAUL ALBERT, DIRECTOR GENERAL DEPARTMENT OF EDUCATION AND TRAINING	RESPONDENT
	AND	
	BRIAN LEE WINTLE	APPELLANT
	-v-	
	PAUL ALBERT, DIRECTOR GENERAL DEPARTMENT OF EDUCATION AND TRAINING	RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR	
DATE	FRIDAY, 24 MARCH 2006	
FILE NO.	PSA 26 OF 2005, PSA 27 OF 2005	
CITATION NO.	2006 WAIRC 04026	

Result	Recommendation issued
Representation	
Applicant	Ms. L. Jacobson
Respondent	Ms. A. Young

Recommendation

WHEREAS these matters are reclassification appeals which were filed with the Registrar on the 7th day of June 2005;
 AND WHEREAS the Public Service Arbitrator ("the Arbitrator") convened a conference on Friday, 24 March 2006 at 10.30am for the purpose of conciliating between the parties;
 AND WHEREAS at the commencement of the conference the parties advised the Arbitrator that agreement had been reached as to the level of classification, however the parties were in dispute as to the effective date;
 AND WHEREAS the parties indicated the preparedness to accept a recommendation of the Public Service Arbitrator in resolution of the dispute between them;
 AND WHEREAS the parties advised the Arbitrator of their respective positions and the factual basis of their positions;
 AND WHEREAS the Arbitrator referred to the Reclassification Appeals – Practice Direction issued by the Public Service Arbitrator and published in volume 85 of the Western Australian Industrial Gazette at page 1406, noting that in respect of operative date the Practice Direction states "the normal practice is that reclassifications are effective from the date on which the employee formally notified the employer that a reclassification is sought.";
 AND WHEREAS the Arbitrator also noted that in this case a review report was provided to the respondent in June 2005, recommending the reclassification. Subsequently further information and clarification were sought. The Arbitrator noted that this is normal practice in respect of areas where employers require further information for the purposes of determining a reclassification. However, the essential information upon which the reclassification application is made was before the employer. Accordingly, the Arbitrator recommended that the effective date for the reclassification appeal be the date upon which the reclassification was lodged, being 7 June 2005;

NOW THEREFORE pursuant to the powers under section 80E, the Public Service Arbitrator hereby recommends -
 THAT the reclassifications of the positions held by the appellants be effective from 7 June 2005.

(Sgd.) P E SCOTT,
 Commissioner,
 Public Service Arbitrator.

[L.S.]

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 12/2005	Catherine Mary Podger	Workcover	Scott C	Appeal Dismissed	4/04/2006
PSA 13/2005	James Cameron	Workcover	Scott C	Appeal Dismissal	16/03/2006

NOTICES—Award/Agreement matters—

2006 WAIRC 04134

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 52 of 2006

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED “AUSTRESS FREYSSINET (REMEDIAL DIVISION) /CFMEUW INDUSTRIAL AGREEMENT 2005 - 2008 ”

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

1. DEFINITIONS

The following terms will have the following meanings when used in this Agreement:

“**Award**” means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

“**Employer**” means, subject to clause 2, Austress Freyssinet Pty Limited ABN 15 002 617 736;

“**Union**” means The Construction, Forestry, Mining and Energy Union of Workers.

2. PARTIES AND PERSONS BOUND

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement. This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

4. SCOPE & APPLICATION

4.1 This Agreement applies in the state of Western Australia to:

- (a) the Employer in respect to all of its employees including junior workers unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings or any other structures of any kind.
- (b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.
- (c) The Unions and all employees of the Employer who are members or eligible to be members of the Union.
- (d) There are approximately 12 employees covered by this Agreement.

6. RELATIONSHIP TO PARENT AWARD

6.1 The provisions of the Award are incorporated into and form part of this Agreement (“**Incorporated Terms**”).

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George’s Terrace, Perth.

J.A. SPURLING,
 Registrar.

29 March 2006

2006 WAIRC 04132

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 55 of 2006

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "CHUBB SECURITY PTY LTD
BP SITE ENTERPRISE AGREEMENT 2006"**

NOTICE is given that an application has been made by the "Liquor, Hospitality And Miscellaneous Union, Western Australian Branch" under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

3. APPLICATION

- (a) This agreement shall apply to:

Chubb Security Pty Ltd in respect of its contract at BP Kwinana and all employees engaged there under the terms and conditions of the *Security Officers (Western Australia) Award 2002*.

- (b) Estimated number of employees associated with this E.B.A. at March 2006 = 25

4. PARTIES BOUND

- (a) **Employer**

1. Chubb Security Pty Ltd

- (b) **Union Parties**

1. Liquor, Hospitality & Miscellaneous Union (W.A. Branch)

6. RELATIONSHIP TO PARENT AWARD

- (a) This Agreement is to be read in conjunction with the:-

- Security Officers (Western Australia) Award 2002

- (b) Where there is any inconsistency between this agreement and the Awards, this agreement shall take precedence to the extent of the inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

24 March 2006

2006 WAIRC 04088

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 54 of 2006

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "FCL CONSTRUCTION P/L /
CFMEUW INDUSTRIAL AGREEMENT 2005 - 2008"**

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

1. DEFINITIONS

The following terms will have the following meanings when used in this Agreement:

"Award" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

"Employer" means, subject to clause 2, FCL Construction Pty Ltd ABN 074 024 356;

"Union" means The Construction, Forestry, Mining and Energy Union of Workers.

2. PARTIES AND PERSONS BOUND

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement.

This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

4. SCOPE & APPLICATION

- 4.1 This Agreement applies in the state of Western Australia to:

- (a) the Employer in respect to all of its employees including junior workers unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings or any other structures of any kind.
- (b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.
- (c) The Unions and all employees of the Employer who are members or eligible to be members of the Union.
- (d) There is approximately 15 employees covered by this Agreement.

6. RELATIONSHIP TO PARENT AWARD

6.1 The provisions of the Award are incorporated into and form part of this Agreement ("**Incorporated Terms**").

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

29 March 2006

2006 WAIRC 04066

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. AG 46 of 2006

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "MODERN INDUSTRIES (WA)/CFMEUW INDUSTRIAL AGREEMENT 2005-2008"

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

1. DEFINITIONS

The following terms will have the following meanings when used in this Agreement:

"**Award**" means the Building Trades (Construction) Award 1987, Award No. R14 of 1978 as amended from time to time;

"**Employer**" means, subject to clause 2, Modern Industries (WA) Pty Ltd ABN 17 060 045 061;

"**Union**" means The Construction, Forestry, Mining and Energy Union of Workers.

2. PARTIES AND PERSONS BOUND

The Parties to this Agreement are the Employer, the Union and all employees of the Employer whose employment is, at any time when this Agreement is in operation, subject to the Agreement.

This agreement is binding on the Employer and any successor assignee, transmittee (whether immediate or not) to or of the business or any part of the Business of the Employer.

4. SCOPE & APPLICATION

4.1 This Agreement applies in the state of Western Australia to:

- (a) the Employer in respect to all of its employees including junior workers and unregistered apprentices engaged in work on, in connection with, or in any way incidental to building, civil works, construction, alteration, maintenance repair or demolition of or on buildings.
- (b) Employees of the Employer who are engaged in any of the occupations, callings or industries specified in the Award.
- (c) The Union and all employees of the Employer who are members or eligible to be members of the Union.
- (d) There are approximately 30 employees covered by this Agreement.

4.2 This Agreement will not apply to:

- (a) employees employed permanently by the Employer in the 2 factories in Karratha and Malaga; or
- (b) projects where there is an existing agreement in operation applying to the terms and conditions of employment of employees who would otherwise be covered by this Agreement.

6. RELATIONSHIP TO PARENT AWARD

6.1 The provisions of the Award are incorporated into and form part of this Agreement ("**Incorporated Terms**").

6.2 The express terms of this Agreement are supplementary to, and shall be read and interpreted wholly in conjunction with the Incorporated Terms provided that the terms of whichever provision is more beneficial to the employees will prevail to the extent of any inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

24 March 2006

2006 WAIRC 04133

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 49 of 2006

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "NEWAY TRANSPORT WESTERN AUSTRALIAN CERTIFIED AGREEMENT 2006"

NOTICE is given that an application has been made by the "Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch" under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

3. DEFINITIONS...

"**Award**" means the Transport Workers Award 1998.

"**Agreement**" means the Neway Transport Western Australia Certified Agreement 2006.

"**Employee**" means any Employee whose employment is covered by this Agreement and whose job classification is set out in Schedule A and B of this Agreement.

"**Employer**" means N.T. WestAus (A.C.N. 118 364 846) trading as Neway Transport.

"**Parties**" means the Employer and TWUA and Employees whose employment is covered by this Agreement.

"**TWUA**" means the Transport Workers Union of Australia.

4. PARTIES BOUND

This Agreement shall be binding on the Employer, the TWUA and all Employees of the Employer whose employment falls within the scope of the Award.

8. WORKSITES COVERED BY THIS AGREEMENT

This Agreement applies to the Employer's operations at 61 Mulgool Road, Malaga, Western Australia, 6090 which acts as the Employee's home base.

9. RELATIONSHIP WITH AWARD

- (a) This Agreement shall be read and interpreted in conjunction with the Transport Workers Award 1998 (the Award).
- (b) Where there is any inconsistency between this Agreement and the Award, this Agreement will prevail to the extent of the inconsistency.
- (c) In the event that there is, after the making of this Agreement, legislative change to the Workplace Relations Act 1996 including changes which have the effect of altering Federal Awards or matters which can be included in Federal Awards and which has the result of reducing or eliminating entitlements of employees covered by this Agreement, the parties agree that the entitlements and this Clause will be deemed to be part of this Agreement, from the moment they cease to apply in the Federal award.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

24 March 2006

2006 WAIRC 04135

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 45 of 2006

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "RAVENSTHORPE NICKEL PROJECT AND MCD CONTRACTING AGREEMENT 2006."

NOTICE is given that an application has been made by The Construction, Forestry, Mining and Energy Union of Workers under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation and scope are published hereunder.

1.4 – AREA AND SCOPE

This Agreement shall cover the Unions, Employees and Employer named in this agreement whilst working on the Project. This agreement applies to work by the Employer on the Project involving;

- a) The construction of earthworks, concrete foundations and associated civil works.
- b) Cranage for all the project.
- c) Building works that are used for offices or for human habitation.

This agreement excludes the classification mentioned in clause 6 of the agreement between the CFMEU and AMWU termed "AMWU and CFMEU Western Australia Construction Co-operation Agreement" unless that work forms part of (a) and/or (b) above.

The Agreement shall not apply to employees, employers or contractors engaged in:

- a) The transport of personnel to and from the Project where the employer or contractor providing the transport is not a signatory to this Agreement.
- b) Deliveries of materials and equipment to and from the Project.
- c) Off site infrastructure and offsite manufacture and fabrication associated with the Project.

1.3 PARTIES BOUND

This Agreement shall be binding upon:

- a) MCD Contracting ("the Employer");
- b) Employees of the Employer who are engaged on the Ravensthorpe Nickel Project ("the Project) in the classifications detailed in Section 3 of this Agreement ("the employees"); and
- c) The Australian Workers Union ("the AWU"); and
- d) The Construction, Forestry, Mining and Energy Union ("the CFMEU"), together "the Parties".

In this Agreement, "Relevant Union" means, in relation to an employee, a union that is one of the Parties to this Agreement and of which the employee is eligible to become a member.

At the time of registration this agreement currently applies to approximately ten employees.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

22 March 2006

2006 WAIRC 04188

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 52 of 2006

**APPLICATION FOR VARIATION OF AN AWARD TITLED
"SECURITY OFFICERS' AWARD, NO A 25 OF 1981"**

NOTICE is given that an application has been made to the Commission by the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch under the Industrial Relations Act 1979 to vary the above Award.

As far as relevant, those parts of the proposed Award which relate to area of operation or scope are published hereunder.

3. – AREA AND SCOPE

This award shall apply to all officers in the callings set out in 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.

21 – CLASSIFICATION STRUCTURE AND WAGE RATES**(1) (a) CLASSIFICATION STRUCTURE**

An employer shall classify existing and new employees, as a security officer at a level 1 to 4, according to the criteria set out below. Existing employees, and new employees upon engagement, shall be informed by the employer of the classification into which they have been placed.

SECURITY OFFICER - LEVEL 1

- (1) A Security Officer - Level 1 is an employee who performs work to the level of his or her training.
- (2) Indicative of the tasks which an employee at this level may perform are the following:
 - (a) Watch, guard or protect premises and/or property;
 - (b) Be stationed at an entrance and/or exit, whose principal duties shall include the control of movement of persons, vehicles, goods and/or property coming out of or going into premises or property, including vehicles carrying goods of any description, to ensure that the quantity and description of such goods is in accordance with the requirements of the relevant document and/or gate pass and who also may have other duties to perform and shall include an area or door attendant or commissionaire in a commercial building;
 - (c) Respond to basic fire/security alarms at their designated post;
 - (d) In performing the duties referred to above the officer may be required to use electronic equipment such as hand-held scanners and simple closed circuit television systems utilising basic keyboard skills.

SECURITY OFFICER - LEVEL 2

- (1) A Security Officer - Level 2 is an employee who performs work above and beyond the skills of an employee at Level 1 to the level of his or her training.
- (2) Indicative of the tasks which an employee at this level may perform are the following:
 - (a) Duties of securing, watching, guarding and/or protecting as directed, including responses to alarm signals and attendances at and minor non-technical servicing of automatic teller machines, and is required to patrol in a vehicle two or more separate establishments or sites; or
 - (b) Monitors and responds to electronic intrusion detection or access control equipment terminating at a visual display unit and/or computerised printout (except for simple closed circuit television systems).
 - (c) May be required to perform the duties of Security Officer - Level 1.
 - (d) Monitors and acts upon walk through magnetic detectors; and/or monitor, interpret and act upon screen images using x-ray imaging equipment.
 - (e) The operation of a public weighbridge by a Security Officer appropriately licensed to do so.

SECURITY OFFICER - LEVEL 3

- (1) A Security Officer - Level 3 is an employee who performs work above and beyond the skills of an employee at Level 2 to the level of his or her training.
- (2) Indicative of the tasks which an employee at this level may perform are the following:
 - (a) The monitoring and operation of integrated intelligent building management and security systems terminating at a visual display unit or computerised printout which requires data input from the Security Officer.
 - (b) A Security Officer, who in the opinion of the Employer has no previous relevant experience at this level, and is undertaking the tasks of a Security Officer Level 4 whilst undergoing training and gaining experience during the first 6 months of employment as such.
- (3) A Security Officer Level 3 is also required to perform the duties of a Security Officer - Level 1 and/or Security Officer - Level 2.

SECURITY OFFICER - LEVEL 4

- (1) A Security Officer - Level 4 is an employee who performs work above and beyond the skills of an employee at Level 3 to the level of his or her training.
- (2) Indicative of the tasks which an employee at this level may perform are the following:
 - (a) Monitoring, recording, inputting information or reacting to signals and instruments related to electronic surveillance of any kind within a central station.

- (b) Keyboard operation to alter the parameters within an integrated intelligent building management and/or security system.
- (c) The co-ordinating, monitoring or recording of the activities of Security Officers utilising a verbal communications system within a central station.
- (3) A Security Officer Level 4 is also required to perform the duties of Security Officers at Levels 1 and/or 2 and/or 3.

A copy of the proposed variation may be inspected at my office at 111 St. Georges Terrace, Perth.

J.A. SPURLING,
Registrar.

13 April 2006

2006 WAIRC 04204

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 408 of 2004

APPLICATION FOR VARIATION OF AWARD

ENTITLED

"CLEANERS AND CARETAKERS (GOVERNMENT) AWARD, 1975"

NOTICE is given that an amended application for a variation of the above Award was filed on the 3 March 2006 by the "Liquor, Hospitality and Miscellaneous Union, Western Australian Branch". Further, a counter proposal was received on the 18 April 2006 from the respondent.

As far as relevant, those parts of the amended application and counter proposal that relate to area of operation or scope are published hereunder.

Amended Application:

1.3 AREA AND SCOPE

This Award shall apply throughout the state of Western Australia to persons employed under the classifications specified in Clause 4 – Wages and who are employed in the Western Australian Public Sector. Provided that this Award shall not apply to any person employed pursuant to one of the following Awards:

Country High Schools Hostels Award No 7 of 1979;
Cultural Centres Award No A28 of 1988;
Hospital Workers (Government) Award;
Parliamentary Employees Award 1989;
Western Australian Mint Security Officers Award No A5 of 1988.

The 'Western Australian Public Sector' includes any person employed by a public sector body, chief executive officer, chief employee, department, minister, board, agency, commission, or SES organization upon which is conferred employing authority by the Public Sector Management Act 1994 (WA) or any other relevant Western Australian Act or regulation.

4. WAGES

PART A: WAGES ADJUSTED BY ARBRITRATED SAFETY NET ADJUSTMENTS

Level One

Comprehends the following classes of work:

Attendant

Cleaner

Level Two

Comprehends the following classes of work:

Home Economics Assistant

Car Park Attendant

Window Cleaner

Level Three

Comprehends the following classes of work:

Caretaker

Estate Attendant (Homeswest) Grade 1

Level Four

Comprehends the following classes of work:

Estate Attendant (Homeswest) Grade 2

Level Five

Comprehends the following classes of work:

Janitor

Security Officer

Office Attendant (Homeswest)

Level Six

Comprehends the following classes of work:

Court Usher

Level Seven
Comprehends the following classes of work
Estate Attendant (Homeswest) Grade 3
Foreperson

Department of Education and Training shall be as follows.

Level One
Comprehends the following classes of work:
Cleaner for initial 12 months of employment
Level Two
Comprehends the following classes of work:
Cleaner
Level Three
Comprehends the following classes of work:
Cleaner in Charge (of one to six employees inclusive)
Home Economics Assistant
Level Four
Comprehends the following classes of work:
Cleaner in Charge (of seven to ten employees inclusive)
Caretaker of Schools (employing seven to ten employees inclusive)
Level Five
Comprehends the following classes of work:
Cleaner in charge (of eleven or more employees)
Caretaker of Schools (employing eleven or more employees)
Level Six
Comprehends the following classes of work:
Cleaner in Charge of TAFE Campuses
Foreperson (Cleaning)

9.2 NAMED EMPLOYERS

Commissioner
Main Roads Western Australia
Director General
Department of Agriculture
Director General
Department of Industry and Resources
Director General
Department of Housing and Works
Disability Services Commission
Executive Director
Department of Conservation and Land Management
General Manager
Metropolitan Cemeteries Board
Governing Council of Central TAFE
Governing Council of Central West College of TAFE
Governing Council of Challenger TAFE
Governing Council of CY O'Connor College of TAFE
Governing Council of Great Southern Regional College of TAFE
Governing Council of Kimberley College of TAFE
Governing Council of Pilbara TAFE
Governing Council of South West Regional College of TAFE
Governing Council of Swan TAFE
Governing Council of West Coast College of TAFE
Recreation Camps and Reserves Board
The Board
Insurance Commission of WA
Western Australian Alcohol and Drug Authority
Western Australian Sports Centre Trust

Zoological Parks Authority
The Hon Premier
The Hon Attorney General
The Hon Minister for Agriculture
The Hon Minister for Consumer and Employment Protection
The Hon Minister for Community Development
The Hon Minister for Education and Training
The Hon Minister for Energy
The Hon Minister for the Environment
The Hon Minister for Fisheries
The Hon Minister for Housing and Works
The Hon Minister for Indigenous Affairs
The Hon Minister for Justice
The Hon Minister for Land Information
The Hon Minister for Local Government and Regional Development
The Hon Minister for Planning and Infrastructure
The Hon Minister for Police and Emergency Services
The Hon Minister for Racing and Gaming
The Hon Minister for Sport and Recreation
The Hon Minister for State Development
The Hon Minister for Tourism
Treasurer

Counter Claim by Respondent

Clause 3 – Scope

This award shall apply throughout the state of Western Australia to persons employed under the classifications specified in Clause 17 – Wages and who are employed by an employing authority in an agency as defined by the Public Sector Management Act 1994 (WA) and the non – SES organisations listed in Schedule B. Provided that this award shall not apply to any person employed in the classifications specified pursuant to one of the following awards:

Country High School Hostels Award No. 7 of 1979;
Cultural Centres Award A28 of 1988;
Hospital Workers (Government) Award;
Parliamentary Employees Award 1989;
Railway Employees Award 1969
Western Australian Mint Security Officers Award A5 of 1988

Schedule B: List of non-SES organisations

Animal Resources Authority
Builders & Painters Registration Board of WA
Building and Construction Industry Training Fund
Burswood Park Board
Conservation Commission
Eastern Goldfields Transport Board
Equal Opportunity Commission
Forest Products Commission
Hairdressers Registration Board
Health Promotion Foundation WA
Heritage Council of WA
Law Reform Commission of WA
Legal Aid WA
Nurses Board of WA
Office of Health Review
Office of the Information Commissioner
Parliamentary Commissioner for Administrative Investigations
Perth Market Authority
Potato Marketing Corporation of WA
National Trust of WA
WA Meat Industry Authority
WA Sports Centre Trust

A copy of the amended application and counter proposal may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

18 April 2006
