Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 5 WEDNESDAY 23 MAY, 2007 Vol. 87—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

87 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

GENERAL ORDERS—

2007 WAIRC 00378

A GENERAL ORDER TO ESTABLISH WAGE STRUCTURES FOR SCHOOL BASED AND PART TIME APPRENTICES.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR EMPLOYMENT PROTECTION
	APPLICANT
	-v-
	TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA, AUSTRALIAN MINES & METALS ASSOCIATION INC AND CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
HEARD	MONDAY, 26 MARCH 2007, WEDNESDAY, 14 FEBRUARY 2007
DELIVERED	MONDAY, 16 APRIL 2007
FILE NO.	APPL 158 OF 2006
CITATION NO.	2007 WAIRC 00378

CatchWords	General Order – conditions for school-based and part-time apprentices – Industrial Relations Act, 1979 (WA) s50; Industrial Training Act 1979 (WA) ss23A, 33(2)
Result	General Order issued
Representation	
Applicant	Ms E Clements and with her Ms K Berger for the Minister for Employment Protection
	Mr I Amato for Department of Education and Training
Respondents	Mr D Ellis for Trades and Labor Council of Western Australia
	Mr L Joyce for Australian Mines and Metals Association Inc
	Mr J Uphill for Chamber of Commerce and Industry of Western Australia
Other person	Mr L Edmonds, for Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division

Reasons for Decision

1 The Minister for Employment Protection ("the Hon Minister") has applied for a General Order pursuant to section 50(2) of the *Industrial Relations Act, 1979* ("the Act") to establish wage structures for school-based and part-time apprentices. At the time of the hearing of this matter, there was broad agreement between the Hon Minister's proposals and the Trades and Labor Council of Western Australia ("TLCWA"), Australian Mines and Metals Association Inc ("AMMA") and Chamber of Commerce and Industry of Western Australia, Inc ("CCIWA").

2 The Master Builders Association of Western Australia ("MBA") made a written submission, a copy of which was provided to the parties for their comment. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division ("CEPU") appeared in the proceedings to seek an exclusion of four awards to which that union is a party on the basis of safety concerns it has for school-based and part-time apprentices learning the electrical trade.

3 At the conclusion of the hearing on 26 March 2007 the Commission informed the parties that the application was agreed to in principle and requested that any party which wished to make a submission about matters raised by the MBA in its written submission should do so within 7 days. Further, the Commission extended an opportunity for the CEPU to put submissions or evidence before it in relation to its position within 7 days of the hearing. Only the Hon Minister took advantage of the Commission's offer.

4 The Hon Minister's application seeks a General Order to apply to all school-based and part-time apprentices whether or not they are employed under and subject to awards or industrial agreements. The Hon Minister submitted that the General Order to issue will assist in progressing a commitment given to the Council of Australian Governments to enable school-based and part-time apprenticeships in Western Australia. By this commitment, the State Government has agreed to remove legislative regulatory and educational barriers to school students participating in school-based apprenticeships by 31 December 2006. This is seen as a measure to make the training system more flexible and responsive and to encourage the take-up of apprenticeships and therefore address the skills shortage in future years.

5 To that end, the Hon Minister informed the Commission that until recently, the *Industrial Training Act, 1975* (WA) provided for apprenticeships to be undertaken on a full-time basis. That Act has now been amended by the *Industrial Training Amendment Act, 2006* which commenced on 29 March 2007. By the amendment, the Hon Minister may, by notice published in the Government Gazette, approve of an apprentice or industrial trainee of a class specified in the notice being employed on a part-time basis. The Commission was informed that it is the Government's intention that these be created initially in the retail, hospitality, automotive, furnishing, horticulture and the building and construction industries (not covering the electrical trades).

6 The intention is to allow school students to undertake study towards achieving qualifications whilst completing their secondary school certificate. Enabling apprenticeships to be done part-time will allow persons to undertake apprenticeships on a less than full-time basis outside the school system thus attracting people who may wish to change careers whilst meeting other commitments such as family care. Part-time apprenticeships may also meet the needs of employers who are not able to employ an apprentice on a full-time basis.

7 The Hon Minister's application for a General Order will support these changes and is based upon the model clause published in Appendix B of the Australian Industrial Relations Commission's ("AIRC") Wages and Allowances Review 2006 (PR002006, 8 December 2006). The Commission was informed that the New South Wales, South Australian and Tasmanian State Governments have also implemented wage provisions for school-based apprentices which have adopted similar provisions to this model clause. The Hon Minister's part-time apprenticeship clause is loosely based on the AIRC's endorsement of part-time apprenticeships in March 2000.

8 The TLCWA, AMMA and CCIWA indicated their broad support for the Hon Minister's position.

9 Subject to what follows, the Commission agrees that a General Order should be issued. The changes to the *Industrial Training Act, 1975* from 29 March 2007 enables the approval of part-time apprentices. The present School Apprenticeship Link operates to facilitate school-based apprenticeships. Whilst some awards might provide for the wages and conditions of apprentices and trainees in the industries to which those awards relate, others may not and it is appropriate to issue a General Order to prescribe minimum conditions of employment for school-based and part-time apprentices. The General Order to issue will apply to those persons throughout the State whether or not they are employed and subject to awards or industrial agreements.

10 We also approve in principle the clause proposed.

11 Two matters remain. The MBA provided a comprehensive written submission which has been of assistance to the Commission. The MBA supported the application but raised strong reservations relating to the school-based apprenticeship payment model. The in-principle objection relates to payment by employers to a high school student for off-the-job training as being a disincentive to engage school students in an apprenticeship. The MBA proposes what it describes as a "more user friendly and acceptable wage structure" by introducing a casual-type loading for employers to pay the school-based apprentice an hourly rate of pay to compensate for not giving pro rata annual leave and for each hour worked on-site only.

12 The Hon Minister opposed the proposal of the MBA. No other person appearing wished to put any submission to us on the matter.

13 We consider that the issue raised by the MBA is only able to be approached on the following basis. In this State, the *Industrial Training Act, 1975* in section 33(2) obliges an employer to grant the apprentice leave of absence, without deduction from wages, as is necessary to enable the apprentice to attend such classes and obtain such instruction by correspondence as is prescribed, as well as undertake such courses or skills training programmes as are accredited by the Training Accreditation Council. Therefore, by legislation, an employer is required to pay an apprentice for off-the-job training. The Hon Minister makes the point, with which we respectfully agree, that there is no basis for differentiating between a school-based apprentice

and a full-time apprentice. It is merely that the school-based apprentice might spend fewer hours undertaking on and off-the-job training per week.

14 Further, and decisively, we suspect that the provisions of section 33(2) of the *Industrial Training Act, 1975* necessarily will apply to a part-time or school-based apprentice in any event now that that Act has been amended to provide for those classes of persons. Accordingly, we do not think it possible for the Commission to prescribe as urged by the MBA.

15 The second matter is that the CEPU indicated during the proceedings its fears regarding the health and safety of school-based or part-time apprentices in the electrical industry. However, it made only a general submission to this effect and presented no evidence or submissions in support of its position, even when the Commission gave it a further 7 days after the hearing of the matter to do so.

16 We are not in a position to address the issue on the basis of this general submission. Not only has the CEPU not provided the Commission with any material upon which it could act, the fact remains that it is not the General Order which will allow part-time or school-based apprenticeships in the electrical industry. Any decision allowing part-time apprenticeships is to be made by the Hon Minister under the *Industrial Training Act, 1975*. We are told that at the date of this General Order, the Hon Minister has not approved a part-time apprentice in the electrical industry. To the extent the Hon Minister intends to allow part-time apprentices in the building and construction industry, it does not include the electrical trade. We are unable to take the issue any further.

17 The Minutes of a General Order now issue and arrangements will be made with the parties to speak to the Minutes if it is requested.

2007 WAIRC 00382

A GENERAL ORDER TO ESTABLISH WAGE STRUCTURES FOR SCHOOL-BASED AND PART-TIME APPRENTICES.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR EMPLOYMENT PROTECTION
	APPLICANT
	-v-
	TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA, AUSTRALIAN MINES & METALS ASSOCIATION INC AND CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DATE	WEDNESDAY, 18 APRIL 2007
FILE NO.	APPL 158 OF 2006
CITATION NO.	2007 WAIRC 00382

Result General Order issued

General Order

HAVING HEARD Ms E Clements and with her Ms K Berger on behalf of the applicant, Mr I Amato, assisting them on behalf of Department of Education and Training, Mr D Ellis on behalf of Trades and Labor Council of Western Australia, Mr L Joyce on behalf of Australian Mines and Metals Association Inc, Mr J Uphill on behalf of Chamber of Commerce and Industry of Western Australia and Mr L Edmonds on behalf of Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division;

THE COMMISSION IN COURT SESSION, pursuant to the powers conferred on it under section 50(2) of the *Industrial Relations Act 1979* -

HEREBY makes a General Order in the terms set out in the schedule attached.

(Sgd.) A R BEECH,
[L.S.] Commission In Court Session.

SCHEDULE

1. APPLICATION

1.1 This General Order takes effect on the first pay period on or after 18 April 2007.

1.2 This General Order applies to all school-based and part-time apprentices, whether or not they are employed under and subject to awards or industrial agreements.

1.3 Entitlements to wages and conditions for school-based and part-time apprentices which are more favourable than those set out in this General Order whether by way of award, order or agreement of this Commission or by the *Minimum Conditions of Employment Act 1993* or otherwise shall prevail.

2. DEFINITIONS

2.1 '**Industrial instrument**' means an award made under the *Industrial Relations Act 1979* and includes any industrial agreement, employer-employee agreement or order of the Commission under that Act.

2.2 '**Off-the-job**' training is structured training delivered by a Registered Training Organisation separate from normal work duties or general supervised practice undertaken on the job.

2.3 '**Training Contract**' is a contract of training, registered by the Department of Education and Training, between an apprentice, his or her legal guardian (where required), and an employer.

3. SCHOOL-BASED APPRENTICES

3.1 This clause shall apply to school-based apprentices. A school-based apprenticeship means a Training Contract and paid employment where a school-student's timetable or curriculum reflects a combination of work, training and school study, which together lead to the award of a secondary certificate or its equivalent, and progress towards an apprenticeship qualification.

3.2 A school-based apprenticeship may be undertaken subject to a school-based apprenticeship having been published in the Government Gazette in accordance with section 28A of the *Industrial Training Act 1979* and the *Industrial Training (Apprenticeship Training) Regulations 1981* and pursuant to a Training Contract for a school-based apprenticeship.

3.3 The hourly rates of pay for full-time junior and adult apprentices as set out under the relevant industrial instrument or the *Minimum Conditions of Employment Act 1993* shall apply to school-based apprentices for total hours worked including time deemed to be spent in off-the-job training.

3.4 For the purposes of 3.3 above, where an apprentice is a full-time school-student, the time spent in off-the-job training for which the apprentice is paid is deemed to be 25% of the actual hours each week worked on-the-job. The wages paid for training time may be averaged over the semester or year.

3.5 The school-based apprentice shall be allowed, over the duration of the apprenticeship, the same amount of time to attend off-the-job training as an equivalent full-time apprentice.

3.6 The duration of the apprenticeship shall be as specified in the Training Contract for each apprentice. The period so specified to which the apprentice wage rates apply shall not exceed six years.

3.7 School-based apprentices shall progress through the wage scale at the rate of no less than 12 months' progression for each two years of employment as an apprentice or on an equivalent pro-rata basis.

3.8 Where an apprentice converts from school-based to full-time, all time spent as a full-time apprentice shall count for the purposes of progression through the wage scale. This progression shall apply in addition to the progression achieved as a school-based apprentice.

3.9 Except as otherwise provided in this General Order, a school-based apprentice shall be entitled to all other conditions, allowances and entitlements that an equivalent full-time apprentice is entitled to on a pro rata basis under the relevant industrial instrument or the *Minimum Conditions of Employment Act 1993* for all hours worked including off-the-job training as provided for in 3.4.

4. PART-TIME APPRENTICES

4.1 An apprentice is employed on a part-time basis if the hours of employment including off-the-job training are less than:

a) the ordinary hours of work specified in the apprentice's industrial instrument; or

b) if the apprentice's industrial instrument does not specify ordinary hours, 38 ordinary hours as prescribed by the *Minimum Conditions of Employment Act 1993*.

4.2 A part-time apprentice will be employed for the minimum number of hours as set out in the *Industrial Training (Apprenticeship Training) Regulations 1981*.

4.3 The hourly rates of pay for full-time junior and adult apprentices as set out under the relevant industrial instrument or the *Minimum Conditions of Employment Act 1993* shall apply to part time apprentices for total hours worked including time spent in off-the-job training.

4.4 The ordinary hours of work per week, including off-the-job training, for an apprentice employed on a part-time basis shall be set out in the Training Contract. The ordinary hours can be varied by written agreement between the employer and apprentice and, if a signatory to the Training Contract, the apprentice's guardian.

4.5 A part-time apprentice's weekly off-the-job training time may be averaged over the period of a year or some other agreed period, provided that the pattern of ordinary working and training hours is specified in advance as part of the training programme at the commencement of each year.

4.6 The part-time apprentice shall be allowed, over the duration of the apprenticeship, the same amount of time to attend off-the-job training as an equivalent full-time apprentice.

4.7 A part-time apprentice should be advised by the employer in writing in advance and at least once each year of the off-the-job training hours and that these hours form part of the paid hours for the apprentice. This advice will be consistent with the Training Contract.

4.8 The duration of a part-time apprenticeship shall be specified in the Training Contract for each apprentice. The period so specified to which apprentice wage rates will apply will not exceed 6 years.

4.9 Part time apprentices will progress through the wage scale at the rate of 12 months' progression on the basis of the table below:

Part-time Apprenticeship duration specified in the Apprenticeship Agreement	Period of Employment to Achieve 12 Months Wages Progression
4 years	12 months
5 years	15 months
6 years	18 months

4.10 These rates are based on full-time apprenticeships of three, three and a half or four years. The rates of progression reflect the average rate of skill acquisition expected from the typical combination of work and training for a part-time apprentice undertaking the applicable apprenticeship.

4.11 Where an apprentice converts from part-time to full-time, all time spent as a full-time apprentice shall count for the purposes of progression through the wage scale. This progression shall apply in addition to the progression achieved as a part time apprentice.

4.12 Except as otherwise provided in this General Order, an apprentice employed on a part-time basis shall be entitled to all other conditions, allowances and entitlements that an equivalent full-time apprentice is entitled to on a pro rata basis under the relevant industrial instrument or the *Minimum Conditions of Employment Act 1993.*

FULL BENCH—Appeals against decision of Commission—

2007 WAIRC 00396

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 00396
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT SENIOR COMMISSIONER J H SMITH COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 8 MARCH 2007
DELIVERED	**:**	THURSDAY, 26 APRIL 2007
FILE NO.	**:**	FBA 37 OF 2006
BETWEEN	**:**	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) Appellant AND DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE HON. MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE METROPOLITAN HEALTH SERVICE Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Public Service Arbitrator
Coram	**:**	Commissioner P E Scott
Citation	**:**	**(**2006) 86 WAIG 3197
File No	**:**	PSACR 15 of 2006

CatchWords:

Industrial Law (WA) - Appeal against decision of Public Service Arbitrator - Review sought of classification of position pursuant to s80E of the *Industrial Relations Act 1979* (WA) - Jurisdiction of Arbitrator - Applicability of s80G(2) of the *Industrial Relations Act 1979* (WA) - Meaning of the word "*decision*" in the context of s80G - Issues relating to "*privative clause*" and relevant authorities - Application of the Statement of Principles to the claim before the Arbitrator - Whether the error of the Arbitrator was a "*jurisdictional error*" and relevant authorities - Appeal allowed.

Legislation:

Industrial Relations Act 1979 (WA) (as amended), s7, s12(1), s26, s43(1), s44, s49(2), s50, s51(4), s80C, s80D(1), s80E(1), (2)(a), (b), (5), s80F(1), (3), s80G(1), (2)

Industrial Relations Commission Regulations 2005, r102(1), r106(3)

Result:

Appeal allowed, decision of Arbitrator quashed, and matter remitted to an Arbitrator

Representation:

Counsel:

Appellant	:Mr D H Schapper (of Counsel), by leave
Respondent	:Mr D Matthews (of Counsel), by leave

Case(s) referred to in reasons:

Bennett v Higgins (2005) 146 IR 205

Craig v The State of South Australia (1995) 184 CLR 163

CSA v Commissioner, Public Service Commission (1994) 74 WAIG 801

Director General, Department of Justice v Civil Service Association of Western Australia Incorporated [2005] WASCA 244

Director General, Department of Justice v Civil Service Association of Western Australia Inc (2005) 149 IR 160

Enright v Sleepeezee Pty Ltd (2004) 84 WAIG 305

Grellier v Secondary Education Authority No. PSA 54 of 1996

Grumont v Director General, Education Department (2001) WAIRC 01817

Helm v Hansley Holdings Pty Ltd (In liq) (1999) 118 IR 126

Michael v Musk (2004) 148 A Crim R 140, [2004] WASCA 203

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597

Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales and Others (2003) 57 NSWLR 212

Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs and Another (1996) 137 ALR 103

Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Re City of Melville; Ex parte J-Corp Pty Ltd (1998) 20 WAR 72

Re Refugee Tribunal and Another; Ex parte Aala (2000) 204 CLR 82

Re Robbins SM; Ex parte West Australian Newspapers Ltd (1999) 20 WAR 511

Re Sharkey and Others; Ex parte Robe River Mining Company Pty Ltd (1992) 46 IR 72

Said v District Court (NSW) (1996) 39 NSWLR 47

Samad and Others v District Court of New South Wales and Another (2002) 209 CLR 140

Solomons v District Court of New South Wales and Others (2002) 211 CLR 119

Wall v Department of Fisheries (2004) 84 WAIG 3895

Woolworths Ltd v Hawke and Others (1998) 45 NSWLR 13

Case(s) also cited:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Carbines v Powell (1925) 36 CLR 88

Esmonds Motors Pty Ltd v Commonwealth (1970) 120 CLR 463

Great Fingall Consolidated Ltd v Sheehan (1906) 3 CLR 176

McEldowney v Forde [1969] 2 All ER 1039

Minister for Resources v Dover Fisheries Pty Ltd (1993) 116 ALR 54

Plaintiff S157 v Commonwealth [2003] HCA 2

Registrar v CEEEIPPAWU [1999] WASCA 170

Shanahan v Scott (1957) 96 CLR 245

South Australia v Tanner (1989) 166 CLR 161

Swan Hill Corporation v Bradbury (1937) 56 CLR 746

Webster v McIntosh (1980) 32 ALR 603

Reasons for Decision

RITTER AP:

Introduction

1 On 9 November 2006 the appellant filed a notice of appeal. The notice of appeal was in the form of Form 9 of the *Industrial Relations Commission Regulations 2005* (the regulations) which pursuant to regulation 102(1) is a notice of appeal to the Full Bench. The notice said that the appellant had instituted an appeal against the decision of the Commission, constituted by Public Service Arbitrator Commissioner P E Scott (the Arbitrator) given on 19 October 2006 in matter No PSACR 15 of 2006.

2 The decision of the Arbitrator was an order that "*this matter be, and is hereby dismissed*". The Arbitrator also published reasons for decision on 19 October 2006. The reasons and the order followed a hearing by the Arbitrator on 13 October 2006.

The Notice of Appeal

3 The grounds and particulars of appeal were set out in a schedule to the notice of appeal. At the commencement of the hearing of the appeal the appellant obtained the leave of the Full Bench to amend the grounds of appeal by the deletion of two paragraphs which were both numbered 5. The Full Bench informed the parties that a formal order would be included in the final orders issued by the Full Bench.

4 The grounds and particulars of appeal therefore are:-

> "*1. That the Public Service Arbitrator ("Arbitrator") erred at law in determining that the matter could only be remedied in accordance with the Statement of Principles ((2006) 86 WAIG 1631 at 1657) in particular principle 1 and 2 and erred at law in finding that "Given the status of those Principles and their binding nature on a single Commissioner, I am unable to find that the matter is one which the Arbitrator can deal with".*
>
> *2. The Arbitrator erred at law in determining that the matter referred sought to amend the Award whereas the application sought to determine the classification of a position utilizing a broad banded classification structure which has already been determined within the Award.*
>
> *3. That the Arbitrator erred at law by concluding that the act, matter or thing done by the respondent could not be reviewed, nullified, modified or varied by the arbitrator in accordance with Section 80E (5) of the Industrial Relations Act 1979 ("the Act").*
>
> *4. That the Arbitrator having found that jurisdiction existed to deal with the current classification of the Duty Medical Scientist position (Position Number PC 001535) did not refer the matter for determination consistent with the general provisions of the Industrial Relations Act in particular Section 6 Objects; Section 26 Commission to Act According to Equity and Good Conscience; and Section 80E Jurisdiction of Arbitrator.*"

5 The reference to the Statement of Principles or the Principles, in the grounds of appeal, reasons of the Arbitrator and submissions of the parties is to the "*Statement of Principles – July 2006*". This is Schedule 2 to the General Order and Order of the Commission in Court Session made on 4 July 2006 (the General Order). The General Order was made pursuant to s50 and s51(4) of the *Industrial Relations Act 1979* (WA) (as amended) (*the Act*). Order 8 said that the "*Statement of Principles – July 2006 as set out in Schedule 2 operate with effect on and from 7 July 2006*" (See (2006) 86 WAIG 1656). They are also known as the State Wage Fixing Principles.

Factual Background

6 The initiating application was made by the appellant to the Arbitrator for a conference pursuant to s44 of *the Act*. The schedule to the application set out the "*Relief Sought*" and the "*Grounds and Reasons*". As the contents of the schedule provide a good summary of the background to the application to the Arbitrator, it is appropriate to set it out in full, as follows, minus the five attachments to the schedule, which will then be referred to:-

> "***RELIEF SOUGHT:***
>
> *1. That the classification level of the position of Duty Medical Scientist, Clinical Pathology (PC 001535) be reviewed by the Public Service Arbitrator.*
>
> *2. That the decision of the respondent in declassifying the above position in 2001 was unfair and unreasonable.*
>
> *3. That the classification of the above position be determined as being a HSU Level 6 (to be viewed as a Level 7 when the decision associated with the Health Professionals Review is implemented).*

GROUNDS AND REASONS:

1. *There is a significant history associated with the position of Duty Medical Scientist (A/Hours) Post No. 001535.*
2. *Prior to the change from Path Centre to Path West in 2005 the position was classified as a GOSAC Level 2/4 (equivalent to HSU Level 3/5).*
3. *However, this position had not always been classified as a GOSAC Level 2/4. The position in 2001 was downgraded from a GOSAC Level 5 (HSU Level 6) to a Level 2/4. The downgrading of the classification level for the position occurred when the position had fallen vacant. (See **Attachment 1** for a copy of the minutes of the CRC meeting of November 2001 where the decision was made to declassify the position).*
4. *The HSU became aware of the issue associated with the classification of the Duty Medical Scientist when HSU took over coverage of the newly formed Path West in mid 2005.*
5. *The HSU wrote to the Chief Executive of Path West on 26 July 2005 to raise the issue and seek to have the position classified at Level 6. (**See Attachment 2**)*
6. *A meeting took place on 12 August between the HSU and Mr Taylor of Path West.*
7. *Subsequent to this meeting the HSU wrote to Path West, dated 31 August 2005, (See **Attachment 3**). In this correspondence the HSU included its submission regarding the decision to downgrade the position.*
8. *The Path West wrote back on 2 September 2005 (See **Attachment 4**) indicating agreement to review the position and suggesting an effective date of 31 August 2005 should the position be viewed as being a HSU Level 6.*
9. *Agreement was reached that a further review of position would be conducted to determine the appropriate classification for the position.*
10. *As a result of the agreement reached to review the classification of the position, Path West employed Austral Training and Human Resources to provide them with an assessment report and recommendation.*
11. *Austral delivered their report and recommendation, dated 15 March 2006. Austral Consultant, Mr Tony Pepper, recommended that the position remain at a HSU Level 3/5.*
12. *The Classification Review Committee met and considered the assessment report and recommended that the classification remain at the declassified level of Level 3/5 and this recommendation was then endorsed by the Chief Executive (**See Attachment 5**).*
13. *We disagree with the conclusions reached by the independent assessor and further the decision of the CRC and Chief Executive. We seek a review of the appropriate classification for the position and the process by which the position was downgraded in the first instance.*
14. *We say that the respondent was obliged when Path West was created and all positions were created within the new entity known as Path West to ensure that all positions were classified correctly.*
15. *Such other grounds and reasons as may be put before the Commission/Public Service Arbitrator.*"

7 Attachment 1 to the schedule was as indicated in the "*Grounds and Reasons*", the minutes of the meeting of the Classification Review Committee (CRC) on 7 November 2001. The classification of the position was Item 3. The minutes set out the discussion at the meeting and concluded with a resolution that position PC001161 and PC001535 be classified level 2/4.

8 Attachment 2 was as described, a letter from Mr Dan Hill the secretary of the appellant to Dr Peter Flett, the chief executive of PathWest dated 26 July 2005. The letter refers to the decision by the CRC in November 2001 to downgrade the position of duty medical scientist, after hours position No 001535, from level 6 (then GOSAC level 5) to level 3/5 (then GOSAC level 2/4).

9 Mr Hill's letter said upon review of the relevant documents and the submissions made by the current occupant of the post the appellant had formed the view the position was erroneously and unfairly downgraded. An agreement was sought to reclassify the position to HSO level 6.

10 The letter said the circumstance fell outside of the usual reclassification process whereby changes in work value are identified and the case is made to the PathWest CRC. The letter said that under "*section 80E of the Industrial Relations Act the [appellant] can seek review by the Public Service Arbitrator of the classification of this position, however, we believe it is a practical first step to see if we can reach agreement through negotiation*".

11 As stated in the "*Grounds and Reasons*", attachment 3 is a letter from the appellant to PathWest dated 31 August 2005 which included the appellant's submissions regarding the decision to downgrade the position. The submissions were five pages long and quite detailed.

12 Attachment 4 is as described in paragraph 8 of the "*Grounds and Reasons*".

13 Attachment 5 is a letter to Mr Jason Cardey, the duty medical scientist of clinical pathology from the secretary of PathWest CRC which said that the CRC had recommended the position of duty medical scientist PC001535 remain as currently classified at HSU level 3/5. The letter said the recommendation was subsequently approved by the chief executive of PathWest.

Proceedings Before the Arbitrator

14 The notice of application for a s44 conference was dated 6 June 2006. The dispute was not settled by conciliation and on 3 October 2006 the Arbitrator published, pursuant to regulation 31, a Memorandum of Matters Referred for Hearing and Determination. The schedule contained a summary of the appellant's position and said the appellant sought the Arbitrator to determine the value of the position in 2005 rather than undertake a reclassification review which required a demonstration of work value change between 2001 and 2005. It also said the appellant sought the reclassification of the position to be HSU level 6.

15 The schedule also set out the respondent's position. This was contained in paragraphs 3 and 4 as follows:-

> *"3. The Respondent rejects the Applicant's claims and says that:*
>
> *(a) The application can only be processed by way of a current reclassification application. Any changes in the classification of the appeal position must be subject to significant work value change as prescribed in Principle 6 of the State Wage Case.*
>
> *(b) There is no jurisdiction for the Arbitrator to determine the classification of the appeal position without a work value review.*
>
> *(c) The Applicant's member has a right to a review of the CRC's determination of 15 March 2006 but no right to seek a review of the 2001 decision as at the time of that decision:*
>
> *(i) The Applicant was not the relevant registered industrial organisation;*
>
> *(ii) The HSU Award and Agreement had no application;*
>
> *(iii) The current incumbent was not the incumbent of the appeal position; and*
>
> *(iv) The current employer was not the employer.*
>
> *4. The Respondent denies that the Applicant is entitled to the relief sought or any relief at all and requests that the application be dismissed."*

16 Although not material to the appeal the date specified as 15 March 2006 in paragraph (3)(c) ought to have been 15 May 2006.

The Arbitrator's Jurisdiction

17 I have already mentioned that a hearing occurred on 13 October 2006. As will be referred to in greater detail below, at the hearing there was a lack of clarity as to the basis upon which the application was before the Arbitrator. The application commenced with a notice for a s44 conference. It was common ground at the appeal however that the hearing and order of dismissal by the Arbitrator was under s80E(1) or (2) of *the Act*. Section 80E of *the Act* is in the following terms:-

> *"**80E. Jurisdiction of Arbitrator***
>
> *(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.*
>
> *(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —*
>
> *(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and*
>
> *(b) a claim in respect of a decision of an employer to downgrade any office that is vacant.*

(3) An Arbitrator also has the jurisdiction conferred on an Arbitrator as a relevant industrial authority by —

(a) Part VID Division 5 Subdivision 3;

(b) section 97WI; and

(c) section 97WK.

(4) The jurisdiction referred to in subsection (3) is to be exercised in accordance with the relevant provisions of Part VID, and the provisions of —

(a) subsection (6); and

(b) section 80G,

do not apply to the exercise of any such jurisdiction by an Arbitrator.

(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division.

(6) Notwithstanding subsection (1), but subject to subsection (7), an Arbitrator may —

(a) with the consent of the Chief Commissioner refer an industrial matter referred to in subsection (1) or any part of that industrial matter to the Commission in Court Session for hearing and determination by the Commission in Court Session; and

(b) with the consent of the President refer to the Full Bench for hearing and determination by the Full Bench any question of law, including any question of interpretation of the rules of an organisation, arising in a matter before the Arbitrator,

and the Commission in Court Session or the Full Bench, as the case may be, may hear and determine the matter, or part thereof, or question, so referred.

(7) Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act."

The Claimed Applicability of Section 80G(2)

18 Ordinarily it may not matter if an application was made pursuant to s80E(1) or (2) but it has materiality because of the presence of s80G(2) of *the Act.*

19 Section 80G is in the following terms:-

"***80G. Provisions of Part II Division 2 to apply***

(1) Subject to this Division, the provisions of Part II Divisions 2 to 2G that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a commissioner shall apply with such modifications as are prescribed and such other modifications as may be necessary or appropriate, to the exercise by an Arbitrator of his jurisdiction under this Act.

(2) For the purposes of subsection (1), section 49 shall not apply to a decision of an Arbitrator on a claim mentioned in section 80E(2)."

20 At the hearing of the appeal, the respondent raised for the first time that the provisions of s80G(2) applied so that the appellant could not under s49 of *the Act* appeal against the decision of the Arbitrator.

21 Given the late notice of this submission the Full Bench made an order for the exchange after the hearing of the appeal of written submissions on this and other issues. The respondent filed on 19 March 2007 a document entitled "*Respondent's Further Submissions Pursuant to Orders Made on 8 March 2007*". In that document the respondent reiterated its position that s80G(2) applied. The appellant filed on 27 March 2007 a document entitled "*Appellant's Further Submissions Pursuant to Orders Made on 8 March 2007*". The appellant's position was that s80G(2) did not apply.

The Submissions on Jurisdiction at the Hearing before the Arbitrator

22 As stated there was a lack of clarity as to the basis on which the application was before the Arbitrator for hearing.

23 The **appellant's advocate** opened on the basis that the appellant sought the review and determination of an "*industrial matter*", which was the classification or salary level of the appeal position, and that this should be achieved by looking at the duties, skills, responsibilities and conditions under which it operates and to review the decision of the CRC. (T3).

24 The advocate said that a second issue was whether the Arbitrator had jurisdiction to review the industrial matter without the appeal position being subject to a significant work value change as prescribed in "*Principle 6 of the State Wage*" case. It was submitted this was not the issue that had been referred for determination. (T3).

25 The advocate said that the abolition of the PathCentre had occurred on 12 July 2005 and at that time employees including Mr Cardey, the occupant of the appeal position, transferred into identical position numbers within the Metropolitan Health Service. The advocate said Mr Cardey raised with the appellant a concern about the classification level assigned to his position and about a previous decision of the PathCentre in 2001 to downgrade the classification of the position he now held. This was what led to the appellant writing to the respondent. (T4/5).

26 The advocate said the matter did not come to the Arbitrator by way of a Form 10 Notice of Appeal (under the regulations) as there was not a current reclassification request being considered by the parties and therefore it was appropriate for the appellant to refer the dispute between the parties to the Arbitrator via a Form 1 Notice of Application for a s44 compulsory conference. (T6).

27 It was submitted that, with respect to jurisdiction, neither *the Act* nor the regulations required, contrary to the position of the respondent, that the Arbitrator must resolve an industrial matter regarding a classification of the position exclusively by conducting a work value review. (T8).

28 The **respondent's advocate** in his submissions referred to the appointment of Mr Cardey to take effect from 13 October 2003 as a GOSAC level 2.6, year 6. The appointment was at the maximum salary level for a level 2.4. Mr Cardey had applied for and accepted the position as a level 2.4. It was submitted Mr Cardey was subsequently transferred in accordance with the PathCentre's directions of 2005 to an HSU level 3/5.6 and then subsequent to that, which applied from 12 July 2005, translated to a level 4/6.6, the top of the level 4/6 range. (T25).

29 The respondent's advocate submitted that neither the appellant nor Mr Cardey had any interest in the position at the time in which it was downgraded and therefore as third parties had no recourse available to them for a review of that decision. Reference was made to s80E(2)(a) and (b) of *the Act*. (T26). Reference was then made to s80F(1) and s80F(3). (T26). The respondent's advocate submitted there was no basis for the appellant to now file an application because they were not the relevant registered organisation at the time and the position was not now vacant. It was occupied and therefore s80E(2)(b) did not apply.

30 The respondent's advocate said that the second issue raised was that the remedies sought in the application could only be processed by way of a reclassification application and that any changes in the classification of the Duty Medical Scientist must be subject to significant work value change as prescribed by "*Principle 6 of the State Wage Case*". (T27). The respondent submitted the jurisdiction of the Arbitrator under s80E(2), when looking at the salary range or classification level of a position, could only be done in respect to work value. (T29).

31 The respondent's advocate then made submissions about prejudice (T30) and estoppel. (T31).

32 In **reply, the appellant's advocate** submitted the issue fell within the general provisions of s80E(1). It was submitted it was an industrial matter referred to the Arbitrator via s44 as a compulsory conference. (T37). It was submitted that s26 of *the Act* also applied to the effect that the Commission should act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. (T37).

33 It was also submitted that the issue was the classification of the position and that the employer under s80E(5) had agreed to review the classification of the position and therefore it was capable (under that subsection) of being reviewed, nullified, modified or varied by an Arbitrator. (T37).

34 It was finally submitted that the issue did not fall within any of the specific "*Principles*" because it was not a work value change issue and therefore the jurisdiction of the Arbitrator was to review, nullify or modify the decision of the employer utilising equity, good conscience and the substantial merits of the case without reference to technicality or legal forms. (T37).

35 The reference to the applicability of s26 of *the Act* was presumably pursuant to s80G(1) which has been quoted above. Part II Divisions 2 to 2G encompasses ss22A-49O of *the Act* and therefore obviously ss26 and 44.

36 In the Arbitrator's reasons, which will be referred to in detail later, it was not made clear as to whether the Arbitrator thought that s80E(1), (2) or (5) applied.

Jurisdiction at First Instance and on Appeal Revisited

37 Section 80E(5) provides for the powers which may be exercised by an Arbitrator upon the referral of a matter pursuant to the provisions of s80F of *the Act*. Section 80F of *the Act* is as follows:-

> "***80F. By whom matters may be referred to Arbitrator***
>
> *(1) Subject to subsections (2) and (3) an industrial matter may be referred to an Arbitrator under section 80E by an employer, organisation or association or by the Minister.*
>
> *(2) A claim mentioned in section 80E(2)(a) may be referred to an Arbitrator by the government officer concerned, or by an organisation on his behalf, or by his employer.*

> *(3) A claim mentioned in section 80E(2)(b) may be referred to an Arbitrator by an organisation or an employer.*
>
> *(4) A government officer who is an employee under an employer-employee agreement may refer to an Arbitrator where an Arbitrator is the relevant industrial authority under Part VID —*
>
> *(a) any question, dispute or difficulty that an Arbitrator has jurisdiction to determine under section 97WI; and*
>
> *(b) an allegation referred to in section 97WK(2).*"

38 It can be seen that the scheme of this section is that there is a division of industrial matters for the purpose of who may refer them to the Arbitrator under s80E. As an organisation, the appellant was entitled to refer a matter to an Arbitrator pursuant to s80F(1), (2) or (3).

39 The *Act* itself does not specify the method by which this referral should take place. Regulation 106 which is headed Reclassification Appeals provides in subregulation (1) that an application in respect of a claim under s80E(2)(a) and (b) of *the Act* may be commenced by filing a Notice of Appeal in the form of Form 10. Regulation 106(3) provides that a claim under s80E(2)(a) or (b) of *the Act* may be made at any time, provided however that in respect of a claim under s80E(2)(a) of *the Act* not more than one claim may be made in relation to the same office within a period of 12 months unless the duties and responsibilities of that office are altered within this period. As stated earlier, the present application was not commenced by a Notice of Appeal in the form of Form 10 but by way of an application for a conference pursuant to s44 of *the Act*.

40 Section 80E(1) and (2), combined with s80G are somewhat curious provisions. As will be set out later, the second reading speech, when s80G(2) was inserted into *the Act*, did not indicate why there was the limitation upon rights of an appeal to the Full Bench from a decision of an Arbitrator on a claim mentioned in s80E(2).

41 The opening words used in s80E(2) show that the jurisdiction there conferred upon the Arbitrator is a subset of s80E(1). The present matter which was referred to the Arbitrator certainly fell within the Arbitrator's general jurisdiction as described in s80E(1).

42 If however the referral of the industrial matter involved a claim of the types specified in s80E(2), as a subset of s80E(1), then the limitation on appeal rights contained in s80G(2) applied.

The Claim Before the Arbitrator

43 The reasons for decision of the Arbitrator, although quoting s80E(1) and (2), did not specify which subparagraph the Arbitrator understood the application to have been made under.

44 Contrary to the submission of the respondent's advocate at the hearing before the Arbitrator, in my opinion the claim was not of the type provided for in s80E(2)(b). That is, this was not a claim in respect of a decision of an employer to downgrade a vacant office. As set out above, the office was not vacant but it was occupied by Mr Cardey.

45 In my opinion however, the claim referred was within s80E(2)(a) of *the Act*. This was because it was a claim "*in respect of the salary … allocated to the office occupied by a government officer …*". The claim was in respect of the salary occupied by Mr Cardey, as the appellant sought a review of the classification of the position held by Mr Cardey which in turn affected his salary. In my opinion this was a claim "*in respect of the salary*".

46 The meaning of the expression "*in respect of*" has been considered in numerous cases.

47 In *Bennett v Higgins* (2005) 146 IR 205, Le Miere J, with whom Wheeler and Pullin JJ agreed, said at [31]:-

> "*The phrase "in respect of" has a very wide connotation and has been said to have the widest possible meaning of any expression intended to convey some connection or relation between two subject-matters to which the words refer: McDowell v Baker (1979) 144 CLR 413 and 419 per Gibbs J, but reflects the context in which it appears: Technical Products Pty Ltd v State Government Insurance Office (Qld) (1989) 167 CLR 45 at 47 and 51; Commissioner of Taxation (Cth) v Scully (2000) 201 CLR 148 at 171 [39].*"

48 Further, McHugh J in *Solomons v District Court of New South Wales and Others* (2002) 211 CLR 119 said at [45] that:-

> "*That phrase has a very wide meaning. In the constitutional context, Latham CJ once said that "[n]o form of words has been suggested which would give a wider power". This court has also given a wide meaning to the not dissimilar phrase "in respect of", saying that it only requires "some discernible and rational link" between the matters in question.*" (Footnotes omitted)

49 Merkel J summarised the effect of relevant but earlier High Court authorities in *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1996) 137 ALR 103 at 127-128. His Honour commented:-

> "*However, as was emphasised more recently in the High Court in Workers' Compensation Board of Queensland v Technical Products Pty Ltd (1988) 165 CLR 642 ; 81 ALR 260, the phrase must be construed in the context in which it appears.*
>
> > *It has been said, perhaps somewhat extravagantly, that the words "in respect of" "have the widest possible meaning of any expression*

> *intended to convey some connexion or relation between two subject matters to which the words refer": Trustees Executors & Agency Co Ltd v Reilly, cited in State Government Insurance Office (Qld) v Crittenden. The words were cited again by Gibbs J in McDowell, and by Mason J in State Government Insurance Office (Qld) v Rees, when his Honour added the comment: "But, as with other words and expressions, the meaning to be ascribed to 'in respect of' depends very much on the context in which it is found": at CLR 646-7; ALR 262 per Wilson and Gaudron JJ.*
>
> *Undoubtedly the words "in respect of" have a wide meaning, although it is going somewhat too far to say, as did Mann CJ in Trustees Executors & Agency co. Ltd v Reilly, that "they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer". The phrase gathers meaning from the context in which it appears and it is that context which will determine the matters to which it extends (at CLR 653-4; ALR 267 per Deane, Dawson and Toohey JJ).*
>
> *In Technical Products Pty Ltd v State Government Insurance Office (Queensland) (1989) 167 CLR 45 ; 85 ALR 173 the words were said (at CLR 47; ALR 175 per Brennan, Deane and Gaudron JJ) to "have a chameleon-like quality in that they commonly reflect the context in which they appear" and to "take their colour from the context in which they are found": at CLR 51; ALR 177 per Dawson J.*
>
> *Obviously in any particular instance where those words are used, questions of degree are involved in determining the materiality and sufficiency of the connection between the two relevant subject matters.*"

50 In my opinion, in the context of s80E(2)(a) of *the Act* the words "*in respect of*" simply require in a broad sense, a connection between the claim and the specified subject matters. For this reason, as set out earlier, the claim made by the appellant was "*in respect of the salary*" "*allocated to the office occupied by*" Mr Cardey as "*a government officer*". There was a connection between the claim made and the salary.

51 The applicability of s80G(2) will be considered after a discussion of the Arbitrator's reasons.

The Arbitrator's Reasons

52 As stated in the memorandum dated 3 October 2006 and quoted above, the respondent asserted before the Arbitrator that there was no jurisdiction for the Arbitrator to determine the classification of the appeal position without a work value review. Paragraph 4 of the schedule also set out the respondent's position of denying the appellant was entitled to any relief and requested the application be dismissed.

53 The Arbitrator's reasons for decision commenced with a quotation of the Memorandum. The reasons then related the agreed history of the matter between the parties. In addition to the information contained in the schedule to the s44 application, the Arbitrator recorded that the Western Australian Centre for Pathology and Medical Research (PathCentre) was abolished from 15 July 2005 and the Metropolitan Health Service took over the functions previously undertaken by the PathCentre, by what is now known as PathWest. The employees of the PathCentre had been covered by the *Government Officers Salaries, Allowances and Conditions Award 1989* ("*the GOSAC Award*") and the *Government Officers Salaries Allowances and Conditions General Agreement 2004*, an award and agreement to which the Civil Service Association of Western Australia Inc (the CSA) was a party. The reasons recorded that with the creation of PathWest, the positions of those employees were abolished and new positions were created, and due to the arrangements for industrial coverage, the positions became subject to the *Hospital Salaried Officers Award 1968* and the *Health Services Union – Department of Health – Health Service Salaried Officers State Industrial Agreement 2004* (the HSU Agreement), under the industrial coverage of the appellant. ([2]).

54 The reasons recorded that the arrangements included that the employees ceased to be employed or engaged by PathCentre and became employed or engaged by PathWest. The positions were translated into the structures of the *Hospital Salaried Officers Award* and the agreement that related to it. (See Western Australian Government Gazette, Tuesday 12 July 2006, No 131). ([3]).

55 The Arbitrator then referred to the downgrading of the position. The reasons also recorded that there was no suggestion that the CSA, the organisation with industrial coverage at the time, objected to the downgrading. ([4]).

56 The reasons recorded that Mr Cardey applied for and was appointed to the level 2/4 position on 2 October 2003. ([5]). The reasons then referred to the initiation of communications by Mr Hill in July 2005. ([6]). The reasons related the history of the matter as noted in the schedule to the application for the s44 conference. ([7] – [9]).

57 In paragraph [10] of the Arbitrator's reasons it was summarised that the appellant said the Arbitrator was able to consider the matter and come to its own decision with a finding that the position ought to be classified at level 6. The reasons also said the respondent challenged the Arbitrator's jurisdiction to deal with the matter and argued the only way that the classification could be considered is in accordance with the usual reclassification review which requires consideration of the Work Value Principle contained within the Statement of Principles.

58 Under the heading "*The Matter for Consideration*" the Arbitrator in paragraph [12] said it was the 2001 review and downgrading which was sought to be remedied, as well as a consideration of the position as it applied in 2005. The Arbitrator said that: "*One would be hard pressed to conclude that it was fair and reasonable for the Commission to review a decision taken by a different employer, i.e. Path Centre some five years ago, when the then relevant union, the CSA had a right to challenge that downgrading and did not do so. It may be appropriate for the Commission to enter into a hearing and determination as to a dispute between the parties in respect of the proper classification of a position at this point, subject to whether it is within jurisdiction and subject to the application of the Statement of Principles.*" From this it is clear the Arbitrator viewed the application as being one which was affected by the Statement of Principles.

59 The Arbitrator then quoted s80E(1) and (2) of *the Act*. At paragraph [14] the Arbitrator made a "*finding*" that the decision to downgrade as it related to the decision of PathCentre would have been within the jurisdiction of the Arbitrator at the time that PathCentre downgraded the position. The Arbitrator also said: "*The current classification of the position as it is held by PathWest is able to be considered by the Arbitrator. As noted earlier, whether it is appropriate to consider a decision of an employer, not currently the employer, to downgrade the level of an office that was downgraded some 5 years ago is another matter.*" ([14]).

60 The Arbitrator then said the issue "*is not one so much of jurisdiction but of whether the Arbitrator is actually able to provide a remedy in the circumstances of the operation of the Statement of Principles*". This confirmed the position of the Arbitrator as set out in paragraph [12] that the claim was subject to the application of the Statement of Principles. ([15]).

61 The Arbitrator then quoted paragraphs 1 and 2 of the Statement of Principles.

62 At paragraph [17] the Arbitrator said the claim was clearly for the purpose of the Arbitrator determining the value of the position with a view to changing that classification to HSU level 6.

63 The Arbitrator said she examined Principle 2 which is headed "*When an Award or relevant Agreement may be varied or another Award made without the claim being regarded as above or below the Safety Net*". The Arbitrator set out reasons for, in effect, concluding the claim did not come within paragraph 2 of the Statement of Principles.

64 In paragraph [20] the Arbitrator reasoned therefore that she was "*unable to find that the matter before the Arbitrator meets any of the matters which the Commission (in this case, the Arbitrator) is able to consider in accordance with the Statement of Principles. The usual basis upon which reclassifications are able to proceed pursuant to the Statement of Principles is only in accordance with Principle 6 – Work Value Changes. That Principle requires that there be a demonstration of 'changes in the nature of the work, skill and responsibility required or the conditions under which work is performed'. Those changes 'should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification'.*" The Arbitrator then said that the appellant did not seek a reclassification based upon the requirements of Principle 6. The Arbitrator said that given "*the status of those Principles and their binding nature on a single Commissioner, I am unable to find that the matter is one which the Arbitrator can deal with*". ([20]).

65 The Arbitrator concluded that there was no "*capacity for the Arbitrator to consider this matter and it will be dismissed*".

The Applicability of Section 80G(2)

66 Given the submission by the respondent that s80G(2) of *the Act* applied and that the appellant could not therefore appeal to the Full Bench, it is appropriate to first consider this issue.

(a) The Respondent's Submissions

67 In the respondent's further written submissions it was asserted that contrary to the position of the appellant, the Arbitrator had exercised her jurisdiction by enquiring into and dealing with the appellant's reclassification application. It was submitted the Arbitrator's statements in her reasons should be read as a whole and the Arbitrator had expressly acknowledged she had jurisdiction to enquire into and deal with a government officer reclassification application. It was said the Arbitrator exercised her jurisdiction in her reasons for decision in paragraphs [14]-[20]. Parts of paragraphs [15] and [20] of the Arbitrator's reasons were quoted. It was said the Arbitrator decided the matter and gave her reasons for dismissing the application and there was no failure on the Arbitrator's part to exercise jurisdiction.

68 It was said that in *Director General, Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244 at [29] the Industrial Appeal Court had correctly decided the Arbitrator's jurisdiction was wide, but in this case the Arbitrator had exercised her jurisdiction, but considered her decision had to be made in accordance with what she considered to be the usual approach.

69 The respondent also submitted s80G of *the Act* was inserted by s47 of the *Acts Amendment and Repeal (Industrial Relations) (No 2) Act 1984* (Act No 94 of 1994). The second reading speech did not make any specific reference to s80G. (Western Australia, Parliamentary Debates, Legislative Council, 4 April 1984, page 6651).

(b) The Appellant's Submissions

70 The appellant in their further written submissions asserted s80G(2) had no application for two reasons. The first was that if the order of the Arbitrator dismissing the application was a decision at all, it was not a "*decision … on a claim*" as in s80G(2). It was submitted the phrase "*decision … on a claim*" requires that the decision directly decide the claim on its merits. It was submitted the decision appealed from did not do this as the Arbitrator reasoned the Principles prevented her from so doing. It was submitted the position may be different if a phrase had been used such as "*decision … in relation to a claim*", but the use of the direct and immediate connector "*on*" and not "*in relation to*" or an equivalent phrase only prevents an appeal where the merits of the reclassification matter had been decided.

71 Secondly it was submitted that in any event the decision to dismiss the appellant's claim was not a decision at all. This was based on the reasoning of a majority of the High Court in *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476. The appellant's submissions quoted what was said to be paragraph [77] of the reasons. The context of the

observations made by their Honours was s474(1) of the *Migration Act 1958* (Cth). This provided that a "*privative clause decision*" was final and conclusive and must not be challenged, appealed against, reviewed, quashed or called in question in any court, and that it was not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. Section 474(2) provided that a "*privative clause decision*" means "*a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5)*". The matter came before the High Court by way of a case stated. The background was that the plaintiff, a citizen of Bangladesh, had been refused a protection visa. This decision was affirmed by the Refugee Review Tribunal. The plaintiff wished to challenge the decision on the ground that the Tribunal's decision was made in breach of the rules of procedural fairness. Section 474 potentially created an obstacle to the plaintiff.

72 The reported version of the reasons is different from that which was quoted by the appellant in their further written submissions. They appear to have been quoted from the [2003] HCA 2 version of the decision. The paragraph quoted is paragraph [76] of the CLR reported decision and the footnote numbers are different from those quoted by the appellant. The relevant reported passage of the reasons of the majority is in the following form. In the quotation which follows, the footnotes are omitted:-

> "*[76] Once it is accepted, as it must be, that s 474 is to be construed conformably with Ch III of the Constitution, specifically, s 75, the expression "decision[s] ... made under this Act" must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all". Thus, if there has been jurisdictional error because, for example, of a failure to discharge "imperative duties" or to observe "inviolable limitations or restraints", the decision in question cannot properly be described in the terms used in s 474(2) as "a decision ... made under this Act" and is, thus, not a "privative clause decision" as defined in s 474(2) and (3) of the Act.*"

73 The appellant in their submissions emphasised the reference to the "*general principle*" and the statement that an administrative decision involving jurisdictional error is no decision at all.

74 The appellant then submitted the Arbitrator had failed to enquire into and deal with the merits of the appellant's claim because of a wrong view that the Arbitrator was prevented from doing so or that it was pointless to do so because no remedy could be granted. It was submitted the Principles did not apply and hence the claim could be dealt with on its merits and a remedy could be granted. It was submitted that there was a refusal by the Arbitrator to perform the duty imposed by *the Act* for which, in the absence of an appeal, mandamus would lie. It was submitted the decision to dismiss the appellant's claim was not a decision at all in that it was based on an error of law going to jurisdiction. It was submitted it was a wrongful refusal to decide the matter. Section 80G(2) did not therefore apply, as it only applies to "*a decision of an Arbitrator on a claim*".

(c) Decision on a Claim

75 I do not accept the first submission made by the appellant on this issue. In my opinion a decision on a claim does not require a decision on the merits. The word "*decision*" is defined in s7 of *the Act* to include an "*award, order, declaration or finding*". This definition is applicable to s80G as s7(1) provides that the definitions apply in "*this Act, unless the contrary intention appears …*". There is no contrary intention in s80G(2). The definition of "*decision*" in its terms and because it is inclusive, is a broad definition. In this instance there was an order made by the Arbitrator that the matter was dismissed. That order is a decision under s7. It was therefore, absent the issue of jurisdictional error to be later considered, a "*decision*" for the purposes of s80G of *the Act*.

76 Further, in my opinion it was a decision on the claim under s80E(2) and referred pursuant to s80F of *the Act*. As quoted above, the exclusive jurisdiction of the Arbitrator under s80E(2) is to deal with the types of claim there specified. In my opinion a decision by an Arbitrator either that they do not have jurisdiction to deal with the claim, or that they have no authority to grant a remedy in relation to a claim that is within jurisdiction, is a decision "*on a claim mentioned in section 80E(2)*".

(d) A Decision?

77 This leaves the second basis upon which the appellant sought to avoid the consequence of s80G(2). As set out above, the argument was that in accordance with *Plaintiff S157/2002*, as a matter of general principle, "*an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'*".

78 Section 80G(2) is a type of "*privative clause*" in that it restricts an otherwise entitlement to appellate review. The authorities establish that a section like this should be strictly construed.

79 As stated by justices of the High Court in *Plaintiff S157/2002* at [72] and also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [48] this is because sections like s80G(2) of *the Act*, which restrict appellate rights are circumscribed by the presumption that Parliament does not intend to cut down the jurisdiction of the courts, save to the extent that the legislation in question expressly so states or necessarily implies.

80 The statement in *Plaintiff S157/2002* relied on by the appellant is about an "*administrative decision*". In my opinion however the decision made by the Arbitrator cannot be so characterised.

81 Section 12(1) of *the Act* says the Commission is a court of record. The "*Commission*" is defined in s7 to mean the body continued and constituted under *the Act* under the name of "*The Western Australian Industrial Relations Commission*". Section 80C of *the Act* defines an "*Arbitrator*" to mean "*the Commission constituted by a public service arbitrator appointed under this Division*". Commissioner Scott has been appointed as a Public Service Arbitrator pursuant to s80D(1) of *the Act*. Accordingly, when Commissioner Scott acts as an Arbitrator it is as a constituent part of the Commission. Therefore s12 of *the Act* applies. Whilst in some circumstances the exercise of the powers of the Commission may not be those of a court, the relevant authorities dictate that when performing the arbitral functions contained in s80E(1), (2) and (5) of *the Act* the Arbitrator is acting as a court. (See *Helm v Hansley Holdings Pty Ltd (In liq)* (1999) 118 IR 126 and *Enright v Sleepeezee Pty Ltd* (2004) 84 WAIG 305).

82 This conclusion leads to the issue of whether what was said in *Plaintiff S157/2002* at [75] also applies to a decision of a "*court*" like the Commission, which has a limited, statutory based jurisdiction (Such a court is often referred to as an "*inferior court*"). This issue was not addressed in either *Plaintiff S157/2002* or *Craig v The State of South Australia* (1995) 184 CLR 163, a decision of the High Court which discussed jurisdictional errors by an "*inferior court*".

83 In *Halsbury's Laws of Australia, Administrative Law,* paragraph [10 – 2527] it is stated that where "*a decision of an inferior court or tribunal is affected by jurisdictional error, the decision is void. This means that there is nothing for a privative clause to protect, for there is no decision in exercise of jurisdiction under the empowering act*." (Footnotes omitted). The footnotes to this statement do not however include authorities about an "*inferior court*".

84 There is however a particularly relevant authority on point. This is *Re Sharkey and Others; Ex parte Robe River Mining Company Pty Ltd* (1992) 46 IR 72. This was a decision of the Full Court of the Supreme Court of Western Australia involving a decision of the Full Bench under *the Act.* The applicant before the Full Court had been refused leave, by the Full Bench, to object to an amalgamation application filed in the Commission by two unions. The applicant sought orders for writs of certiorari, prohibition and mandamus against the Full Bench. The application involved the correct construction of s72 of *the Act*. Also relevant to the success of the application was the contents of the then s34 of *the Act.* This contained a privative clause, restricting the granting of prerogative writs against decisions of the Commission.

85 Nicholson J, with whom Pidgeon ACJ and Ipp J agreed (although both also wrote reasons of their own), said at page 79 the Full Bench had erred in the construction it had placed on s72 of *the Act* and as a consequence the applicant was denied standing as an objector. At page 81 his Honour said that it was "*well established that a constructive refusal to exercise jurisdiction is not protected from review by provisions*" of the character of s34 of *the Act.* His Honour cited a number of authorities to support this proposition, including High Court authorities. At page 83 his Honour concluded that the misconstruction placed on s72 of *the Act* by the Full Bench constituted a "*misconception by it of its jurisdiction and a failure by it to consider the true question which the Full Bench was bound to decide*". His Honour said that this was a jurisdictional error. His Honour held that s34 of *the Act* did not oust the jurisdiction of the Supreme Court to provide prerogative relief for the jurisdictional error made. (83).

86 Ipp J at page 85 repeated the point made by Nicholson J about a constructive refusal to exercise jurisdiction, and cited a number of authorities also cited by Nicholson J. Importantly, Ipp J at page 86 said that "*a decision to refuse to exercise jurisdiction, albeit a constructive refusal, is in effect no decision*".

87 Two decisions of the New South Wales Court of Appeal establish that a different approach was necessary, in relation to s179 of the *Industrial Relations Act 1996* (NSW), which provided that, subject to the exercise of a right of appeal to the Full Bench of the Commission, "*a decision or purported decision of the Commission*" was final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal whether on an issue of fact, law, jurisdiction or otherwise. In these decisions it was material that s179 unlike s80G(2) of *the Act*, referred to a "*purported decision*". (See *Woolworths Ltd v Hawke and Others* (1998) 45 NSWLR 13 and *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales and Others* (2003) 57 NSWLR 212).

88 In my opinion, supported by the decision of *Re Sharkey*, where the Arbitrator makes a decision effected by jurisdictional error it is in law "*no decision*". Applied to this appeal it means that if the Arbitrator's purported "*decision*" was infected with an error of this type, s80G(2) would not apply to defeat the appellant's otherwise right of appeal, under s49 of *the Act*, because there had not been "*a decision*" of the Arbitrator.

89 The next issue is what is a jurisdictional error for this purpose. The High Court in *Craig* at 177-180 emphasised that there is a difference between what constitutes a jurisdictional error by an administrative tribunal and an inferior court. Illustrations of jurisdictional error by an inferior court are provided by *Re Sharkey*.

90 Relevantly, the court in *Craig* said there would be jurisdictional error committed by an inferior court if:-

(a) It disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a precondition of the exercise of any authority to make an order or decision in the circumstances of the particular case (177).

(b) It misconstrues the statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the case (177-178).

91 Another example of a jurisdictional error by an inferior court, is provided by the reasons of Gleeson CJ and McHugh J in *Samad and Others v District Court of New South Wales and Another* (2002) 209 CLR 140. Their Honours' joint reasons agreed with the conclusion reached by the joint reasons of Gaudron, Gummow and Callanan JJ but the reasons of the latter joint judgment did not touch upon the issue relevant to the present appeal. The appeal before the High Court involved a decision by the District Court of New South Wales, as an appeal de novo, from a decision by the Director General of the New South Wales Department of Health to cancel a license to supply drugs of addiction. The decision of the District Court was determined against the former licensee. That party then applied to the Court of Appeal of New South Wales for an order in

the nature of certiorari to quash the decision of the District Court judge. The Court of Appeal refused the application and the former licensee appealed, on a grant of special leave, to the High Court.

92 Gleeson CJ and McHugh J at page 150 agreed with the contention by the former licensee, that the District Court judge had erred in his construction of the relevant regulation, as excluding a discretion not to cancel a license where a ground for cancellation had been made out. Their Honours said that the error was a jurisdictional error and cited *Craig* at page 177. At page 151, Gleeson CJ and McHugh J said that if the conclusions by the District Court judge about the nature of the decision he had to make were "*erroneous in law, then he based his decision upon a misconception of the nature or limits of his jurisdiction*". Their Honours allowed the appeal and said certiorari should lie on the basis that the decision made by the District Court judge was a decision which should and ought to be quashed on the basis that it contained a jurisdictional error.

93 Furthermore, in a trilogy of decisions of the Full Court of the Supreme Court of Western Australia, the Court decided that certiorari could lie against decisions made by the Court of Petty Sessions for jurisdictional error. In at least two of these decisions, the Court held that certiorari would lie despite a privative clause contained in s147 of the *Justices Act 1902* (WA). The cases are *Re City of Melville; Ex parte J-Corp Pty Ltd* (1998) 20 WAR 72; *Re Robbins SM; Ex parte West Australian Newspapers Ltd* (1999) 20 WAR 511 and *Michael v Musk* (2004) 148 A Crim R 140, [2004] WASCA 203. In *City of Melville,* Ipp and Steytler JJ at 76-77 quoted from *Craig* and Malcolm CJ in *Talbot v Lane* (1994) 14 WAR 120 at 133 and said an order would constitute a jurisdictional error if it was "*made by an inferior court on the basis of a misapprehension or disregard of the nature of limits or powers*".

94 Also, in *Said v District Court (NSW)* (1996) 39 NSWLR 47, cited by Ipp and Steytler JJ in *City of Melville*, the Court of Appeal of NSW ordered a decision made by a District Court judge be quashed as it was infected by a jurisdictional error. This was because the decision made by the District Court judge was "*based upon a misconception of the nature and limits of his jurisdiction*". (Gleeson CJ at page 56; Priestley and Meagher JJ agreeing).

95 Each of these decisions provide illustrations of the type of errors, committed by an "*inferior court*" which are characterised as jurisdictional errors and lead to the conclusion that there had been no "*decision*" for the purposes of s80G(2) of *the Act.*

96 Also Hayne J in *Bhardwaj* at [149] referred to an error comitted by the Refugee Review Tribunal as being a jurisdictional error because "*what it did was not authorised by the Act and did not constitute performance of its duty under the Act*" (See also *Re Refugee Tribunal and Another; Ex parte Aala* (2000) 204 CLR 82 per Hayne J at [163]).

97 In *Judicial Review of Administrative Action*, Aronson and Others, Lawbook Company, Third Edition, 2004, at page 227, it is stated, citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 that:-

> "*Jurisdictional requirements are preconditions to the validity of the exercise of public power. If they are absent or breached, the resulting decision or conduct is invalid. This means that where statutory power is in issue, the ultimate questions are whether the statute has indicated that breach of one of its requirements is to result in invalidity, and similarly, whether the statute has indicated that breach of a common law requirement is not to result in invalidity.*" (Footnotes omitted)

98 Further, at page 620 it is stated that "*jurisdictional*" is now a conclusory label which "*stands as a shorthand for all of the grounds for alleging that decision makers lacked legal authority to act or decide as they have done*". (Footnotes omitted). In my opinion the observations made by Hayne J and Aronson are apposite to the present appeal.

99 Attention must therefore be directed to the decision which was made by the Arbitrator, whether it was attended with any error, the significance of such an error being made in the context of the duties reposed in the Arbitrator to make decisions under *the Act*, and therefore whether the consequence of such an error is that it is "*jurisdictional*" in nature.

100 To consider this it is necessary to firstly see whether any of the grounds of appeal can be established.

Ground 1

101 The ground is quoted above. The appellant in support of this ground provided to the Full Bench a copy of the HSU Agreement. Although referred to in the reasons of the Arbitrator it seems the HSU Agreement was not formally before her. The document was however provided to the Full Bench without objection. The HSU Agreement was an agreement registered by the Commission.

102 The appellant submitted that what it wanted the Arbitrator to consider was whether a specified position, assigned to a level by the respondent within the HSU Agreement, was fair and appropriate. The position itself was not contained in or referred to in the HSU Agreement. Instead, the HSU Agreement clause 13 – Salaries and Payment, provided for various salary levels. The assignment of a position to a level within that clause was undertaken by the respondent administratively pursuant to clause 13(4)(d).

103 Accordingly, it was submitted the claim before the Arbitrator did not seek the variation of the HSU agreement or any award. It sought to have the administrative decision of the respondent to assign the appeal position to a particular level, reviewed by the Arbitrator on the merits.

104 To determine the ground it is necessary to review the basis on which the Arbitrator dismissed the claim. The reasons of the Arbitrator are however, and with great respect, attendant with some confusion on this issue.

105 In paragraph [12] the Arbitrator referred to possibly having a hearing and determination of the claim "*subject to whether it is within jurisdiction and subject to the application of the Statement of Principles*".

106 In paragraph [14] the Arbitrator referred to having jurisdiction in the past tense, referring to the time that the PathCentre downgraded the position. The Arbitrator then said that "*the current classification of the position as it is held by PathWest is able to be considered by the Arbitrator*". This appears to be a statement that the Arbitrator had jurisdiction. This view is

enhanced by paragraph [15] where the Arbitrator said the issue was not "*so much of jurisdiction but of whether the Arbitrator is actually able to provide a remedy in the circumstances of the operation of the Statement of Principles*".

107 After reviewing the applicability of the Statement of Principles the Arbitrator at paragraph [20] said the matter before her did not meet "*any of the matters which the Commission (in this case, the Arbitrator) is able to consider in accordance with the Statement of Principles*". The reference to "*able to consider*", is suggestive of a conclusion that the Arbitrator lacked jurisdiction. This position is enhanced by the last sentence in paragraph [20] where the Arbitrator said "*I am unable to find that the matter is one which the Arbitrator can deal with"*. Further, in paragraph [21] the Arbitrator concluded there was "*no capacity"* for her to consider the matter.

108 Although I accept the respondent's submission that the reasons of the Arbitrator must be read as a whole, as I have said and with great respect, engaging in this exercise produces some confusion.

109 The ground of appeal may however be considered on the basis that the Arbitrator either decided that because the matter did not fit within the Statement of Principles she lacked the jurisdiction to hear and determine the application, or alternatively although having jurisdiction she was, on the same basis, unable to provide a remedy. The next question is whether this was in error.

110 Sections 80E(1) and (2) of *the Act* provides the Arbitrator with exclusive jurisdiction to enquire into and deal with any industrial matter relating to amongst other things a government officer. There was no dispute that the matter before the Arbitrator related to a government officer or that it was an industrial matter. This was correct as the expression "*industrial matter*" is defined broadly in s7 of *the Act* and includes "*any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry …*" and "*the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment*". Accordingly, the Arbitrator had exclusive jurisdiction to enquire into and deal with the claim referred to her.

111 Section 80E(1) of *the Act* does not in its terms state that the Arbitrator must enquire into and deal with an industrial matter where it has been referred under s80F, but it is implicit that this is to occur. Furthermore in this instance the Arbitrator prepared a Memorandum of Matters Referred for Hearing and Determination.

112 In *Director General, Department of Justice v Civil Service Association of Western Australia Inc* (2005) 149 IR 160, Wheeler and Le Miere JJ in discussing the interaction between s80E(1) and (5) said at [29]:-

> "*However, the powers of the Arbitrator are very wide. They are to inquire into and deal with any industrial matter. To the extent necessary, the exercise by an employer in relation to a government officer of a power relating to that industrial matter may be reviewed, nullified, modified, or varied by the Arbitrator.*"

113 The Arbitrator did not enquire into and deal with the matter before her in any substantive way because of her view about the effect of the Statement of Principles. As stated, her conclusion was that because of the Statement of Principles she either lacked jurisdiction or alternatively was unable to provide a remedy in relation to the claim.

114 This directs attention to the interaction between s80E of the Act and the Statement of Principles.

115 The jurisdiction contained in s80E(1) and (2) of the Act is not in any way expressed to be the subject to any General Order, including the Statement of Principles. As long as there is an industrial matter before the Arbitrator of the type referred to in s80E(1), the Arbitrator has the jurisdiction to enquire into and deal with the matter.

116 The appellant submits that the Arbitrator "*correctly concluded that the claim did not fit within any of the Principles*" but wrongly concluded the claim could not be considered. It was submitted that the Arbitrator ought to have concluded that as the Principles did not apply to the claim, the matter fell to be determined by the exercise of the Arbitrator's statutory discretion, untrammelled by the Principles. As stated the Statement of Principles is referred to in the General Order made by the Commission in Court Session on 4 July 2006.

117 The proceedings before the Arbitrator involved a registered "*industrial agreement*" as defined in s7 of *the Act*. Such an agreement may, relevantly, pursuant to s43(1) of *the Act* only be varied, renewed or cancelled by subsequent agreement between the parties. On this basis alone it would appear that the Principles could have no application to the formation of the terms of an industrial agreement by the Commission - as it has no arbitral role to play in this.

118 In any event a review of the Principles demonstrates its lack of applicability to agreements. The General Order contains nine orders. Of these, only orders 4, 8 and 9 do not refer to awards. Order 4 is about increases under State Wage Case Principles prior to 7 July 2006, except those resulting from enterprise agreements, not being used to offset the arbitrated safety net adjustment of $20.00 per week. The reference to the "*arbitrated safety net adjustment of $20.00 per week*", is a reference to Order 1 which increases the weekly rates of pay for adults in each award of the Commission, other than awards set out in Schedule 1, by "*the arbitrated safety net adjustment of $20.00 per week with effect on and from 7 July 2006*". Order 8 has already been referred to. Order 9 is simply about the publication of the clauses of awards varied by the General Order.

119 Additionally the only reference to agreements or registered agreements in the Principles is in Principles 1, 2(g) and (j) and 9(8).

120 Principle 1 of the Statement of Principles is headed "*Role of Arbitration and the Award Safety Net*". It provides that:-

> "*Existing wages and conditions in awards and relevant agreements of the Commission constitute the safety net which protects the employees who may be unable to reach an industrial agreement.*
>
> *Wages and conditions of employment maintained in awards in accordance with these Principles and through the operation of section 40B of the Act are the safety net.*

> *These Principles do not have application to Enterprise Orders made under section 42I of the Act.*"

121 Although Principle 1 refers in the first sentence to "*relevant agreements*", it then refers to protecting employees "*who may be unable to reach an industrial agreement*". It is not immediately apparent what the "*relevant agreements*" are. In any event however the HSU Agreement does represent an industrial agreement and accordingly the "*wages and conditions*" in the HSU Agreement do not fit within Principle 1 as being a safety net to protect employees who are "*unable to reach an industrial agreement*". There is a further difficulty in understanding the precise ambit of Principle 1, with respect to agreements because the second paragraph refers to the safety net as being comprised by wages and conditions of employment maintained in awards and through the operation of s40B of *the Act*. Section 40B of *the Act* is about the variation of awards by the Commission of its own motion.

122 Principle 2 is headed "*When an Award or relevant Agreement may be varied or another Award made without the claim being regarded as above or below the Safety Net*" and provides in the first paragraph:-

> "*In the following circumstances an award or relevant agreement may, on application, be varied or another award made without the application being regarded as a claim for wages and/or conditions above or below the award safety net:*"

123 The "*circumstances*" are then set out as (a) – (j).

124 It can be seen that the first paragraph of Principle 2 also refers to a "*relevant agreement*" but the context is the variation of the "*relevant agreement*" on application. The appellant submitted however that it did not seek the variation of an award or agreement. I accept this submission. The claim was as submitted by the appellant, as I have described above.

125 Only "*circumstances*" (g) and (j) of Principle 2 refer to "*relevant agreements*". In "*circumstance*" (g) there is reference to the variation of a "*relevant agreement*" to include the minimum adult wage in accordance with Principle 9. Circumstance (j) refers to an application to vary an award to incorporate "*industrial agreement provisions into the award by consent pursuant to s40A of the Act. The incorporated industrial agreement wage rate and allowance provisions will not be subject to arbitrated safety net adjustments and will be identified separately in the award at the time of variation*". Clearly neither "*circumstance*" (g) or (j) applied to the claim which was before the Arbitrator.

126 Principle 9 itself refers to a minimum adult wage clause being required to be inserted in any new award. Principle 9(8) makes reference to above award payments pursuant to enterprise agreements, but this was also not relevant to the claim which was before the Arbitrator.

127 Included as Principle 2(d) is "*to adjust wages pursuant to work value changes in accordance with Principle 6*". It is noted however that Principle 6 and other Principles such as Principles 8, 9, 11 and 12 all refer to an award. The industrial matter in issue before the Arbitrator did not involve an award. Principle 6(a) refers to a "*change in wage rates*". This is also not what the appellant sought. It was not a claim to change wage rates in an award or even the HSU Agreement, but a change to the classification level of a particular position. As set out, s43(1) of *the Act* would only allow variation of the registered agreement by a subsequent agreement of the parties. In the second paragraph of Principle 6(a) there is reference to, "*a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related*". Again, the present claim was not a "*work value application*" and the claim did not involve an award. In the fourth paragraph in Principle 6(a) there is also reference to "*wage relativities between awards*". Principle 6(c) refers to the "*time from which work value changes in an award should be measured*". The point made about an award not being involved is again relevant.

128 The Arbitrator was correct to conclude that the claim before her did not fit within the Statement of Principles. In my opinion however s43 of *the Act*, and a review of the Statement of Principles themselves demonstrates that they were not intended to and did not apply to a claim such as that which was before the Arbitrator. The consequence of the claim not fitting within the Statement of Principles was not that the Arbitrator could not deal with the claim or provide a remedy. The claim was an "*industrial matter*", referred to the Arbitrator by the appellant under s80F of *the Act* and was required to be dealt with under s80E(1) and (2), with consideration by the Arbitrator of the possible exercise of the powers set out in s80E of *the Act*.

129 I accept therefore the submission of the appellant that the Arbitrator erred.

130 The respondent submitted the Arbitrator correctly followed a long line of authority that before reclassifying the position a change in work value must be demonstrated. It was submitted that although the Statement of Principles did not apply to applications for the reclassification of positions, Arbitrators/the Commission had long held that such applications could only succeed upon the demonstration of increased work value. For that reason reference to the Statement of Principles was relevant and convenient. The respondent cited *CSA v Commissioner, Public Service Commission* (1994) 74 WAIG 801, *Grellier v Secondary Education Authority* No. PSA 54 of 1996, *Grumont v Director General, Education Department* (2001) WAIRC 01817 and *Wall v Department of Fisheries* (2004) 84 WAIG 3895.

131 With respect to these authorities I accept the appellant's submission that the Arbitrator did not refer to the Statement of Principles as a matter of convenience but found "*they were a legal bar to her deciding the matter*". (T16). The appellant also submitted that the cases were distinguishable because they did not apply to an application such as the present which asserted the level to which the position was assigned in 2005 was an incorrect level. I also accept this submission. I also note that none of the authorities cited were decisions of the Full Bench.

132 In summary the Arbitrator erred because:-

(a) The Principles do not cut down the jurisdiction of the Arbitrator to deal with an "*industrial matter*", under s80E(1) and/or (2) of *the Act*.

(b) The Principles did not in any event apply to the application which did not seek any variation of an award, or for that matter, the HSU Agreement. With respect to any variation of the agreement the Principles could not apply because of the contents of s43(1) of *the Act*.

(c) The consequence of (b) was not that the Arbitrator lacked jurisdiction or could not provide a remedy, but that the Arbitrator's jurisdiction was not affected by the Principles and the claim therefore could and should be substantially determined without reference to them.

(d) In particular the Arbitrator was required to hear and substantially determine the claim even if it was not based on or could fit within the requirements of Principle 6 and a work value change claim.

133 For these reasons in my opinion, ground 1 of the appeal has been established.

Ground 2

134 This ground asserts error of law by the Arbitrator in determining that the matter referred sought to amend "*the award*". There is a difficulty in this ground in that as submitted by the appellant there was no award which applied to the occupier of the relevant position and the classification of that position. The HSU Agreement applied. Insofar as the ground encapsulates that the Arbitrator erred in applying the Statement of Principles as if there was an application to amend an award, it does not take the matter any further than ground 1.

Ground 3

135 In my opinion, ground 3 also does not take the appeal any further than ground 1. The conclusion referred to in ground 3 is the consequence of the way in which the Arbitrator determined the matter. This as referred to with respect to ground 1 was in error.

Ground 4

136 This ground refers to the Arbitrator finding that "*jurisdiction existed to deal with the current classification*" of the relevant position. As set out earlier there is some difficulty in ascertaining whether the Arbitrator found that she had jurisdiction or not. The ground also refers to the Arbitrator not "*referring the matter for determination*". There is some difficulty with the drafting of this ground because the matter was referred for determination, but the matter was not determined in substance because of the Arbitrator's view as to jurisdiction or whether a remedy could be provided.

137 Overall, ground 4 does not add to ground 1 and need not be considered any further.

Was the Error a Jurisdictional Error?

138 In my opinion the error of the Arbitrator, as set out above with respect to ground 1, was a jurisdictional error. This was because the result of the error was that the Arbitrator did not undertake the duty reposed in her by sub-sections 80E(1) and (2) of *the Act*, to deal with the "*industrial matter*" before her.

139 This occurred because of what the authorities describe as a "*misconception of the nature and limits*" of her jurisdiction. This was that the Arbitrator wrongly decided that she could only hear the claim, or provide a remedy, if it fitted within the Statement of Principles. Put slightly differently, in the terms of *Craig*, the Arbitrator misconceived the nature of her function or powers in the circumstances of the case. The consequence of this error was, as indicated above, jurisdictional. This is because the effect of it was a failure to do what *the Act* required – to deal with the "*industrial matter*", and consider the application of the powers in s80E(5) of *the Act*.

140 Accordingly, based on my earlier reasoning the purported decision of the Arbitrator was not a "*decision*" for the purposes of s80G(2) of *the Act*. The appellant may therefore appeal under s49 of *the Act* and the appeal should be allowed.

141 I should also mention that although s49(2) refers to an appeal against a "*decision of the Commission*" there are many authorities that establish a decision infected with a jurisdictional error is nevertheless a "*decision*" for the purposes of exercising rights of appeal or review (See for example, Aronson at pages 627-629).

Orders

142 In my opinion a minute of proposed orders should issue in the following terms:-

1. The appellant have leave to amend the grounds of appeal by the deletion of both paragraphs numbered 5.
2. The appeal is allowed.
3. The decision of the Arbitrator is quashed.
4. The appellant's claim is remitted to an Arbitrator for hearing and determination according to law.

SMITH SC:

143 I have read the reasons of decision of His Honour, the Acting President and I agree with those reasons and have nothing to add.

HARRISON C:

144 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.

2007 WAIRC 00411

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPELLANT
	-and-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE HON. MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	TUESDAY, 1 MAY 2007
FILE NO/S	FBA 37 OF 2006
CITATION NO.	2007 WAIRC 00411

Decision	Appeal allowed, decision of Arbitrator quashed, and matter remitted to an Arbitrator
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr D Matthews (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 8 March 2007, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the appellant, and Mr D Matthews (of Counsel), by leave, on behalf of the respondent, it is this day, 1 May 2007 ordered that:-

1. The appellant have leave to amend the grounds of appeal by the deletion of both paragraphs numbered 5.
2. The appeal is allowed.
3. The decision of the Arbitrator is quashed.
4. The appellant's claim is remitted to an Arbitrator for hearing and determination according to law.

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2007 WAIRC 00409

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN DARROW STACEY
	APPLICANT
	-and-
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	TUESDAY, 1 MAY 2007
FILE NO/S	PRES 5 OF 2006
CITATION NO.	2007 WAIRC 00409

Decision	Orders and Directions
Appearances	
Applicant	Mr D Howlett (of Counsel), by leave
Respondent	Mr P Fraser (of Counsel), by leave

Order

This matter having come on for hearing before me on 20, 21 and 22 February 2007 and 26 and 27 April 2007 and having heard Mr D Howlett (of Counsel), by leave, on behalf of the applicant, and Mr P Fraser (of Counsel), by leave, on behalf of the respondent, it is this day, 1 May 2007, ordered as follows:-

1. The applicant file and serve an aid memoir setting out relevant evidence in the transcript and exhibits by 11 May 2007.

(Sgd.) M T RITTER,
[L.S.] Acting President.

AWARDS/AGREEMENTS—Variation of—

2007 WAIRC 00393

SECURITY OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	WORMALD SECURITY AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 23 APRIL 2007
FILE NO	APPL 96 OF 2006
CITATION NO.	2007 WAIRC 00393

Result	Award varied
Representation	
Applicant	Ms E. Palmer
Respondent	No appearance

Order

HAVING heard Ms E. Palmer on behalf of the applicant and there being 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 *Security Officers' Award* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period commencing on or after 2 April 2007.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 15. – Overtime: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) An officer required to work in excess of one hour after completion of his/her ordinary shift, without being notified before the completion of the previous day or shift, shall be paid a meal allowance of $9.40. A further meal allowance of $6.35 shall be paid on the completion of each additional four hours' overtime worked.

2. Clause 20. – Allowances and Conditions:

(A) Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Work Related Allowances

Officers who meet the following requirements shall be paid the following allowances in addition to their wages:

(a) Security Officers and above who are required to possess a recognised first aid certificate as a condition of employment, $9.70 per week. If an employee, at the request of his/her employer, attends a course of training the employer shall pay for the actual cost of the course and textbook expenses.

(b) Security Officers required to carry firearms in the performance of their duties, $15.10 per week, or $3.00 per day for each day a firearm is carried.

(c) Security Officers who are required to drive emergency vehicles, $4.10 per day for each day that a vehicle is driven in an emergency situation.

(d) Security Officers who are required to attend and reset alarm panels, $6.05 per week or $1.25 per day in the case of employees who work part-time or casual.

(e) Security Officers required to hold a licence in accordance with the provisions of the *Security and Related Activities (Control) Act 1996* must have, in the second and subsequent years of employment 50% of the cost of each annual licence renewal reimbursed by the employer.

(f) Where an officer is required to carry a torch, a suitable torch shall be provided and maintained in working order by the employer or an allowance of $3.11 per week (or 62 cents per day) shall be paid where a torch is required.

(g) Aviation Security Allowance

(i) An allowance of $1.04 per hour shall be payable to employees engaged in Aviation Security at the Perth International and Domestic Terminals, or any facility within the Westralia Airports Corporation (Perth Airport) boundary.

(ii) For the purpose of this clause, Aviation Security means the provision of security services including, but not limited to, passenger, goods and/or baggage security including checked baggage screening services, control room functions, guarding and controlling access to designated areas, and of security persons, property and buildings.

(iii) Aviation Security does not include traffic control (including kerbside traffic management), car parking services, or any other function for which a valid security licence is not required.

(h) Standing-by Allowance

An employee required to hold himself/herself in readiness to work after ordinary hours shall until released be paid standing-by time at ordinary rates from the time which he/she is so to hold himself/herself in readiness.

(i) Broken Shift Allowance

Where employees are required to perform their ordinary hours of duty in more than one continuous period on one day or shift, such employees shall be paid $5.76 per shift in addition to any other wage and allowances prescribed by this Award.

(B) Delete subclause (2)(b) of this clause and insert the following in lieu thereof:

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

(i) Motor Vehicle Allowance

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600-2600cc*	l600cc & under
		Rate per kilometre (cents)	
Metropolitan Area	81.7	71.1	62.8
South West Land Division	84.0	72.9	64.8
North of 23.5° South Latitude	92.1	80.3	71.6
Rest of the State	86.8	75.3	66.8

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

(ii) Motor Cycle Allowance

In all areas of the State, the motor cycle allowance will be 28.2 cents per kilometre

3. Clause 21. – Classification Structure and Wage Rates: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Senior Officials:

Any officer placed in charge of other officers shall be paid in addition to the appropriate wage prescribed, the following:

		Per Week $
(a)	if placed in charge of not less than 3 and not more than 10 other officers	24.55
(b)	if placed in charge of not less than 10 and not more than 20 other officers	37.70
(c)	if placed in charge of more than 20 other officers	48.35

And further, with the consent of the parties, the Commission records the following basis for variations:

1. The agreed Key Minimum Classification in this Award is Security Officers Grade 1.

2. For Work Related Allowances – the percentage increase in:

   - Clause 20. – Allowances and Conditions
   - Clause 21. – Classification Structure and Wage Rates

   is derived from $17 divided by $506.60 equals 3.36% (2005) and $20 divided by $523.60 equals 3.82% (2006), as prescribed by Principle 5. - Adjustment of Allowances and Service Increments of the State Wage Case:

   > "allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the arbitrated safety net increase . . . the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100."

3. For Expense Related Allowances:

   - Clause 15. - Overtime has been varied for the CPI Meals Out and Take Away Foods – Perth for the period December 2004 to June 2006 giving the percentage of 6.19%.

   $$\text{June 2006} \atop \text{December 2004} \quad \frac{171.0}{161.5} \times \frac{100}{1} = 6.19\%$$

   CPI Meals Out and Take Away Foods - Perth

   - Clause 20. – Allowances and Conditions, subclause (2)(b) has been varied for the CPI (Private Motoring Perth) for the period December 2004 to June 2006 giving the percentage of 8.50%.

   Calculations are therefore:

   $$\text{June 2006} \atop \text{December 2004} \quad \frac{157.0}{144.7} \times \frac{100}{1} = 8.50\%$$

   CPI Private Motoring – Motor Vehicles – Perth

4. This application seeks to correct the following mistypes in the Order for Application 637 of 2003 (2005 WAIRC 00646):

   - Clause 15(2). – Overtime. The meal allowance of $8.55 should have been $8.85, as per the basis for the variations incorporated at the end of the Order.
   - Clause 25. – Fares and Travelling. The allowance for a 1600-2600cc vehicle in the South West Land Division of 37.2 cents should have been 67.2 cents.

For all allowances previous rates are identified in Column A of the spreadsheet. Column B identifies the new actual rate having applied the increase. Column C the new rate identified in Column B rounded where appropriate.

WORK RELATED ALLOWANCES

KEY MINIMUM CLASSIFICATION – SECURITY OFFICER GRADE 1

Clause		A	B	C
Clause 20. – Allowances and Conditions	(1)(a)	$9.05	$9.71	$9.70
	(b)	$14.10	$15.11	$15.10
	(c)	$2.80	$3.01	$3.00
	(d)	$3.80	$4.10	
		$5.65	$6.07	$6.05
	(f)	$1.15	$1.25	
		$2.90	$3.11	
		$0.58	$0.62	
Clause 21. – Classification Structure and Wage Rates	(4)(a)	$22.90	$24.55	
	(b)	$35.10	$37.69	$37.70
	(c)	$45.05	$48.33	$48.35

EXPENSE RELATED ALLOWANCES

Clause		A	B	C
Clause 15. – Overtime	(2)	$8.85 (with correction to 637/03)	$9.40	
		$6.00	$6.37	$6.35

CPI Meals Out and Take Away Food – Perth

2007 WAIRC 00397

SECURITY OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	UNIONS WA AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	TUESDAY, 27 MARCH 2007
DELIVERED	THURSDAY, 26 APRIL 2007
FILE NO.	APPL 52 OF 2006
CITATION NO.	2007 WAIRC 00397

Catchwords	Award - Award variation - Conditions of employment - Application for new allowances/provisions - Special Case - Statement of Principles July 2006 applied - Award varied - Industrial Relations Act 1979 (WA) s 40
Result	Varied
Representation	
Applicant	Ms S Northcott
Respondent	Mr D Jones on behalf of the Chamber of Commerce and Industry of Western Australia

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings

as edited by the Commissioner)

1 This application was lodged by the Liquor, Hospitality and Miscellaneous Union ("the applicant") ("the Union") pursuant to s40 of the *Industrial Relations Act 1979* ("the Act") to vary a number of clauses in the *Security Officers' Award (No A25 of 1981)* ("the Award").

Background

2 This application, which was lodged in the Commission in April 2006, has an extensive history. As the applicant sought to vary the Award's scope clause relevant parts of the application were advertised in the Western Australian Industrial Gazette ("the WAIG") (see 86 WAIG 1001). On 8 January 2007 the applicant then lodged an amended schedule to the application proposing additional variations to the Award, including the addition of other named respondents and changes to the compassionate leave clause. The relevant parts of the amendments were again advertised in the WAIG (see 87 WAIG 229) and the applicant was required to provide a copy of the amended application to the respondents to the application and the proposed named respondents. As some of the proposed allowances appeared to vary the Award's safety net the application was referred to the Chief Commissioner for consideration as to whether or not the incorporation of these allowances should be progressed pursuant to Principle 10 of the Statement of Principles – July 2006 of the 2006 General Order Wage Case Decision. After considering the matter the Chief Commissioner determined that relevant parts of the application should be dealt with by a single Commissioner under that principle and this application was remitted to the Commission as constituted to deal with the application under Principle 10.

The Proposed Variations

3 By letter dated 21 March 2007 the Union detailed further changes to the amended schedule lodged on 8 January 2007 that it was seeking to incorporate into the Award and at the hearing the Union confirmed that these were the final variations being sought by the Union. I will not detail the specific variations being sought by the Union as the proposed changes are on the record and contained in the Union's letter to the Commission dated 21 March 2007 however the variations being sought relate to the following Award clauses:

Clause 2 – Arrangement

Clause 3 – Area and Scope

Clause 4 - Term

Clause 5 – Definitions

Clause 6 – Contract of Employment

Clause 7 – Hours

Clause 8 – Holidays

Clause 9 – Annual Leave

Clause 10 – Absence through Sickness

Clause 11 – Long Service Leave

Clause 12 – Compassionate Leave

Clause 13 – Shift Allowances

Clause 14 – Saturday and Sunday Work During Ordinary Hours

Clause 15 – Overtime

Clause 16 – Call Back

Clause 18 – Access to Records

Clause 19 – Posting of Notices

Clause 20 – Special Rates and Provisions

Clause 21 – Classification Structure and Wage Breaks

Clause 22 – Safety Provisions

Clause 26 – Maternity Leave

Clause 28 – Payment of Wages

Clause 30 – Probationary Security Officer

Clause 31 – Dispute Settlement Procedures

Clause 33 – Superannuation Record

Clause 35 – Transition and Implementation: Classification Structure

Clause 36 – Jury Service Leave

Clause 37 – Termination, Introduction of Change and Redundancy

Appendix – Resolution of Disputes Requirements

Appendix – S.49b - Inspection of Records Requirements

Schedule A – Parties to the Award

Schedule B – Respondents.

4 The applicant made assertions from the bar table that no employer bound by the Award had indicated that it contested the proposed variations and it is also the case that no objection to this application was lodged in the Commission, nor did any respondent attend the hearing of this application to object to the proposed Award variations.

5 I will deal firstly with those parts of the application which are variations based on updating and modernising the Award and the incorporation of legislative changes into the Award. I find that these changes meet the requirements of the Statement of Principles – July 2006 as they do not constitute a variation to the Award's safety net and they should therefore be incorporated into the Award and in reaching this view I note that the changes as proposed modernise and update the Award, the changes give the Award greater clarity and I accept that some of the changes rectify previous omissions and mistakes.

6 The applicant proposes that a new Clause 12. - Compassionate Leave be included in the Award and maintains that this is a standard provision currently covering the majority of Australian employees by virtue of ss257, 258 and 259 of the *Workplace Relations Act 1996* ("the WR Act"). As I am satisfied that the terms of this clause, which is a standard benchmark clause, applies to a substantial proportion of the Australian workforce then it is my view that it is appropriate that the Award be updated to include this clause. I will therefore order that the proposed new Clause 12 - Compassionate Leave be incorporated into the Award.

7 The Union is seeking the inclusion of four new allowances into the Award; a non-rotating night shift allowance, an aviation security allowance, a standing-by allowance and a broken shift allowance. I propose to deal with this part of the application pursuant to Principle 10 of the Statement of Principles – July 2006 as the inclusion of these allowances will vary the Award's safety net.

8 Ms Nashell Ireland gave evidence during these proceedings. Ms Ireland is employed by the Union as an Industrial Officer and she has been dealing with members working in the security industry for approximately two years. I accept Ms Ireland's evidence that some security officers now work a permanent nightshift, specifically in the areas of the provision of security for shopping centres and local government authorities and that working night shift on a permanent basis negatively impacts on the social life of those employees and on the flexibility that these employees have with respect to their family responsibilities. I am satisfied on the evidence that some security officers are now working permanent nightshift as opposed to working nightshifts from time to time, and that this disability has not previously been compensated in the Award and in the circumstances I am of the view that it is appropriate that employees covered by the Award who work a permanent night shift should be compensated for these disabilities by being paid the non-rotating night shift allowance being claimed.

9 I am of the view that the aviation security allowance as proposed should also be incorporated into the Award. I accept Ms Ireland's evidence that security officers working in the aviation industry require greater levels of security clearance than before due to the events of 11 September 2001 and I accept Ms Ireland's evidence that this allowance is paid to security officers working in the aviation industry in other states. My associate also informs me that the allowance as proposed is in the

same terms as the Award's counterpart Federal award. In the circumstances I find that it is therefore appropriate that this allowance be incorporated into the Award.

10 The Union proposes that a standing-by allowance and a broken shift allowance be incorporated into the Award. The Union argues that these allowances are contained in other awards of this Commission that apply to other like industries such as the hospitality industry and the Union argues that these allowances should be paid to compensate employees who suffer the disability of being required to stand-by for duty and work broken shifts. I am aware that allowances of this nature are contained in a range of awards and I accept the Union's claim that from time to time employees covered by the Award undertake these activities and are currently not recompensed for doing so. In the circumstances it is my view that both of these allowances, which in my opinion contain reasonable rates, should be incorporated into the Award.

11 In reaching the view that all of these allowances should be incorporated into the Award I note that no employer bound by the Award objected to their inclusion.

12 In conclusion and when taking into account the Statement of Principles – July 2006 and the requirements under s26 and s6 of the Act I am satisfied that all of the variations as proposed by the applicant in its amended application lodged on 8 January 2007 and letter dated 21 March 2007 should be incorporated into the Award and an order will issue in those terms.

13 I will comment on some issues raised by the Chamber of Commerce and Industry of Western Australia ("the CCI") during these proceedings. At the outset of the proceedings the CCI sought leave to intervene in these proceedings with respect to two issues. The CCI sought to ensure that no constitutional corporations were named as respondents to the Award due to the displacement of the Commission's jurisdiction over constitutional corporations given the provisions of s16 of the WR Act and the CCI advised the Commission that discussions between the Union and the CCI had taken place prior to the hearing and that as a result the applicant had agreed to delete Bax Security Services and Transurety Pty Ltd as named respondents to the Award. Even though the CCI requested that the Commission satisfy itself that no other entities to be named respondents to the Award were constitutional corporations I declined to make these enquiries as I accept the applicant's assertions at the hearing that after having undertaken business searches of the proposed respondents to the Award, to the best of its knowledge none of the proposed named respondents contained in its application were constitutional corporations. I also note that in any event even if a constitutional corporation was named as a respondent to the Award then the provisions of the WR Act would override their respondency to the extent of the scope of that act. The CCI then asked that the Commission include a variation to the Award's scope clause to include words to the effect that the Award should not apply to any employer that is a constitutional corporation within the meaning of the WR Act. I informed the CCI's representative at the hearing that I would not deal with this application at this point in time as no formal application to this effect was before the Commission and I advised the CCI that if it wished to make an application to vary the scope clause of the Award in the manner that it was proposing then it was open for it to do so and the application, if lodged, would then be dealt with in the normal manner.

14 As I am satisfied that the variations as proposed by the Union should be incorporated into the Award I will issue an order that these variations be effective from the first pay period on or after 27 March 2007.

2007 WAIRC 00294

SECURITY OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	UNIONS WA AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 28 MARCH 2007
FILE NO/S	APPL 52 OF 2006
CITATION NO.	2007 WAIRC 00294

Result Varied

Order

HAVING heard Ms S Northcott on behalf of the applicant, Mr D Jones intervening on behalf of the Chamber of Commerce and Industry of Western Australia and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Security Officers' Award (No A 25 of 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 or after 27 March 2007.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

SCHEDULE

1. Clause 1B. – Minimum Adult Award Wage: Delete this number, title and clause.

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

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

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.

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

The term of this award shall be for a period of one (1) year.

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

(1) "Security Officer" or "Officer" means a person employed to watch and/or guard and/or patrol and/or protect premises and/or property; provided that a Security Officer may perform incidental duties which need not be of a security nature.

(2) "Full time Officer" means an officer engaged for an average of 38 hours per week and paid by the week or fortnight.

(3) "Casual Officer" means an officer engaged by the hour.

(4) "Part Time Officer" shall mean an officer who is regularly employed for, and who works, between 10 and 38 hours per week.

(5) "Union" means the Liquor Hospitality and Miscellaneous Union, Western Australian Branch.

(6) "Day" means the period from midnight to midnight.

(7) "Night Shift" means any shift commencing between 5.00pm and 5.00am, or concluding between 11.00pm and 5.00am.

(8) "Afternoon Shift" means any shift commencing between 12.00 noon and 5.00pm, or concluding between 6.00pm and 11.00pm.

(9) "Continuous shifts" means an employee who is required to work ordinary hours of duty in accordance with a roster where the employee is rostered for duty over seven days of the week, and is required to work and works regularly on every day of the week, including public holidays and Sundays.

(10) "Non-Rotating Night Shift" means any shift in which night shifts are worked which do not rotate or alternate with another shift so as to give the employee at least one-third of his/her working time off night shift in each roster cycle.

(11) "Accrued Day(s) Off" means the paid day(s) off accruing to an officer resulting from an entitlement to the 38 hour week as prescribed in Clause 7. - Hours of this award.

(12) "Probationary Security Officer" means an officer who, upon commencement of employment with the employer, is required to serve a probationary period of three months in accordance with the provisions of subclause (5) of Clause 6. – Types of Employment.

(13) "Commission" means the Western Australian Industrial Relations Commission.

(14) "Union Delegate" is a workplace representative or delegate of the Union, elected or appointed according to the rules of the Union."

(15) "reasonable evidence" shall mean evidence which would satisfy a reasonable person.

(16) "immediate family" shall include

(a) the partner or *de facto* partner of an employee;

(b) the child or step-child of an employee;

(c) the brother or sister of an employee; or

(d) the parent, step-parent or grandparent of an employee.

6. Clause 6. – Contract of Employment: Delete this number, title and clause and insert the following in lieu thereof:

6. - TYPES OF EMPLOYMENT

Employees under this award must be engaged as full-time, part-time or casual officers. Before 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. Termination of employment is subject to Clause 31. – Termination of Employment and Clause 37. – Termination, Introduction of Change and Redundancy of this award.

(1) Full-time employees

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 shall:

(i) work less than full-time hours of 38 per week; and

(ii) have reasonably predictable hours of work; and

(iii) receive, 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 shall agree in writing:-

(i) on a regular pattern of work, specifying at least the number of hours worked each week, and

(ii) unless unique circumstances make this impossible the employer shall also specify which days of the week the employees shall work and daily start and finish times.

(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 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 (3)(a) of this clause.

(g) All time worked in excess of the hours agreed in paragraphs (c) or (d) of this subclause will be overtime and paid for at the rates prescribed in Clause 15.- 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) Casual Employees are engaged and paid by the hour.

(b) Casual employees must be paid a loading of 20% in addition to the applicable hourly rate in lieu of entitlements to sick and annual leave and payment for public holidays not worked.

(c) On each occasion a casual employee is required to attend work the employee is entitled to payment for a minimum of four hours work.

(d) In order to meet his or her personal circumstances a casual employee may request and the employer may agree to an engagement for less than the minimum of four hours. Any dispute about a refusal to such a request is to be dealt with as far as practicable with expedition through the dispute settlement procedures.

(e) An employer before engaging a person for casual employment must inform the employee that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed and the classification level, the actual or likely number of hours required, and the relevant rate of pay.

(f) The employer shall give to a casual employee who has been engaged for one or more periods of employment extending over three or more weeks in any calendar month, and whose employment is or is likely to be ongoing, a note in writing signed by or on behalf of the employer stating:

(i) the name and address of the employer;

(ii) if the employee has been engaged by the employer to perform work on hire to another person or company or is regularly engaged to perform work on hire to other persons or companies, a statement to that effect;

(iii) the job to be performed and the classification level on which the employee has been or is likely to be engaged;

(iv) as far as practicable, the terms of the current engagement, including the likely number and likely pattern of hours required to be worked, the casual rate or other loading applied and the base rate of pay on which the loading is applied;

(v) the contingency on which the engagement expires, or the notice, if any, that will be given to terminate any ongoing employment;

(g) It shall be sufficient compliance with paragraph (f) if the employer gives such a note in writing upon or following the first occasion on which the casual employee has been so engaged for a period or periods extending over three or more weeks in any calendar month.

(4) Conversion to full-time or regular part-time employment.

(a) This sub-clause applies to a casual employee, but not one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

(b) Notwithstanding paragraph (a) of this subclause, an employee must not be engaged and re-engaged to avoid any obligations under this award.

(c) A casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, shall thereafter have the right to elect to have his or her contract of employment converted to full-time employment or part-time employment.

(d) Every employer of such an employee shall give the employee notice in writing of the provisions of this subclause within four weeks of the employee having attained such period of six months.

(e) The employee retains his or her right of election under this clause if the employer fails to comply with this paragraph.

(f) Any such casual employee who does not within four weeks of receiving written notice elect to convert his or her contract of employment to a full-time employment or a part-time employment will be deemed to have elected against any such conversion.

(g) Any casual employee who has a right to elect under paragraph (c), upon receiving notice under paragraph (d) or after the expiry of the time for giving such notice, may give four weeks notice in writing to the employer that he or she seeks to elect to convert his or her contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer shall consent to or refuse the election but shall not unreasonably so refuse. Any dispute about a refusal of an election to convert a contract of employment shall be dealt with as far as practicable with expedition through Clause 32 - Dispute Settlement Procedure of this award.

(h) If a casual employee has elected to have his or her contract of employment converted to full-time or part-time employment in accordance with paragraph (g) of this subclause, the employer and employee in accordance with this paragraph, shall discuss and agree upon:

(i) which form of employment the employee will convert to, that is, full-time or part-time; and

(ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked.

(i) Provided that an employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert his or her contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert his or her contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed upon between the employer and employee.

(j) Following such agreement being reached, the employee shall convert to full-time or part-time employment.

(k) Any dispute about the arrangements to apply to an employee converting from casual employment to full-time of part-time employment shall be dealt with as far as practicable with expedition through the dispute settlement procedure.

(5) Probationary Security Officer

(a) An officer may only be a probationary security officer for the first three months of employment with the employer and only if the employer notifies the employee in writing prior to the engagement, and must be paid in accordance with Clause 21. - Classification Structure and Wage Rates.

(b) A probationary security officer must be appointed as a full-time, part-time or casual officer in accordance with this clause.

(c) Upon the satisfactory completion of the probationary period the employer must confirm this in writing, the officer's appointment and his/her employment status as a full-time, part-time or casual officer.

(d) A probationary security officer must, where applicable, be entitled to all of the leave benefits, allowances, loadings and penalty rates prescribed in this award.

(6) Rosters

(a) Subject to what is provided elsewhere in this subclause, full-time and part-time officers shall, by a legible notice displayed in a place accessible to such officers, be notified of the commencing and ceasing times of ordinary hours of work rostered by an employer no later than one week prior to the operative date of such roster or any subsequent operative date of an amendment thereto.

(b) A lesser period of notice than that prescribed in paragraph (a) hereof may be given by an employer in circumstances where -

(i) such is agreed between an employer and the employee in writing, or

(ii) the prescribed period of notice is not practicable because of an emergency.

(c) In any other circumstances, Clause 15. – Overtime shall apply.

7. Clause 7 – Hours - Delete this clause and insert the following in lieu thereof:

(1) (a) The ordinary hours of work for full-time employees shall be an average of 38 per week and shall be worked on not more than five consecutive days of the week.

(b) 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 (ADOs) in each 12-month period. The ADOs 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 ADO.

(c) Within a five-day, one-week cycle, of 38 hours.

(3) In addition to the foregoing the following specific provisions shall apply:

(a) The ordinary working hours in any day shall be worked within a spread of ten hours and, where a broken shift is worked, each portion of that shift shall be for a period of not less than three hours.

(b) 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 employees do not support the agreement then the issues will be referred to the Commission for conciliation and, if necessary, arbitration.

(4) An employer and employee may by agreement substitute the ADO the employee is to take off for another day; in which case the ADO shall become an ordinary working day.

(5) (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.

(d) 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 one and a half hours shall be allowed a break of ten (10) minutes duration. Such break shall be counted as time worked.

(6) Where ADOs are allowed to accumulate, the employer may require that they be taken within 12 months of the employee becoming entitled to an ADO.

(7) Any dispute over the operation of this clause must be dealt with in accordance with Clause 32. – Dispute Settlement Procedures.

8. Clause 8. – Holidays:

A. Delete the number and title of this clause and insert the following in lieu thereof:

8. – PUBLIC HOLIDAYS

B. Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) (a) Subject to the provisions of this clause, the following days (or the days observed in lieu) shall be allowed as holidays without deduction of pay:

New Year's Day

Australia Day

Good Friday

Easter Monday

Anzac Day

Labour Day

Foundation Day

Sovereign's Birthday

Christmas Day

Boxing Day.

Provided that another day may be taken as a holiday by agreement between the parties, in lieu of any of the days named in the subclause.

(b) Notwithstanding paragraph (1)(a) of this clause:

(i) When any of the holidays fall on a Saturday or a Sunday, the holiday shall be observed on the next succeeding Monday.

(ii) When Boxing Day falls on a Sunday or a Monday, the holiday shall be observed on the next succeeding Tuesday.

(iii) In each case the substituted day shall be a holiday with pay and the day for which it is substituted shall not be a holiday.

C. Delete subclause (4)(a) of this clause and insert the following in lieu thereof:

(4) (a) Where a holiday extends into the rostered day off of a weekly officer working a seven-day shift roster and the officer is not required to work on that day, the employer shall pay such officer for the time on the rostered day off falling on the public holiday, at ordinary rates.

9. Clause 9. – Annual Leave: Delete 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 2.923 hours per week for each completed week of service.

(b) An employee who is rostered to work regularly on Sundays and holidays shall be allowed one week's leave in addition to the leave to which the employee is otherwise entitled under this clause.

(c) Where pursuant to paragraph (4) of section 6 of the Long Services Leave Act 1958, employment with a transmittor is deemed to be employment with a transmittee employer, then that employment shall be deemed to be service with the transmittee for the purposes of this subclause.

(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's 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 public 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) The loading prescribed by this clause shall apply to accrued leave on termination except where: -

(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 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

(f) workers' compensation.

(6) (a) Annual leave may be taken in more than one period of leave, at the request of the employee and with the consent of the employer.

(b) Provided further that the maximum number of single day absences allowable during any twelve month accrual period shall be three.

(c) 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) 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) 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 (4) of this clause, the employee shall be liable to pay the amount representing the difference between the amount received 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. Clause 10. – Absence Through Sickness: Delete this number, title and clause and insert the following in lieu thereof:

10. – 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) An employee claiming entitlement under this clause is to provide the employer reasonable evidence 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 they produce a certificate from a registered medical practitioner that they were so confined.

(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 9. - 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 9. - 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 section 6(4) of the Long Service Leave Act 1958, 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 transmittee 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) 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 (4) 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) Carers Leave

(a) An employee is entitled to use any part 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.

(b) A member of the employee's family mentioned within paragraph (a) 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.

(c) By mutual agreement between the employer and employee an employee may be granted further sick leave credits for carers leave.

(d) An employee may take unpaid carers leave by agreement with the employer.

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

(1) Employees covered by this award shall be entitled to Long Service leave in accordance with the Long Service Leave Act 1958.

(2) When a worker proceeds on long service leave there will be no accrual towards an Accrued Day Off as prescribed in subclause (1) and (2) of Clause 7. - Hours of this award.

(3) Any long service leave accumulated as at July 1, 1985 shall be adjusted in hours in the ratio of 38 to 40.

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

(1) For the purposes of this section, compassionate leave is paid leave taken by an employee:

(a) for the purposes of spending time with a person who:

(i) is a member of the employee's family (as defined in Clause 10. – Sick Leave); and

(ii) has a personal illness, or injury, that poses a serious threat to his or her life; or

(b) after the death of a member of the employee's family or a member of the employee's household.

(2) Subject to this section, an employee is entitled to a period of two (2) days of compassionate leave for each occasion (a permissible occasion) when a member of the employee's family:

(a) contracts or develops a personal illness that poses a serious threat to his or her life; or

(b) sustains a personal injury that poses a serious threat to his or her life; or

(c) dies.

(3) However, the employee is entitled to compassionate leave only if the employee gives his or her employer evidence that the employer reasonably requires of the illness, injury or death.

(4) An employee who is entitled to a period of compassionate leave for a particular permissible occasion is entitled to take the compassionate leave as:

(a) a single, unbroken period of two (2) days; or

(b) Two (2) separate periods of one (1) day each; or

(c) any separate periods to which the employee and his or her employer agree.

(5) An employee who is entitled to a period of compassionate leave because a member of the employee's family has contracted or developed a personal illness, or sustained a personal injury, is entitled to start to take the compassionate leave at any time while the illness or injury persists.

(6) If an employee takes compassionate leave during a period, the employer must pay the employee for that period the amount the employee would reasonably have expected to be paid by the employer if the employee had worked during that period.

(7) An employee, whilst on bereavement leave 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.

13. Clause 13. – Shift Allowances: Delete this clause and insert the following in lieu thereof:

A fulltime employee may be employed on shift work. The following allowances for shift work shall be paid to officers in addition to their hourly rate in respect of all work performed during the ordinary hours of shifts as defined in subclauses (7), (8) and (10) of Clause 5. – Definitions of this award.

Afternoon Shift	15%
Night Shift	25%
Non-Rotating Night Shift	30%

An employee who works on any afternoon or night shift which does not continue for at least five successive afternoon or nights at a five day work site or for at least six successive afternoons or nights at a six day work site shall be paid at the rate of time and a half.

14. Clause 14. – Saturday and Sunday Work During Ordinary Hours: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Officers required to work their ordinary hours on a Saturday or Sunday shall be paid for all time worked at the following rates:

Saturday work – time and one half

Sunday work – double time

15. Clause 15. – Overtime:

A. Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) (a) Except as hereinafter provided, all work done outside the ordinary hours prescribed by Clause 7. – Hours of this award shall be paid at the rate of time and one-half for the first two hours and double time thereafter.

(b) Continuous shift officers shall be paid double time for all work done outside ordinary hours.

(c) For the purpose of calculating overtime, each day's work shall stand alone.

B. Immediately following subclause (4) of this clause insert a new subclause as per the following:

(5) (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 his or her intention to refuse it; and

(v) any other relevant matter.

16. Clause 16. – Call Back: Delete this clause and insert the following in lieu thereof:

An officer required to attend the employer's premises for any reason including picking up pay shall be paid for the time involved in each such attendance.

Provided further, that such officer shall be given at least eight hours off duty, excluding travelling time in excess of 30 minutes and a meal break of 30 minutes, before he is required to resume his ordinary hours. If such officer is requested to resume duty before eight hours' rest is given he shall be paid at double ordinary rates until he has been relieved from duty for a period of eight hours.

17. Clause 18. – Access to Records: Delete this number, title and clause and insert the following in lieu thereof:

18. – 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) Each employer shall keep a written record showing the name of each officer required by the employer to carry a firearm and the dates of firearms training undertaken by each such officer according to the requirements of subclause (4)(c) of Clause 20. – Allowances and Conditions of this award.

(3) The employer shall on 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.

(4) 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.

(5) An employer shall comply with a request within 48 hours.

18. Clause 19. – Posting of Notices: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Any dispute arising from the operation of this clause shall be dealt with in accordance with Clause 32. - Dispute Settlement Procedures of this award.

19. Clause 20. – Special Rates and Provisions: Delete this number, title and clause and insert the following in lieu thereof:

20. - ALLOWANCES AND CONDITIONS

(1) Work Related Allowances

Officers who meet the following requirements shall be paid the following allowances in addition to their wages:

(a) Security Officers and above who are required to possess a recognised first aid certificate as a condition of employment, $9.05 per week. If an employee, at the request of his/her employer, attends a course of training the employer shall pay for the actual cost of the course and text book expenses.

(b) Security Officers who are required to carry firearms in the performance of their duties, $14.10 per week, or $2.80 per day for each day a firearm is carried.

(c) Security Officers required to drive emergency vehicles, $3.80 per day for each day that a vehicle is driven in an emergency situation.

(d) Security Officers who are required to attend and reset alarm panels, $5.65 per week or $1.15 per day in the case of employees who work part-time or casual.

(e) Security Officers required to hold a licence in accordance with the provisions of the *Security and Related Activities (Control) Act 1996* must have, in the second and subsequent years of employment 50% of the cost of each annual licence renewal reimbursed by the employer.

(f) Where an officer is required to carry a torch, a suitable torch shall be provided and maintained in working order by the employer or an allowance of $2.90 per week (or 58 cents per day) shall be paid where a torch is required.

(g) Aviation Security Allowance

(i) An allowance of $1.04 per hour shall be payable to employees engaged in Aviation Security at the Perth International and Domestic Terminals, or any facility within the Westralia Airports Corporation (Perth Airport) boundary.

(ii) For the purpose of this clause, Aviation Security means the provision of security services including, but not limited to, passenger, goods and/or baggage security including checked baggage screening services, control room functions, guarding and controlling access to designated areas, and of security persons, property and buildings.

(iii) Aviation Security does not include traffic control (including kerbside traffic management), car parking services, or any other function for which a valid security licence is not required.

(h) Standing-by allowance

An employee required to hold himself/herself in readiness to work after ordinary hours shall until released be paid standing-by time at ordinary rates from the time which he/she is so to hold himself/herself in readiness.

(i) Broken Shift Allowance

Where employees are required to perform their ordinary hours of duty in more than one continuous period on one day or shift, such employees shall be paid $5.76 per shift in addition to any other wages and allowances prescribed by this Award.

(2) (a) Fares and Travelling

(i) Where an officer is required during his/her normal working hours, by the employer to work outside his/her usual place of employment the employer must pay the employee reasonable travelling expenses equal to the cost incurred except where an allowance is paid in accordance with subclause (2)(b) of this clause.

(ii) Where an officer is required and authorised to use their own motor vehicle in the course of their duties they must be paid an allowance not less than that provided for in subclause (2)(b) of this clause. 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.

(iii) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed in subclause (2)(b) of this clause must be made at the appropriate rate applicable to each of the separate areas or locations traversed.

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

(i) Motor Vehicle Allowance

Area Details	Engine Capacity		
	Over 2600cc	1601cc to 2600cc*	1600cc and under
		Cents per kilometre	
Metropolitan Area	75.3	65.5	57.9
South West Land Division	77.4	37.2	59.7
North of 23.5° South Latitude	84.9	74.1	66.0
Rest of the State	80.0	69.4	61.6

* Motor vehicles with rotary engines are to be included in the 1601-2600cc category.

(ii) Motor Cycle Allowance

In all Areas of State, the motorcycle allowance will be 26.0 cents/Km.

(3) Location Allowance

(a) 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 full-time 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	$17.80
Argyle	$46.80
Balladonia	$17.90
Barrow Island	$30.40
Boulder	$7.40
Broome	$28.40
Bullfinch	$8.40
Carnarvon	$14.50
Cockatoo Island	$31.20
Coolgardie	$7.40
Cue	$18.10
Dampier	$24.60
Denham	$14.50
Derby	$29.50
Esperance	$5.30
Eucla	$19.80
Exmouth	$25.70
Fitzroy Crossing	$35.70
Goldsworthy	$15.70
Halls Creek	$41.00
Kalbarri	$6.20
Kalgoorlie	$7.40
Kambalda	$7.40
Karratha	$29.40
Koolan Island	$31.20
Koolyanobbing	$8.40
Kununurra	$46.80
Laverton	$18.00
Learmonth	$25.70
Leinster	$17.80
Leonora	$18.00
Madura	$18.90
Marble Bar	$45.00
Meekatharra	$15.60
Mount Magnet	$19.50
Mundrabilla	$19.40
Newman	$17.00
Norseman	$15.40
Nullagine	$44.90
Onslow	$30.40
Pannawonica	$23.00
Paraburdoo	$22.90
Port Hedland	$24.50
Ravensthorpe	$9.40
Roebourne	$33.80
Sandstone	$17.80
Shark Bay	$14.50
Shay Gap	$15.70

TOWN—*continued*	PER WEEK
Southern Cross	$8.40
Telfer	$41.60
Teutonic Bore	$17.80
Tom Price	$22.90
Whim Creek	$29.20
Wickham	$28.30
Wiluna	$18.00
Wittenoom	$39.80
Wyndham	$44.00

(b) Except as provided in paragraph (c) of this clause, an employee who has:

(i) a dependant must be paid double the allowance prescribed in paragraph (a) of this clause;

(ii) A partial dependant must be paid the allowance prescribed in paragraph (a) of this clause, in addition to the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.

(c) Where an employee:

(i) is provided with board and lodging by his/her employer, free of charge; or

(ii) 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 must be paid 66. 7% of the allowances prescribed in paragraph (a) of this clause.

(d) Subject to paragraph (b), junior employees, casual employees, part-time employees, apprentices receiving less than adult rate and employees employed for less than a full week must 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.

(e) Where an employee is on annual leave he/she must be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(f) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she must only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

(g) For the purposes of this clause:

(i) Dependant means -

(aa) a spouse or defacto spouse; or

(bb) a child where there is no spouse or defacto spouse;

who does not receive a district or location allowance, but must exclude a dependant whose salary/wage package includes a consideration of the purposes for which the location allowance is payable pursuant to the provisions of this clause.

(ii) Partial Dependant means a dependant as prescribed in subparagraph (i) of this paragraph who receives a district or location allowance which is less than the location allowance prescribed in paragraph (a) of this clause.

(h) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of this clause, must 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 Labour Council of Western Australia or, failing such agreement, as may be determined by the Commission.

(i) Subject to the making of a General Order pursuant to s.50 of the *Western Australian Industrial Relations Act*, that part of each location allowance representing prices must 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.

(4) Conditions

(a) The employer shall provide adequate shelter and amenities for the officers at each work site.

(b) An officer shall not carry firearms unless required to do so by the employer. Where an officer is required to carry firearms, such firearms shall be provided and maintained in a reasonable condition by the employer.

(c) Where an officer is required by the employer to carry firearms, initial training in the use of such firearm shall be provided and such training time shall be counted as time worked. Paid refresher courses shall be conducted at six-monthly intervals thereafter.

(d) Where it is necessary for an officer to attend a Court in connection with any matter arising out of or in connection with his/her duties, the time so occupied shall count as time worked.

(e) Accommodation for Meals:

Where practicable, employers shall allow static officers to partake of their meals, crib breaks or tea breaks in a suitable place protected from the weather and every such officer shall be provided by the employer with adequate facilities for tea making and for heating food. This provision shall not apply to mobile patrol employees.

(f) Where the employer requires an employee to wear a uniform, the following provisions shall apply -

(i) The uniform issue shall be provided by the employer and shall be replaced on a fair wear and tear basis.

(ii) For full-time or part-time employees the uniform issue shall be as follows:

3 shirts

2 pairs of trousers or slacks or skirts

1 tie or scarf

1 jacket or jumper

(iii) For casual employees the uniform issue shall be as follows:

2 shirts

1 pair of trousers or slacks or skirt

1 tie or scarf

1 jacket or jumper

(iv) The employee shall be responsible for the laundering of and the cost of laundering any uniform supplied.

(g) Protective Clothing:

Where an officer is required to work in wet conditions, he/she shall be supplied with suitable wet weather clothing and boots. Such clothing shall remain the property of the employer.

20. Clause 21. – Classification Structure and Wage Rates: Delete this clause and insert the following in lieu thereof:

(1) 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.

(a) SECURITY OFFICER - LEVEL 1

(i) A Security Officer - Level 1 is an employee who performs work to the level of his or her training.

(ii) Indicative of the tasks which an employee at this level may perform are the following;

(aa) Watch, guard or protect premises and/or property;

(bb) 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;

(cc) Respond to basic fire/security alarms at their designated post;

(dd) 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.

(b) SECURITY OFFICER - LEVEL 2

(i) 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.

(ii) Indicative of the tasks which an employee at this level may perform are the following:

(aa) 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

(bb) 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).

(cc) May be required to perform the duties of Security Officer - Level 1.

(dd) Monitors and acts upon walk through magnetic detectors; and/or monitor, interpret and act upon screen images using x-ray imaging equipment.

(ee) The operation of a public weighbridge by a Security Officer appropriately licensed to do so.

(c) SECURITY OFFICER - LEVEL 3

(i) 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.

(ii) Indicative of the tasks which an employee at this level may perform are the following:

(aa) 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.

(bb) 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.

(iii) A Security Officer Level 3 is also required to perform the duties of a Security Officer - Level 1 and/or Security Officer - Level 2.

(d) SECURITY OFFICER - LEVEL 4

(i) 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.

(ii) Indicative of the tasks which an employee at this level may perform are the following:

(aa) Monitoring, recording, inputting information or reacting to signals and instruments related to electronic surveillance of any kind within a central station.

(bb) Keyboard operation to alter the parameters within an integrated intelligent building management and/or security system.

(cc) The co-ordinating, monitoring or recording of the activities of Security Officers utilising a verbal communications system within a central station.

(iii) A Security Officer Level 4 is also required to perform the duties of Security Officers at Levels 1 and/or 2 and/or 3.

(2) WAGE RATES

(a) The minimum rate of wage payable under this award shall be as follows:

Classification	Minimum Rate
	$
Security Officer-Level 1	543.60
Security Officer-Level 2	558.70
Security Officer-Level 3	569.10
Security Officer-Level 4	579.50

(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.

(3) A probationary Security Officer shall be paid 96% of the weekly wage rate prescribed for a Security Officer - Level 1 or Security Officer - Level 2 whichever is applicable and, if the officer is a casual, the casual loading referred to in subclause (3)(b) of Clause 6. – Types of Employment in the award.

(4) Senior Officers:

Any officer placed in charge of other officers shall be paid in addition to the appropriate wage prescribed, the following:

		Per Week
		$
(a)	if placed in charge of not less than 3 and not more than 10 other officer	22.90
(b)	if placed in charge of not less than 10 and not more than 20 other officers	35.10
(c)	if placed in charge of more than 20 other officers	45.05

21. Clause 22. – Safety Provisions to Clause 35. – Transition and Implementation: Classification Structure inclusive: Delete these numbers, titles and clauses and insert the following in lieu thereof:

22. – 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 $504.40 per week payable on and from 7 July 2006.

(3) The Minimum Adult Award Wage 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 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.

(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 2006 General Order 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 $421.70 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 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 apprenticeship.

(d) Nothing in this 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.

23. – SAFETY PROVISIONS

(1) A reasonable means of communication must be available for a security officer to communicate with headquarters.

(2) Any dispute as to whether a means of communication is reasonable, for the purposes of this clause, may be resolved in accordance with the Clause 32. - Dispute Settlement Procedures of this award.

(3) Employees shall at all times be protected from all adverse affects of work, including but not being limited to noise, heat, cold, dust, chemicals, radiation (ionizing and non-ionizing), vibration and non-ergonomic design of work, tools and work places, and this shall be the responsibility of the employer.

(4) Liberty to apply is reserved to the Union in relation to the insertion of a subclause providing for the wearing of radiation monitoring badges.

(5) The employer is required to provide without charge to the employee safety footwear to be replaced on a fair wear and tear basis provided the employee is working in one of the following areas:

(a) As a Mobile Patrol Officer; or

(b) On a site designated a construction site in accordance with the Occupational Safety and Health Act, 1984; or

(c) On a site where the client company designates that safety footwear should be worn at that workplace; or

(d) Where it is deemed appropriate.

(6) All employees, from commencement of employment, must be given full and appropriate training in all aspects of work that they may be called upon to perform. Such training is the responsibility of the employer, but need not be conducted by the employer.

24. - NO REDUCTION

Nothing contained in this award shall entitle an employer to reduce the wage of any officer who at the date of this award is being paid a higher rate of wage than the minimum prescribed for his or her class of work.

25. - RIGHT OF ENTRY

(1) An authorised representative of the Union may enter, during working hours, any premises where relevant employees work, for the purpose of –

(a) holding discussions at the premises with any relevant employees who wish to participate in those discussions;

(b) investigating any suspected breach of the Industrial Relations Act 1979, 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 such employee.

(2) Authorised representative means a person who holds an authority in force under Division 2G of the Industrial Relations Act 1979 (as amended).

(3) A 'relevant employee' means an employee who is a member of the Union or who is eligible to become a member of the Union.

(4) 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 employers premises, at least 24 hours written notice; or

(b) if the records or other documents are kept elsewhere, at least 48 hours written notice.

26. - UNION DELEGATES

(1) In an establishment a Union Delegate may be elected by the employees. Such Delegate shall be recognized 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/she 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) The employer acknowledges that Union Delegates have an important role to play in the change, consultation, collective negotiation, communication, grievance and disciplinary processes.

(5) Union Delegates shall:

(a) be treated fairly and be able to perform their role as union delegate without any discrimination or victimization in their employment;

(b) have access to facilities for the purpose of carrying out union work as a delegate and consulting with workplace colleagues and the union such as telephone, facsimile, photocopying, Internet and e-mail;

(c) have access to reasonable information about the workplace and the business and be involved in genuine consultation prior to decisions, which impact on union members being taken;

(d) be provided with paid time to represent the interests of members to the employer and industrial tribunals;

(e) be provided with six (6) days per year paid time to participate and attend, accredited union education;

(f) be provided with paid time to research and prepare prior to all negotiations with management;

(g) be able to consult with staff during normal working hours;

(h) be able to address new employees about the benefits of union membership at the time they enter employment;

(i) be released for two (2) additional paid days to attend the annual Union Delegate Convention.

27. - PARENTAL LEAVE

(1) Subject to the terms of this clause employees are entitled to parental leave and full-time employees may elect to work part-time in connection with the birth or adoption of a child.

(2) The provisions of this clause apply to full time, part time and eligible casual employees, but do not apply to other casual employees.

(3) An eligible casual employee means a casual employee:

(a) employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months; and

(b) who has, but for the pregnancy or the decision to adopt, a reasonable expectation of ongoing employment.

(4) 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).

(5) An employer must not fail to re-engage a casual employee because:

(a) the employee or employee's partner is pregnant; or

(b) the employee is or has been immediately absent on parental leave.

(6) The rights of an employer in relation to engagement and re-engagement of casual employees are not affected, other than in accordance with this clause.

(7) 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 (8)(a);

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

(8) Entitlement to Parental Leave

(a) Subject to subclauses (10), (11)(a) and (12)(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).

(9) Parental 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.

(10) 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.

(11) 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.

(12) 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.

(13) 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 (16), 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 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.

(14) 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.

(15) 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 parental leave entitlement.

(16) 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 parental leave for the purposes of this clause.

(17) 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.

(18) 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.

(19) Special Parental 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 parental 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 parental 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 (14), (20) and (21) hereof, parental leave shall include special parental 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 (16), 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.

(20) Parental Leave and Other Leave Entitlements

(a) An employee may, in lieu of or in conjunction with parental 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.

(21) 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 parental 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.

(22) 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) Effect of Parental Leave on Accrued Day Off

(a) When a worker proceeds on parental leave there will be no accrual towards an Accrued Day Off as prescribed in subclauses (1) and (2) of Clause 7. – Hours of this award.

(b) When a worker proceeds on parental leave the employer may pay a worker the amount of hours accrued towards a Accrued Day Off as prescribed in subclauses (1)(and (2) of Clause 7. – Hours of this award.

28. - LIBERTY TO APPLY

Liberty to apply is reserved to either of the parties to the award with respect to wages and conditions of employment for security officers employed on major construction projects.

29. – PAYMENT OF WAGES

(1) Wages will be paid by either cheque, cash or direct deposit into the employee's nominated bank account at the discretion of the employer. If the employer requires the employee to pick up his or her wages from a particular place, the employee will be paid ordinary rates for the time involved in doing so.

(2) The employer shall keep no more than two working day's pay in hand in the case of all employees. Provided that this subclause shall not apply in the case of computer breakdown or other unforeseen circumstances for which the employer cannot be held responsible.

(3) With each pay, all employees must be provided with a pay advice detailing the employee's hourly rate, overtime, penalties, allowances, gross wage, deductions – broken down to: taxation; other and net wage.

(4) No deduction shall be made of an Officer's wages unless the Officer has authorised such deduction in writing.

30. - EFFECT OF 38-HOUR WEEK

(1) Termination

(a) An Officer subject to the provisions of subclause (1) of Clause 7. - Hours of this award who has not taken any Accrued Days Off accumulated during a work cycle in which employment is terminated, shall be paid the total of hours accumulated towards the Accrued Days Off for which payment has not already been made.

(b) An Officer who has taken any Accrued Day Off during a work cycle in which employment is terminated shall have the wages due on termination reduced by the total hours for which payment has already been made but for which the Officer had no entitlement toward those Accrued Days Off.

(2) Workers' Compensation

(a) 20 Day Work Cycle

(i) Where a worker is on workers' compensation for periods for less than one complete 20 day work cycle, such Officer will accrue towards and be paid for the succeeding Accrued Day Off following such absence.

(ii) An Officer will not accrue Accrued Days Off for periods of workers' compensation where such period of leave exceeds one or more complete 20 day work cycles.

(iii) Where a worker is on workers' compensation for less than one complete 20 day work cycle and an Accrued Day Off falls within the period, the Officer will not be re-rostered for an additional Accrued Day Off.

(b) 12 Months' Work Cycle

(i) Where a worker is on workers' compensation for period for less than a total of 20 consecutive work days in a work cycle such Officer will accrue towards and be paid for the succeeding Accrued Days Off following such leave.

(ii) Where a worker is on workers' compensation for periods greater than a total of 20 consecutive days in a work cycle such Officer will have the period of workers' compensation added to the work cycle.

(iii) Where a worker is on workers' compensation for greater than 20 consecutive work days and an Accrued Day Off as prescribed in subclause (1) of Clause 7. - Hours of this award falls within the period the Officer shall be re-rostered for another Accrued Day Off on completion of the 20 week work cycle following such absence.

(3) Leave Without Pay

(a) 20 Day Work Cycle

An Officer who is absent on any form of leave without pay during a 20 day work cycle shall not accumulate an entitlement to an Accrued Day Off for the period of such leave nor will the Officer be entitled to an Accrued Day Off whilst on leave without pay.

(b) 12 Months' Work Cycle

(i) An Officer who is absent on any form of leave without pay for less than a total of five days in any work cycle shall not have payment reduced when proceeding on Accrued Days Off.

(ii) An Officer who is absent on any form of leave without pay for a total of five days or more in any work cycle will have such period of leave added to the work cycle.

(4) Payment of Wages

An Officer shall be paid for Accrued Days Off at the rate, including penalties, at which it was accumulated.

31. - TERMINATION OF EMPLOYMENT

(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) may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of gross misconduct in which case the employee 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) 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 their engagement or the forfeiture or payment of one week's pay by the employee to the employer in lieu or notice.

32. – DISPUTE SETTLEMENT PROCEDURES

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:

Step 1

As soon as practicable after the dispute has arisen, it shall be considered jointly by the appropriate supervisor, the employee or employees concerned and, where requested, by the union delegate.

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 an official of the Union

Step 3

If the dispute is not resolved it may then be referred to the Western Australian Industrial Relations Commission for assistance and if required arbitration.

At all times whilst a dispute or matter is being resolved in accordance with this clause, the status quo shall be maintained unless an employee has a reasonable concern about their health and safety.

33. - TRAINING PROGRAMME AND LEAVE

(1) An employer shall, either through consultation in accordance with Clause 35. - Structural Efficiency and Award Modernisation hereof, or through the establishment of a training committee, develop a training programme consistent with -

(a) the current and future skill needs of the enterprise;

(b) the size, structure and nature of the operations of the enterprise;

(c) the need to develop vocational skills relevant to the enterprise and the security industry through courses conducted by accredited educational institutions and providers.

(2) Should it be agreed that a training committee be established, such committee shall be constituted by equal numbers of employer and employee representatives and have a charter which clearly states its role and responsibilities. The charter may include, for example -

(a) formulation of a training programme and availability of training courses and career opportunities to employees;

(b) dissemination of information on the training programme and availability of training courses and career opportunities to employees;

(c) recommendation of individual employees for training and reclassification;

(d) monitoring and advising management and employees regarding the ongoing effectiveness of the training.

(3) An employee who is approved to attend, and so attends, additional training established by a programme developed pursuant to this clause, shall -

(a) not lose wages for a period of absence from duty to attend such training when it is undertaken during the employee's normal rostered hours of duty;

(b) be paid the appropriate ordinary time rates for any period of attendance at such training which occurs outside of, or in excess of, the employee's normal rostered hours of duty.

34. – SUPERANNUATION

(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) Westscheme 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.

35. - STRUCTURAL EFFICIENCY AND AWARD MODERNISATION

(1) The parties to this award are to co-operate positively to increase the efficiency and productivity of the security industry and to enhance the career opportunities and job security of employees in the industry.

(2) At each workplace or enterprise the employer, employees and the Union shall establish a consultative mechanism and procedures appropriate to the size, structure and needs of the workplace or enterprise. Measures raised by the parties for consideration consistent with the objectives of subclause (1) hereof shall be processed through that consultative mechanism and procedures.

(3) Considerations consistent with subclause (1) hereof shall include measures related to implementation of a new classification structure, the facilitative provisions contained in this award and matters concerning training.

(4) Without limiting the rights of either the employer or the Union to arbitration, any other measures designed to increase flexibility at a workplace/enterprise sought by any party shall be notified to the Commission and by agreement of the parties involved shall be implemented subject to the following requirements -

(a) The majority of employees affected by any change at the workplace must genuinely agree to such change.

(b) Employees shall not lose income applicable to their ordinary hours of work as a result of the change.

(c) The Union must be a party to the agreement.

(d) The Union shall not unreasonably oppose any agreement.

(e) Any agreement shall be subject to approval by the Western Australian Industrial Relations Commission and, if approved, shall operate as a schedule to this award and take precedence over other provisions of this award to the extent of any inconsistency.

36. - JURY SERVICE LEAVE

An employee required to attend for jury service during ordinary working hours shall be reimbursed by the employer an amount equal to the difference between the amount paid in respect of the attendance for such jury service and the amount of wage which would have been paid had the employee not been on jury service. An employee shall notify the employer as soon as possible of the date upon which the employer is required to attend for jury service. Further, the employee shall give the employer proof of such attendance, the duration of such attendance and the amount received in respect of such jury service.

37. – 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

Period of continuous service—*continued*	Severance 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 section 6 of the Long Service Leave Act 1958 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 transmittor") to another employer (in this subclause called "the transmittee"), in any of the following circumstances:

(aa) 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

(bb) Where the employee rejects an offer of employment with the transmittee:

(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 transmittor; and

(B) 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.

(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.

22. Appendix – Resolution of Disputes Requirements: Delete this title and Appendix in its entirety.

23. 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.

24. Schedule B – Respondents: Delete this schedule and insert the following in lieu thereof:

Callaghan Security Services

PO Box 644

Gosnells WA 6110

Dolphin Security Service

42 Dower Street

Mandurah WA 6210

FDL Security

PO Box 6548

East Perth WA 6892

Inline Security WA

PO Box 2564

Malaga WA 6944

Icarus Security

PO Box 1848

Geraldton Private Boxes

WA 6531

Henley Brook Security

PO Box 2138

Ellenbrook WA 6069

Astute Security Services

PO Box 1632

Midland Private Boxes WA 6936

25. Appendix – S.49B – Inspection of Records Requirement: Delete this title and Appendix in its entirety.

NOTICES—Award/Agreement matters—

2007 WAIRC 00421

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 36 of 2007

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "STATE LAW PUBLISHER INDUSTRIAL AGREEMENT 2007"

NOTICE is given that an application has been made by the Director General, Department of Premier and Cabinet and another 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.

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by this Agreement are the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch, and the employer as listed in Schedule 1 of this Agreement.

5.2 This Agreement shall apply to all employees who are members of or eligible to be members of the Union and covered by the Agreement. At the date of registration the approximate number of employees bound by the Agreement is 6.

5.3 To the extent that there is any inconsistency between the provisions of Schedule 2 of the Agreement and the main body of the Agreement, the main body of the Agreement will prevail.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

DATED at Perth this 7th day of May 2007.

J. SPURLING,
Registrar.

2007 WAIRC 00422

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 35 of 2007

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "T.L.C. EMERGENCY WELFARE FOUNDATION OF WESTERN AUSTRALIA (INC.) ENTERPRISE BARGAINING AGREEMENT 2007"

NOTICE is given that an application has been made by the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch and another 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.

5.0 SCOPE AND AREA OF OPERATION

5.1 This agreement will operate in the State of WA and apply to all employees eligible to be members of the Union employed by T.L.C. Emergency Welfare Foundation of Western Australia (Inc.) at 98 Edward Street, Perth.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

DATED at Perth this 7th day of May 2007.

J. SPURLING,
Registrar.

INDUSTRIAL MAGISTRATE—Claims before—

2007 WAIRC 00407

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	TERENCE WILLIAM MILES
	CLAIMANT
	-v-
	BRENDON PENN NOMINEES PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR
HEARD	THURSDAY, 29 MARCH 2007
DELIVERED	THURSDAY, 29 MARCH 2007
CLAIM NO.	M 238 OF 2004
CITATION NO.	2007 WAIRC 00407

Representation

Claimant	Mr P Brunner (of Counsel) instructed by *Kott Gunning Lawyers* appeared for the Claimant.
Respondent	Mrs C McKenzie (of Counsel) instructed by *McKenzie Lalor, Barristers and Solicitors* appeared for the Respondent.

REASONS FOR DECISION

(Given extemporaneously at the conclusion of submissions. Extracted from the transcript of proceedings and edited by His Honour)

1 This matter has come back to me by order of the Full Bench of the Western Australian Industrial Relations Commission as a result of an appeal to that body. The decision was delivered on 24 November 2006 and the Full Bench remitted the matter back to me for further hearing and determination according to law in light of its finding that the Claimant was in fact an employee and not a subcontractor.

2 The original claim was made under the *Workplace Relations Act 1996* (the Act), which is a Commonwealth Act, and when dealt with by me I was exercising the Federal jurisdiction as an eligible Court as provided for in section 170NE of the Act. Under the Act any appeal from a Magistrates Court lies to the Court which is defined as the Federal Court of Australia in section 4(1). (See section 422(1) of the Act).

3 I make that comment and say that the Full Bench of the Western Australian Industrial Relations Commission is a creature of statute and its appeal jurisdiction is clearly set out in Part III (section 84) of the *Industrial Relations Act 1979*. It had no jurisdiction to hear an appeal from this Court when exercising its Federal jurisdiction.

4 I accept however that I am bound at this stage by the decision of the Full Bench and I am dealing with this matter on that basis. I do not intend to go through all the evidence generally. There are certain findings that I made which have not been overturned by the Full Bench. My finding was that there was an agreement between the parties, which was not a sham, and as I have said, although the agreement was oral and lacked detail, I was satisfied that both parties understood what was agreed and this was demonstrated by the performance and expectations of each. The Claimant as I have said initiated and accepted the arrangement willingly and accepted the conditions agreed. He was prepared to work as many hours as agreed at the rate that was agreed, which was well above the award rate.

5 I have been referred to the case of *James Turner Roofing v Peters 83 WAIG 427*, as was the Full Bench, but it seems to me that this claim can be distinguished to some extent from that case in that it was James Turner Roofing, the employer, which considered Peters, the employee, to be a subcontractor. Peters had always considered himself to be an employee and complained about the entitlements that were due to him almost, as was mentioned in that case "*from the inception of the employment*". He complained on a regular basis, it would seem, about overtime, public holidays, redundancy, rest and meal breaks, and rostered days off.

6 In *James Turner Roofing* it was held that there was an agreed rate of $25.00 an hour which was considered an "*all in*" rate for the hours worked. The Industrial Appeal Court considered the so called "*set off*" rules and held that set off came about in relation to those items which were contemplated by the employee or employer at the time. It allowed a set off in relation to some of those payments.

7 In my view this case can be distinguished to some extent from *James Turner Roofing* in that it was clearly the intentions of the parties that all entitlements that were payable to Mr Miles were to be included in the hourly rate that was being paid. I suppose what I should have found, and I believe I did in as many words, that, having been corrected in relation to the relationship between the parties, it is fairly clear to me on the evidence that the parties were bound by the *Mobile Crane Hiring Award 2002* (the Award), and I am approaching these reasons on that basis, that the parties were bound by the Award and I do not believe there is any merit in any argument to the contrary.

8 There are a number of items which are payable under the Award which have been set out, as it happens, by the Respondent and that includes those general items that are considered on a weekly or monthly basis as they become due, for example, the ordinary rate, the overtime rate (one and a half times or double time), travel, meal allowances, public holidays, living away from home allowance, and shift work. They are all items that Mr Miles accepted as being included in the hourly rate he was paid.

9 Mr Penn said that he turned his mind to the Award when calculating what would be an appropriate rate which would cover all the obligations on him under the Award and it seems on the evidence before me that in relation to those items the hourly rate that was paid to Mr Miles covered all of those items and in fact he was paid more than he was entitled to under the Award. For three years he made no complaint compared with Peters in *James Turner Roofing* who had an expectation in relation to those items that I have mentioned at an early stage in the employment relationship or during his employment.

10 So the fact that Mr Miles was paid in excess of his entitlement in relation to those payments that would be expected to be considered, probably weekly if the pay period was weekly, any shift work, any overtime, any travel would be included in that weekly payment. The evidence before me is that there was an expectation that any leave entitlements would be included in the hourly rate, and it seems by the performance of Mr Miles and the Respondent that there was no expectation that Mr Miles would be paid for public holidays. As I said, in view of the amount paid there cannot be, in my view, any claim that there was a breach of the Award by way of an underpayment and even if there were an underpayment in relation to any particular entitlement, it could be "*set off*" by any overpayment under the Award. There is no evidence that he was in fact underpaid. It seems to me in relation to those matters that there is no breach.

11 It is the case in relation to redundancy and notice that the authorities suggest that the parties cannot turn their mind to something that may or may not happen in the future, and I do not think there is any suggestion on the evidence that the parties turned their mind to notice or redundancy pay, although Mr Miles did concede that he was surprised when he was paid two weeks redundancy.

12 The authorities are quite clear that if an award applies the parties cannot contract out of that award, and that any entitlements under the award are payable. As I have said in relation to *James Turner Roofing*, there are some items which it was said that the parties could not have turned their mind to in particular and it seems to me the issue of notice and the issue of redundancy does not become an issue until the end of the term of employment.

13 I should also address the issue of estoppel as it has been raised. I decided in my decision, as it turned out wrongly, that Mr Miles was estopped from claiming to be an employee. But having said that I do not believe that estoppel as it has subsequently been raised could apply to something which is provided for in the Award and which could not have been in the contemplation of the parties at the time. As I have indicated, the parties cannot contract out of the Award and it follows that any payments due in relation to notice and redundancy cannot be set off as provided in the case of *James Turner Roofing* and I am required to allow that part of the claim.

14 I dealt with the issue of superannuation. I do not believe I have any need or power to make any orders in relation to that. I have found that the parties, for the reasons that I have given, turned their mind impliedly to the matters that have been claimed by way of annual leave, annual leave loading, traveling allowance, meal allowance, public holidays, living away from home allowance and shift penalties, but I believe that I am required to make an order in relation to notice and redundancy.

15 I am prepared to allow interest at the rate of 6 per cent from the date of the claim, being 8 September 2004, but I do not believe that a penalty is appropriate. This is a case where the Claimant as I have found was very instrumental in the relationship between the parties being as it was. Mr Penn was not keen, as I understand from the evidence, on making an exception for the Claimant but agreed to on Mr Miles' insistence and Mr Penn cannot be criticised for that. It does not seem to me to be a case where a penalty is appropriate.

16 There will be an order that the Respondent pay the Claimant the sum of $6677.50, plus interest at the rate of 6 per cent with effect from 8 September 2004 and the question of costs will be adjourned.

WG Tarr
Industrial Magistrate

2007 WAIRC 00394

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	DANNY MICHAEL PAGODA
	CLAIMANT
	-v-
	WESLEY COLLEGE
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR
HEARD	WEDNESDAY, 20 DECEMBER 2006, WEDNESDAY, 24 JANUARY 2007, THURSDAY, 25 JANUARY 2007, THURSDAY, 29 MARCH 2007
DELIVERED	THURSDAY, 5 APRIL 2007
CLAIM NO.	M 89 OF 2006
CITATION NO.	2007 WAIRC 00394

Result	Claimant found to be part-time employee.
Representation	
Claimant	Mr M Holler, instructed by *W L & K J Everett, Barristers & Solicitors,* appeared for the Claimant.
Respondent	Mr M Jenson, instructed by *Lavan Legal, Lawyers* appeared for the Respondent**.**

SUPPLEMENTARY REASONS FOR DECISION

1 These Supplementary Reasons for Decision deal with the question of whether the Claimant was a full time or part time employee.

2 The ***Independent Schools (Boarding House) Supervisory Staff Award No A 9 of 1990*** (the Award), in this case, provides for part time employees in clause 9 and that clause reads:

> ***9. – PART TIME EMPLOYEES***
>
> *(1) Notwithstanding anything contained in this award, a part time employee may be employed for less hours per week than are usually worked in the boarding house by full time employee.*
>
> *(2) A part time employee shall be paid salary and receive payment for vacation leave, sick leave and long service leave, at a rate in proportion that the employee's hours bear to the usual full time hours per week at that boarding house.*

3 Nowhere in the Award are the hours per week that are usually worked in the boarding house by a full time employee.

4 Clause 7 of the Award provides for hours of duty as follows:

> ***7. – HOURS OF DUTY***
>
> *(1) Subject to this award, the working days and hours of duty shall be determined by written agreement between the employer, the employee and the union.*
>
> *(2) In the event of no agreement being reached in regard to hours of duty then the matter may be referred to the Western Australian Industrial Relations Commission for determination.*

5 There is no evidence before me of any written agreement between the employer, the employee and the union, nor any evidence of the matter being referred to the Western Australian Industrial Relations Commission for determination.

6 Clause 8, under the heading Rosters, provides:

> *(1) The hours of duty for each employee shall be set out in a roster which shall contain the following details:*
>
> *(a) the name of the employee/s;*
>
> *(b) the starting and finishing times of each employee's shift, including any breaks which may be required during such shift;*
>
> *(c) the day/s on which each employee is off duty.*
>
> *(2) Such rosters shall be drawn up and posted one week in advance and may only be altered by agreement between the employer and the employee concerned.*
>
> *(3) Where agreement cannot be reached, pursuant to subclause (2), the employer may change the roster provided that not less than twelve hours notice of such change is given to any employee so affected.*

7 The ***Minimum Conditions of Employment Act 1993***, in part 2A, deals with reasonable hours of work, and in section 9A provides:

> ***9A. Maximum hours of work***
>
> *(1) An employee is not to be required or requested by an employer to work more than –*
>
> *(a) either –*
>
> *(i) the employee's ordinary hours of work as specified in an industrial instrument that applies to the employment of the employee; or*
>
> *(ii) if there is no industrial instrument that specifies the employee's ordinary hours of work, 38 hours per week;*
>
> . . .

8 It is generally the evidence of and for the Claimant that he was rostered to work one evening roster (usually on a Tuesday between 5.00 pm and 11.00 pm) per week and one morning roster per week (usually on a Wednesday between approximately 7.00 am and 8.30 am) in each week of each school term.

9 Resident Masters were also rostered and were required to be on duty on weekends during each term. The evidence before me is conflicting as to the actual requirement. There appears to be a requirement for each to work five or six full day duties per year, plus about four shifts involving Friday, Saturday or Sunday evenings, and/or a support Master on Duty duty each term.

10 The hours for the weekend rosters are set out hereunder:

Friday	5.00 pm to Midnight
Saturday	7.30 am to Midnight
or	6.00 pm to Midnight
Sunday	8.00 am to 11.00 pm
or	5.00 pm to 11.00 pm

11 Although I have been told the terms are of ten weeks' duration, the roster suggests staff are not rostered for week ten for many terms, and term four was usually an eight week term.

12 On average the Claimant would be rostered to work one full day per term between 7.30 am and Midnight, a total of sixteen and a half hours, and four evening shifts of six or seven hours. A total of about forty four and a half hours per term, averaging approximately five hours per week or a total of about twelve and a half hours per week when added to the Tuesday evening and Wednesday morning commitment.

13 I accept the Claimant's evidence that there were many occasions when he was not rostered for duty and in residence that he was involved with the boarders in some way or another and there was an expectation that he would not turn a blind eye but deal with issues that might arise. However, when he was not rostered on duty, he was under no obligation to remain in the residence. That allowed the Claimant to engage in other employment, including with Wyvern Academic Services between April 2001 and May 2002, and in a full time capacity with the Western Australian Farmers Federation from November 2003 until the date of termination with the respondent in 2005.

14 There were other Resident Masters on duty that had a formal obligation to perform the duties of a Master on Duty, and even between Midnight and 7.00 am when no one was rostered; there were other Resident Masters living in and a Head of Boarding not far away.

15 Notwithstanding the Claimant's involvement when not rostered on duty, this is a claim alleging a breach of the Award, and I am required to consider the claim applying the terms of the Award and the obligation of the employer under the Award.

16 I have noted the Award does not specify the hours of duty which would apply to a full time employee, but provides that the hours of duty shall be set out in a roster and they are the hours for which the Award has application.

17 I have referred to the ***Minimum Conditions of Employment Act 1993***, and that provides for ordinary hours of work to be 38 hours per week if not specified in any industrial instrument. It follows, in my view, that to be classified a full time employee; the Claimant would have to be rostered on duty for 38 hours per week.

18 The evidence before me is that he was rostered on duty approximately twelve and a half hours per week, on average, and it follows in my view that the Claimant was employed for "*less hours per week than are usually worked in the boarding house by a full time employee*". The Respondent's obligation under the Award is to pay him "*at a rate in proportion that the employees' hours bear to the usual full time hours per week*".

19 It has been suggested that there should be a so-called "*set off*" to take into account the value of accommodation and meals provided. The provision of those benefits were not as a result of any award obligation on the Respondent and, in my view, the principles of "set-off" described by Anderson J in the case of ***James Turner Roofing v Peters 83 WAIG 427*** have no application.

WG Tarr
Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2007 WAIRC 00390

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMANDA JANE CULVER
	APPLICANT
	-v-
	MOORA YOUTH GROUP (INC) MANAGEMENT COMMITTEE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 20 APRIL 2007
FILE NO	U 557 OF 2006
CITATION NO.	2007 WAIRC 00390

Result	Application discontinued
Representation	
Applicant	Ms AJ Culver
Respondent	Ms L Craven

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 15 February 2007 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 12 April 2007 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2007 WAIRC 00408

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER DAWSON
	APPLICANT
	-v-
	SEELEY INTERNATIONAL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 1 MAY 2007
FILE NO	U 16 OF 2007
CITATION NO.	2007 WAIRC 00408

Result	Application discontinued
Representation	
Applicant	Mr P Dawson
Respondent	Mr R Holland

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 21 February 2007 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 18 April 2007 that he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2007 WAIRC 00216

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARNA KAREN FARQUHAR
	APPLICANT
	-v-
	REMAX HARBOUR CITY PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 9 MARCH 2007
FILE NO.	B 26 OF 2007
CITATION NO.	2007 WAIRC 00216

Result	Direction issued
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr M Hynes of counsel

Direction

HAVING heard Mr G McCorry as agent on behalf of the applicant and Mr M Hynes 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 upon the respondent further and better particulars of its claim by 16 March 2007.
2. THAT the respondent file and serve upon the applicant further and better particulars of its notice of answer and counterproposal by 30 March 2007.
3. THAT the jurisdiction of the Commission to hear and determine the applicant's claim be heard as a preliminary issue.
4. THAT the respondent give notice pursuant to s 78B of the Judiciary Act 1903 (Cth) to the Attorneys-General of the Commonwealth and of the States as to the matter arising under the Constitution or involving its interpretation by 30 March 2007.
5. THAT the respondent file and serve upon the applicant any affidavit(s) upon which it intends to rely in support of its contentions as to jurisdiction by 30 March 2007.
6. THAT the applicant file and serve upon the respondent any affidavit(s) upon which she intends to rely by 30 March 2007.
7. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than five days prior to the date of hearing.
8. THAT the parties file and serve upon one another an outline of submissions and any list of authorities upon which they intend to rely by no later than three days before the date of hearing.
9. THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2007 WAIRC 00359

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARNA KAREN FARQUHAR
	APPLICANT
	-v-
	REMAX HARBOUR CITY PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 12 APRIL 2007
FILE NO/S	B 26 OF 2007
CITATION NO.	2007 WAIRC 00359

Result	Discontinued by leave
Representation	
Applicant	Mr G McCorry agent
Respondent	Ms R Harding of counsel

Order

HAVING heard Mr G McCorry as agent for the applicant and Ms R Harding 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 be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2007 WAIRC 00430

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIANNA KRISTIE LAUREN GRATTON
	APPLICANT
	-v-
	LEANNE WALKER & KIM RANCE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 9 MAY 2007
FILE NO	U 52 OF 2007
CITATION NO.	2007 WAIRC 00430

Result	Application discontinued
Representation	
Applicant	Ms J Gratton
Respondent	Mr T Thompson as agent

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 1 May 2007 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2007 WAIRC 00420

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANGELINA SVITLANA HILSZ
	APPLICANT
	-v-
	MARK R. GEE & ANTHONY F. POLI
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 8 MAY 2007
FILE NO	U 22 OF 2007
CITATION NO.	2007 WAIRC 00420

Result	Application discontinued
Representation	
Applicant	Mrs A S Hilsz
Respondent	Mr G Lilleyman as agent

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 13 April 2007 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 26 April 2007 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2007 WAIRC 00386

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JANINE KENNEDY
	APPLICANT
	-v-
	CALIBRE PROJECTS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 19 APRIL 2007
FILE NO/S	B 41 OF 2007
CITATION NO.	2007 WAIRC 00386

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Mr R Mahncke

Order

HAVING heard Ms J Kennedy on her own behalf and Mr R Mahncke for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2007 WAIRC 00406

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER LOUISE KIRK
	APPLICANT
	-v-
	IN THE SEEN PROMOTIONS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	FRIDAY, 27 APRIL 2007
DELIVERED	MONDAY, 30 APRIL 2007
FILE NO.	B 505 OF 2006
CITATION NO.	2007 WAIRC 00406

CatchWords	Contractual benefits claim – contract of employment – application upheld – *Industrial Relations Act 1979* (WA) s.29 (1)(b)(ii)
Result	Claim for outstanding contractual entitlements upheld
Representation	
Applicant	Ms J L Kirk
Respondent	No appearance

Reasons for Decision

(Given extempore as edited by the Commissioner)

1 This is an application by Jennifer Louise Kirk ("the applicant") pursuant to s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") seeking benefits due to her under her contract of employment with In The Seen Promotions ("the respondent").

2 Following the application being filed at no stage was a Form 5, Notice of answer and counter proposal filed despite a number of requests from the Western Australian Industrial Relations Commission ("the Commission") to the respondent. The respondent twice failed to attend conferences. The matter was listed for hearing on 27 April 2007 and the respondent was advised formally with a notice of hearing sent to his address. At no stage was any return mail received by the Commission.

3 The Commission is satisfied the notice of hearing was sent out to the respondent. The Commission is further satisfied the respondent knows this matter is on but has chosen not to attend. It is appropriate that I proceed the powers granted to me under s.27(1)(d) of the Act and proceed to deal with this matter in the absence of the respondent. I so determine.

The Claim

4 The applicant seeks outstanding contractual entitlements owed for the period of employment with the respondent. The applicant claims a total of $215.00 (gross) is owed in outstanding wages.

Applicant's Evidence

5 The applicant testified that she commenced employment with the respondent following a meeting between herself, Mr Glen Choyce and Ms Nicole Musolino. The applicant testified she was employed as a casual on an hourly rate of pay which varied depending on where and for whom she was sent to undertake her work. The applicant testified that of the $215.00 (gross) outstanding, 3 hours at $15.00 per hour had been worked on 22 April 2006 at Merriwa News, and again on the 22 April 2006 4 hours had been worked at the Perth Motor Show at the Perth Exhibition and Convention Centre at $20.00 per hour. The applicant testified that on the 9 April 2006 she had worked for 3 hours at $15.00 per hour at Quinns Rock News and finally on the 6 May 2006 the applicant testified she had worked for a further 3 hours at $15.00 per hour at Merriwa News. The applicant testified that on each occasion she was informed of the rate of pay by Ms Musolino by phone at the point of engagement.

6 The applicant testified she had kept a note of all hours worked including the hourly rate of pay in records at home and it was from this note that she had on the 7 August 2006 forwarded correspondence to Mr Choyce outlining the outstanding monies owed. The applicant testified that at no stage did the respondent reply. The applicant testified that she attempted to contact the respondent by mobile phone and on the second occasion he terminated the conversation.

Conclusion

7 The Commission is satisfied that there was an employer/employee relationship between the applicant and the respondent and that the applicant was employed as a casual under an hourly rate that varied dependent on the type of employment.

8 The Commission is satisfied that the terms of the contract are known and that an award does not apply.

9 The Commission is also satisfied there is an entitlement owed to the applicant on the basis of the evidence led, a total of $215.00 (gross).

10 The onus is on the applicant to prove that her claim, in this case $215.00 (gross) is a benefit to which she is entitled to under her contract of employment. Furthermore, it is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit denied under such a contract, having regard to the obligations of the Commission to act according to the equity, good conscience and the substantial merits of the case (see *Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Perth Finishing College v Watts* (1989) 69 WAIG 2307). It is my view that the applicant has made out her claim that she has been denied benefits due to her under her contract of employment with the respondent specifically for wages.

11 The Commission will specify in the Minute of Order for the respondent to pay the applicant that amount within 7 days from the Order issuing.

2007 WAIRC 00423

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER LOUISE KIRK
	APPLICANT
	-v-
	IN THE SEEN PROMOTIONS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 8 MAY 2007
FILE NO	B 505 OF 2006
CITATION NO.	2007 WAIRC 00423

Result	Claim for outstanding contractual entitlements upheld
Representation	
Applicant	Ms J L Kirk
Respondent	No appearance

Order

Having heard Ms J L Kirk on her own behalf and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. DECLARES that the applicant is owed contractual benefits by the respondent.

2. ORDERS that the respondent, within 7 days of the date of this order, pay to the applicant, the sum of $215.00 (gross) being an amount of unpaid wages owing by the respondent.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2007 WAIRC 00434

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEN MCNEILL
	APPLICANT
	-v-
	CENTRAL EARTHMOVING COMPANY PL
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 11 MAY 2007
FILE NO/S	B 30 OF 2007
CITATION NO.	2007 WAIRC 00434

Result Application Dismissed

Order

THERE being no appearance for or by the applicant and having heard Ms L Gibbs on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be and is hereby dismissed.

[L.S.]

(Sgd.) P.E. SCOTT,
Commissioner.

2007 WAIRC 00173

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RITA MARIA MAZALEVSKIS
	APPLICANT
	-v-
	WOODSIDE ENERGY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	THURSDAY, 26 OCTOBER 2006, FRIDAY, 27 OCTOBER 2006, MONDAY, 30 OCTOBER 2006, FRIDAY, 8 NOVEMBER 2006
DELIVERED	WEDNESDAY, 28 FEBRUARY 2007
FILE NO.	APPL 843 OF 2005
CITATION NO.	2007 WAIRC 00173

Catchwords	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Issues in relation to employee's performance – Procedural fairness considered – Principles applied - Applicant harshly, oppressively and unfairly dismissed - *Industrial Relations Act, 1979* (WA) s 29(1)(b)(i) – Reinstatement or Re-employment or Compensation – Principles for loss applied.
Result	Application alleging unfair dismissal upheld and order for compensation for loss and injury awarded
Representation	
Applicant	Mr K. Trainer (as agent)
Respondent	Mr N. Ellery (of counsel)

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) and s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") brought by Rita Maria Mazalevskis ("the applicant"). The applicant claimed she had been harshly, oppressively or unfairly dismissed by Woodside Energy Ltd ("the respondent") in July 2005 and sought reinstatement or re-employment on equivalent terms and conditions of employment or compensation for loss equivalent to 6 months' income and $10,000 compensation for injury. With respect to the application relating to s.29(1)(b)(ii) of the Act, the applicant sought payment in lieu of notice, pro-rata

annual leave entitlements and long service leave entitlements but subsequently withdrew the application prior to the commencement of the hearing.

2 The respondent opposes the claim alleging the applicant, due to inappropriate behaviour and attitude exhibited by her towards staff and a breakdown in professional relationships, was stood down in February 2005 on full pay while a suitable alternative position could be found. Between February and July 2005 the applicant declined any alternative positions and as a result was terminated on 22 July 2005, which was confirmed in writing. The respondent rejects that contractual entitlements have been denied to the applicant and outlined the amount of $35,921.53 (gross) which was paid to the her at the time of her termination representing the following amounts:

(a) One month's salary (gross): $4,765.83;

(b) Payment for 84.35 unused annual leave days (gross): $18,503.02; and

(c) Payment for 11.54 full weeks of long service leave (gross): $12,652.68.

3 The respondent asserts that the applicant's employment was terminated lawfully and in accordance with the terms of the contract and that the termination was neither harsh, oppressive nor unfair.

4 The respondent further asserts that the applicant received her usual salary by way of workers' compensation payments from the respondent up until 22 August 2005 together with all other remuneration entitlements until 31 July 2005 and therefore did not experience any loss of salary between her termination date and 22 August 2005. The respondent sought orders dismissing the applicant's claim.

Background

5 The applicant commenced work with the respondent on 9 September 1996 and at the time of her termination on 22 July 2005 was classified as an executive assistant to the director of projects. At the time of her termination the applicant was paid a salary of $51,790 per annum together with a bonus, medical and other benefits.

6 The parties submitted at the commencement of proceedings a Statement of Agreed facts as follows:

"1. The applicant commenced permanent, ongoing employment with the respondent on 9 September 1996 in the position of technical assistant in the technical support department of the respondent's Offshore Gas Division, classified Job Level 4, pursuant to a letter of offer dated 30 August 1996.

2. Prior to this appointment, the applicant had worked for the respondent over the period March 1988 to September 1996, in various positions and on various bases (sic) (casual, permanent, temporary, fixed term contract).

3. The breaks between the numerous contracts of employment over that period range between zero and six months.

4. Effective 3 April 2000 the applicant transferred to the position of secretary offshore projects, North West Shelf Ventures Division (job level 4) (position). The applicant was advised of this transfer by way of a letter from Tony Brown (then general manager offshore projects) dated 28 March 2000.

5. The position provided secretarial assistance to the general manager offshore projects, a position occupied by:

(a) Tony Brown (until mid 2000);

(b) Ian Binnie (mid 2000 until end 2001/start 2002); and

(c) Roy Thompson (end 2001/start 2002 – present).

6. The applicant was promoted to job level 5 within her position on 1 April 2001, a promotion that was confirmed in writing by a letter dated 3 April 2001.

7. The applicant was promoted to job level 6 within her position on 13 February 2004, a promotion that was confirmed in writing by letter of the same date.

8. The position was subsequently renamed executive assistant to the director projects, in line with the change in title of the general manager NWS offshore projects to director projects and the applicant's increased responsibilities.

9. On 26 Australia 2006 (sic) (Australia Day public holiday), the applicant was involved in a motor vehicle accident.

10. The applicant was absent on leave and did not attend work from 28 January 2005 until Friday 4 February 2005. The applicant returned to work on Monday 7 February 2005.

11. On 9 February 2006 (sic), the director projects advised the applicant that she was to be removed from the executive assistant position and an alternative position within the respondent's business would be found for the applicant.

12. The applicant went home from work after being advised of this, and did not return to work at any time until the date of her termination, save for a week's relief work (leave cover for Jenni Cotton, 30 May – 3 June 2005).

13. The applicant was absent on a combination of sick leave and authorized leave due to her workers' compensation claim, until 26 April 2005 when she was cleared to return to duty.

14. From 26 April 2005 the applicant was stood down from work on full pay whilst the respondent continued to consider whether a suitable alternative position could be found for her.

15. The applicant's services were terminated effective 22 July 2005."

Preliminary Issue

7 This application was filed in the Commission on 12 August 2005. The Commission on four occasions held conferences in an attempt to assist the parties through conciliation to reach agreement in full and final settlement of the issues in dispute. At the conclusion of that process, no agreement was able to be reached. On 24 May 2006 the Commission wrote to the parties seeking written submissions on whether the Commission ought dismiss or refrain from further hearing the matter pursuant to s.27(1)(a) of the Act. Section 27(1)(a) of the Act provides as follows:

> "(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial;
>
> (ii) that further proceedings are not necessary or desirable in the public interest;
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be."

8 The Commission, having received and considered the parties' written submissions determined to proceed to arbitration advising in correspondence of 21 June 2006 that reasons for the decision to proceed would be issued by the Commission at a later date. These are those reasons.

9 The applicant submitted there were significant reasons why the Commission ought not exercise its power under s.27(1)(a) of the Act and dismiss the application. In summary, those matters related to the significant detriment to the applicant that would occur in such circumstances, depriving the applicant of the opportunity to have heard and determine the reasons for her termination thereby refusing the applicant access to opportunities provided for by the Act. For the Commission to exercise such power would be contrary to the objects of the Act as the matters in dispute remained unresolved. In relation to progressing the claim the applicant had done all that was open to progress the matters and at all times the applicant's conduct consistent with attempts to progress a resolution of the issue in dispute. The applicant submits that the Commission's determination in matters such as this is discretionary and urged the Commission to proceed with great caution in exercising this discretion giving full weight to the detriment that would be suffered by the applicant in the event the application was dismissed.

10 The respondent submitted that there had been extraordinary delays in progressing the matter and urged the Commission to exercise its power under s.27(1)(a)(ii) of the Act in particular to dismiss the applicant's entire claim on the basis that further proceedings were not necessary or desirable in the public interest. The respondent submitted that a five day hearing of the matter was a waste of public time and money and there would be significant costs for both parties. The respondent submitted there had been undue delays by one of the parties and on such an occasion where a party does not co-operate with the proceedings or significantly delays proceedings the Commission can dismiss the matter. These principles were outlined in *Kangatheran v Bones Ltd* (1987) 67 WAIG 620. In the alternative, the respondent submitted that the Commission ought exercise its power under s.27(1)(a)(iv) to dismiss the claim.

11 The Commission advised the parties on 21 June 2006 that a determination had been made to proceed to hearing. The Commission finds that the powers under s.27(1)(a) of the Act are broad but must be exercised in conjunction with the objects of the Act. Having regard in particular for s.6(b) of the Act which clearly outlines a principal object of the Act is to provide a mechanism by which disputes between parties can be resolved. Section 6(c) incorporates the means by which industrial disputes ought be resolved where agreement is not possible. Relevant sections of the Act are as follows:

> **"6. Objects**
>
> The principal objects of this Act are —
>
> …
>
> (b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;
>
> (c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;"

12 The processes undertaken by the Commission in meeting such objects clearly are different. For example, conciliation is separate from arbitration, the former being conducted in a manner concomitant with the parties reaching an agreement between themselves. In circumstances where this process is unable to settle the matter then s.6(c) of the Act outlines the object which encourages the means by which matters can be settled by way of arbitration. It is trite to say that the two processes are quite separate, the latter specifically framed in a way which requires the Commission to reach a decision having regard for:

> "**s26**
>
> (a) … equity, good conscience, and the substantial merits of the case …."

13 The attempts by the parties to settle this matter through conciliation have been extensive and I make no findings with respect to the suggestion that there has been undue delay. The Commission considers for the powers contained in s.27(1)(a) of the Act to be exercised, there must be a powerful reason. The Commission finds no substantive basis to deny the applicant her right to have the application heard and determined. Accordingly, the Commission will not exercise its powers pursuant to s.27(1)(a) of the Act.

Applicant's Submissions and Evidence

Submissions

14 The applicant maintains her removal from the projects division and subsequent termination on 22 July 2005 was harsh, oppressive and unfair and seeks reinstatement or re-employment or, in the alternative:

- regarding injury suffered the agent for the applicant submitted that the evidence supporting compensation for injury being awarded by the Commission demonstrated an effect substantially greater than in the matter of *Anthony and Sons Pty Ltd trading as Oceanic Cruises and Fowler* (2005) 85 WAIG 1899 where the applicant was, although depressed by the termination prepared and willing to return to employment immediately following the termination. In this circumstance Mr Fowler was awarded $3,000 for injury which was found to be at the lower end of the scale. In the circumstances currently before the Commission, the agent for the applicant submitted the evidence would support an award of not less that $10,000;
- on the question of loss as suffered by the applicant, compensation is to be calculated by reference to the applicant's remuneration at the time of termination. The applicant submitted that her total income package at the time of termination was shown to be $79,357 and ought form the basis for calculation of loss and compensation pursuant to s.23A(8) of the Act. The salary for the position obtained by the applicant at Landcorp commencing on and from 28 November 2005 was $54,366. The loss therefore to 28 November 2005 (allowing for four weeks' pay in lieu of notice) was a period of 14 weeks at the remuneration rate per annum of $79,357 providing a total sought of $21,365.36;
- ongoing loss arising from the Landcorp position as measured against the respondent's overall income package is a factor of $24,991 per annum or $480.60 per week. From the commencement of the Landcorp employment until the first week of May when the matter was scheduled for hearing, there was a total of 23 weeks. The loss therefore totalled $11,035.80 for the period up until 28 November 2005 with an aggregate loss of $32,401.16;
- to that amount is to be added the amount for injury given, a total of $42,401.16. The agent for the applicant submitted that the applicant's loss is capped at $39,678.50 pursuant to s.23A(8) which is the amount the applicant says should be awarded if the Commission determines that it will award compensation rather than reinstatement or re-employment.

15 Specifically the applicant maintains she was at all times, prior to the removal from her position as the executive assistant projects division, denied procedural fairness. Agent for the applicant asserts she was entitled to be told that the standard required by the respondent in the position was not being met and that failure to achieve such standards may have implications for continued employment. The evidence of Mr Keith Webb, services manager for the respondent, illustrates this point in that discussion between the applicant and himself did occur however the applicant was not informed such behaviour was an issue that could jeopardise her employment. The matters of concern relating to Ms Kerryn Elliott, a secretarial staff member and the applicant, were never put to the applicant in such a way as to invite a response prior to the respondent reaching a conclusion that there was any substance in the allegations. No opportunity was given to the applicant to address any issues that may have been of concern to the respondent and all of these actions by the respondent were contrary to their own policy which the respondent did not at any time prior to the removal of the applicant from the projects division apply. The procedures adopted by the respondent denied the applicant at all times procedural fairness. The applicant relied on the principles set out by the Full Bench in *Margio v Fremantle Art Centre Press* (1990) 70 WAIG 2559.

16 The lack of procedural fairness was, it was submitted by the applicant, of substantial magnitude depriving the applicant of the fundamental right to improve her performance. The applicant submitted the degree of procedural unfairness and its impact on the whole process would warrant a finding of unfair termination of the employment. In making this submission the applicant relied upon the principles outlined in *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. The applicant submitted she ought to have received 3 months of continued employment in the position in order to address the criticisms held by the respondent. On this basis alone, it was submitted the Commission ought to make an Order for compensation based on the lost opportunity of not less than 3 months.

17 The applicant submits that her performance in the position was well regarded by the respondent as evidenced by overall assessments and, to the extent that there were matters raised during her employment or comments made about people skills, they were not at any time put to her as significant issues. It is common ground that the applicant was "technically competent". The applicant submits that the evidence, both documentary and that given by Mr Roy Thompson director projects for the respondent, demonstrated that the respondent either knew and condoned the applicant's abruptness or alternatively, such abruptness was of a dimension that the respondent did not consider that it warranted a formal warning. Therefore the applicant submits it is open to the Commission to find that the respondent was well aware of the allegations and by its failure to act condoned the behaviour for at least 3 years. These principles relied upon are reflected in *Porter v Eltin Underground Operations Pty Ltd* (2000) 80 WAIG 5349. The applicant submits it was not therefore open to the respondent to rely upon the conduct complained of for the removal of the applicant from the projects division in February 2005 unless proper notice had been given together with an opportunity to address issues. It was submitted by the applicant neither of these occurred. Subsequently the applicant submits the removal was flawed and all that followed was based on a false premise that there was in fact a basis for the removal.

18 The applicant submits that the termination by the respondent occurred not for the abrupt manner allegedly displayed by the applicant on a number of occasions but because the applicant was not prepared to accept 'red circling' against the supply chain position as offered and the consequential unwillingness by the respondent to continue to search for a position for the applicant beyond the supply chain position. The applicant submitted that red circling involved transfer of employees within the respondent's organisation from one level to a lower level whereby initially wages and entitlements were protected however over a period of time the income received by an employee would be reduced from the income an employee otherwise received had they remained at the higher level. The applicant submitted there was an expectation on the part of the respondent that the applicant take the reduced classification and failure to do so would result in a real prospect of termination. It is common

ground that the respondent advised the applicant prior to 21 July 2005 both verbally and in writing that failure to accept the position in the supply chain office would mean her services would be terminated. Further common ground is that the applicant accepted the position but not the qualification of red circling as imposed by the respondent. The applicant submits the termination when implemented was to have immediate effect regardless of the contract of employment provision for pay in lieu of notice. The respondent's intention was for the applicant's services to be brought to an end instantly and there was no intention that the applicant work out her notice period. The applicant submits that payment in lieu of notice cannot change the character of the termination which was summary and, as a consequence, it thereby falls to the respondent to establish the facts upon which the termination was based. The applicant submitted these principles were reflect in *Newmont v AWU* (1988) 68 WAIG 677. The applicant submits that that it appears to have terminated the applicant on the basis the respondent considers that all that was reasonable had been done to locate another position for the applicant.

19 The applicant submits that whilst some 20 alternative positions were listed in the respondent's notice of answer some of the positions were at levels well beyond the applicant's classification. The applicant submits the period of which a more intensive search for alternative employment took place was following the submission of the "fit for work" certificate effective 26 April 2005.

20 The applicant submits the respondent applied unreasonable pressure to the applicant to accept the supply chain position with a lower classification and overall lower pay. With that knowledge the respondent then embarked on a process to continue applying pressure overlaid by the threat that failure to take the position would result in termination of the applicant. The applicant submits that such pressure was not reasonable and constituted a significant failure on the part of the respondent of duty of care to the applicant.

21 The applicant submits her contract of employment did not allow for removal in the manner adopted by the respondent. The disciplinary and counselling policy of the respondent had not been applied to the applicant and it was therefore reasonable to refuse red circling as it amounted to an agreement to reduced income and conditions over time. The applicant submitted the respondent had elected to continue the rigid application of its policy in relation to red circling and this was harsh, oppressive and entirely unfair and in breach of terms of the employment and an inappropriate exercise of disproportionate power over the applicant.

22 The applicant submits that she did all that could reasonably have been done in terms of cooperation with the respondent in pursuit of alternatives and that she was entitled to seek to retain existing benefits. The applicant though deeply impacted by the removal from the projects division and still recovering from an injury for which workers' compensation was paid, continued to attend meetings with the respondent's representatives, prepared and submitted a curriculum vitae for consideration by others within the organisation as well as initiating a week's relief, thereby alleviating the need for the respondent to meet the cost of a temporary staff member.

23 The applicant submits the Commission should set aside the substantial amount of hearsay evidence. For example, the evidence from Mr Kevin Hollingsworth, senior human relations manager for the respondent, about the alleged reputation of the applicant referred to at the meeting of 5 May 2005 and 4 June 2005; the evidence of Mr Webb about alleged events that had not been witnessed and the evidence of Mr Thompson about the experiences of other directors concerning the applicant prior to his assuming the role of director. The applicant submitted that the Commission also heard evidence from witnesses for the respondent on matters that were not put to the applicant. For example, the evidence of Ms Elliott who referred to two community initiative events, a matter not put to the applicant and the evidence of Ms Maria Warman, the human resources manager for projects for the respondent, concerning alternative positions as set out in the notice of answer.

24 The applicant submitted she was employed by the respondent for a total of 18 years. The first period of service, comprising a series of contracts, came to an end by resignation. The applicant testified she re-commenced employment with the respondent on 9 September 1996 working as a technical assistant to the technical services manager. The applicant remained within the department of that division until she was approached in 2000 by human resources to head up the new offshore projects division. The applicant testified that she accepted the role of secretary to the general manager of the new projects division at level 4 and that the respondent would reassess her role within 6 months. The applicant testified that her role of secretary to the general manager was to perform all the secretarial side of things, and in addition she had the role of taking care of the "Opportunity and Projection Realisation Project" ("the OPREP") team.

25 The applicant seeks reinstatement or in the alternative re-employment with the respondent submitting that at the time of her removal as executive assistant to the director of projects on 9 February 2005 the respondent's commitment was to provide for the applicant to continue in the position for an undefined period while pursuing an appointment to another equivalent position within the respondent's organisation. The applicant submits that other than the period of time that elapsed and the determination by the respondent to bring the matter to a close nothing altered up until the time of her termination. In terms of mitigation the applicant submitted a substantial volume of material, tendered in evidence, to support the contention that the applicant mitigated her loss. The respondent elected not to cross examine this material and therefore conceded discharge of the obligation by the applicant to demonstrate mitigation. The impact of the removal was, as submitted by the applicant, devastating for the applicant who remained distraught for a considerable period following the termination.

Applicant's Evidence

26 Ms Rita Mazalevskis testified she had commenced working with the respondent in March 1988, based in Karratha. The employment was a permanent contract. The applicant testified she was required to resign when her husband was transferred from Karratha back to Perth and in 1990 was placed on contract with the respondent through until 1994. The applicant testified there was a re-organisation and she was made redundant. The applicant testified she was asked to return to the respondent and work as a temporary employee in the operations division, a position that continued until 1996 when she was made permanent effective from 9 September 1996. The applicant testified she remained in that division until a transfer to the offshore projects division operating as secretary to the general manager of the division and assisting in the implementation of a new project team within the respondent's organisation. The applicant testified that at the outset the position was a level 4 and

it became a level 5 in May 2003 and she was promoted to a level 6 on 1 July 2003 a position she held up until the time she was terminated. The applicant testified that increases in levels within the respondent's organisation were not automatic and persons are promoted dependent on their experience and performance within their role. The applicant testified that as her role grew and carried more responsibility then her manager, Mr Thompson, proposed a promotion for the position. The applicant testified that the process for promotion required an assessment of the person's capabilities in moving to the next level.

27 The applicant testified as to her understanding of the pre-remuneration allowance value system ("parv") that operated within the respondent's organisation and how it was aligned to the setting of rates of pay. The parv system was made up of various components and for each person this was different. For example, the length of time with the company and within the current role. The applicant testified that in her case medical cover was paid for, opportunities were provided to purchase shares from a share loan scheme run by the respondent and salary increases and bonuses together with salary continuance were provided dependent on the role of the employee. The applicant testified that there was a system of salary review including an annual performance review. Although this scheme had changed on a number of occasions, the review required an employee to sit down with their manager at the commencement of the year and delineate tasks and targets for the year and at the conclusion of that period monitor as to whether the tasks and targets had been met. The applicant testified comments would be received on each persons performance within their role and overall the review had an impact on remuneration;

> "obviously if you're a good worker, you get performance–based pay, you would get more than someone that's not a higher performing person."

(Transcript page 15)

28 The applicant testified since 2000 she had received an annual increase confirmed in writing by the respondent. The applicant testified in addition to the performance review carried out on an annual basis there was multi source feedback by the respondent which allowed for an individual employee to nominate other employees to provide comments, in this case, regarding the applicant's performance.

29 The applicant testified she overheard Ms Elliott on the phone gloating to a colleague that she intended to apply for another job. The applicant testified that she reported this matter to Mr McGlynn and later that afternoon discussed it with Mr Thompson. The applicant testified that she was panicking about the prospect of her workload in the event that Ms Elliott left the division, which she discussed later in the day with Mr Thompson. The applicant testified that following the Australia Day holiday when she returned to work Mr McGlynn reported to her that Ms Elliott was leaving because she no longer wished to work with the applicant. The applicant testified that Mr McGlynn had informed the applicant they were allowing Ms Elliott to transfer without a notice period. The applicant testified she was extremely teary and went to the doctor's room where she was informed by the company psychologist to go home and not to return for the next week. From 31 January 2005 until 4 February 2005 the applicant was not at work and was receiving treatment each day. The applicant testified that her first day back was 7 February 2005 and she met with Mr Thompson on 9 February 2005. The applicant testified that during the meeting he advised her it was time she moved on from the division which was the first indication that anything was wrong. The applicant testified that Mr Thompson said to her:

> "You clearly can't work out there. You're too stressed. You have to speak to Maria and you have to get another job." And at that point I burst into tears and was dumbfounded basically."

(Transcript page 34)

30 The applicant testified that during the meeting Mr Thompson had asked her to explain about what occurred on 24 January 2005, referring to words that had been exchanged between Ms Elliott and the applicant.

31 Following Mr Thompson's determination that she was to be transferred the applicant testified she went to the doctor's room and burst into tears and was sent home by the company psychologist. Mr Thompson, according to the applicant had instructed her to contact Ms Warman in human resources in relation to finding a new job. The applicant testified that the following day Ms Warman contacted her and they both met at the Mount Street Café;

> "and I met with Maria and I don't think I stopped crying the whole meeting because I was still devastated and basically asked Maria what was going on, I didn't understand what was going on, why was this happening, and just wanted an answer, which - - Did you get an answer? - - - No."

(Transcript page 44)

32 The applicant testified she did meet with Mr Thompson and was informed that he did not wish to be distracted by the issue anymore. The applicant testified:

> "I said to him that, you know, I had given him my whole life for the last 4 years with the effort that I'd put in, personally and professionally, because I did everything for him, his wife, his kids. I did a lot of personal things for him and I just felt like he'd totally betrayed me and it was a slap in the face because we had such an open and honest relationship and he'd not mentioned this at all at any - - any stage and it was just really hard to absorb the way that it happened."

(Transcript page 45)

33 The applicant testified Mr Thompson did not give his total attention to the meeting. The applicant testified she was on workers' compensation because of injuries relating to her knee which had subsequently required surgery in November 2004. The applicant testified she remained on workers' compensation until 22 April 2005, and was cleared to commence work again on 26 April 2005.

34 The applicant testified that the respondent was to search for new roles within the organisation and put forward proposals to the applicant, a process to be assisted by Ms Warman in her regular meetings with the applicant. Ms Warman gave the applicant position descriptions as they appeared internally and they pursued the prospects of the positions together at meetings, usually at the Mount St Cafe. The applicant testified that some of the positions that were shown to her were job level 8, 9, 10, 11 and up

to 12, these being high level management roles requiring significant experience. The applicant testified that some roles were located in Karratha, not a current option given her medical circumstances. The applicant testified that for one of the advertised positions she attempted to contact the manager, Mr Lin, who did not return her call. She was advised by Ms Warman that the role had been filled by an external candidate. The applicant testified there was a team leader supervisor within the IT group, a job level 6 position which, following discussions with Ms Warman, was not considered suitable.

35 The applicant testified that as part of this process she actually met with one of the managers of a division advertising a position. She was advised by the manager that they had already identified a preferred candidate even though Ms Warman had been informing her she was being considered for the position.

36 The applicant testified that although she was declared fit to return to work on 26 April 2005 that following a meeting with Ms Warman on or about 21 April 2005 the she was instructed to remain at home until such time as she was contacted by the respondent. The applicant testified she wrote to the human resources director Mr Ian Fraser expressing concerns as to how matters were being handled. The applicant testified that shortly after this a meeting was organised with Mr Hollingsworth across all divisions. In attendance was Ms Warman, and Ms Cotton accompanied the applicant. The applicant testified that Mr Hollingsworth put a direct statement to her regarding Mr Thompson's ability to give feedback;

> "He said "I think that he's absolutely hopeless and that he's not good at giving feedback"… He said "I think he's bad at giving feedback, he doesn't communicate and probably thought he communicated with you even though he didn't".
>
> (Transcript page 57-58)

37 The applicant testified that in the meeting Mr Hollingsworth went on to say that there was a perception in the organisation about the applicant and that it was in the applicant's interests to work with Ms Warman to locate a position. The applicant testified that Mr Hollingsworth raised with her that if she did not consider roles that were available and a significant period of time had elapsed then the respondent may consider termination.

38 The applicant testified there were a number of jobs notified by Ms Warman that were inappropriate for example, a logistics coordinator based in Karratha containing a requirement for rigging qualifications. The applicant testified there were 2 positions she was actually interviewed for, one a level 4/5 and the other a level 5. On both occasions following the interview the applicant testified she received no communication from the manager who carried out the interviews. The applicant conceded she was not exactly sure how red circling worked other than the salary was restricted in its movement.

39 The applicant testified that the supply chain position was a matter discussed between herself and Ms Warman following which a meeting was set up with herself and Mr Smith the new manager. When the applicant attended the meeting it became apparent that the discussion was regarding an administrative assistant's role not the role previously discussed with Ms Warman. The applicant testified that she would be willing to take on the role provided it was not red circled. The applicant testified that after a period of time when there were just the two of them in the room she raised her concerns with Mr Smith regarding the red circling. A further meeting was called between Ms Warman and Mr Smith in June 2005 and the applicant testified that she was requested to attend at the meeting and a job offer was made and correspondence was handed to the applicant offering a formal transfer to the position. The applicant testified that the position had been renamed executive assistant rather than administrative assistant however it was confirmed that the position would be red circled. The applicant testified she was informed Mr Hollingsworth and Mr Masson the industrial relations manager had made the decision that the position would be red circled. The applicant testified that Ms Warman advised her it was a condition of the letter of offer which, if not accepted, would result in her termination. The applicant sought time to think about the proposal which was agreed. Following the meeting the applicant testified there were several discussions with Ms Warman as to whether she was going to accept the role, conversations which emphasised on the part of the applicant her willingness to accept the role without the red circling:

> "I didn't feel that it was fair, I still didn't know why I had been removed from my role and I said "I'm more than happy to take the role. I'm not declining the role but I don't accept the "red circling", and she said "well, they're one and the same. You can't accept one without the other. If you accept the role, you're accepting the red circling"
>
> (Transcript page 67)

40 The applicant testified that she informed the respondent of her position in writing and was given time by the respondent to reconsider her position. On the day prior to the expiration of the extension period she was contacted by Ms Warman and encouraged to take up the opportunity, a conversation that went on for several hours. The applicant testified that Ms Warman advised if she did not accept the role she would be terminated and that confirmation of the termination would be forthcoming. The termination would be effective as of the following day. The applicant testified written advice was received on 25 July 2005. The applicant testified the impact of the decision by the respondent to terminate was devastating and the applicant was unable to comprehend why it had occurred. As a result of her emotional state the applicant testified she was attending a psychologist and general practitioner as well as continuing physiotherapy treatment for her work related injuries.

41 The applicant testified that in her attempt to procure employment following termination by the respondent she registered with several agencies to regain entry into the oil and gas industry. Companies were contacted and the applicant testified she went for interviews. A position as executive assistant to the chief executive officer of Landcorp was procured and the applicant testified she commenced on 28 November 2005 on a salary of $56,400 per annum.

42 The applicant testified that following her termination by the respondent on 22 July 2005 she received correspondence from the respondent's self insurers advising that all workers' compensation payments were being ceased and although two open claims remained those claims have not been paid.

43 The applicant testified that she retained a number of friends within the respondent and that the respondent's organisation was an attractive place to work and she had no understanding as to why reinstatement was inappropriate and working alongside

other employees within the respondent's organisation would not succeed. As an example the applicant testified that in the week's work undertaken by way of relief in May 2005 she had encountered no problems at all.

44 In cross examination the applicant initially denied that a number of comments drawn from multi-source feedback documents commencing in 2002 had raised negative comments about her performance. The applicant finally conceded in cross examination that there was a consistent message being relayed through documents which indicated that her communication with peers was at times abrupt and blunt. The applicant testified that the meeting with Mr Thompson on 9 February 2005 was not the first occasion in which the issue of her working relationship with others had been raised. The applicant in cross examination on repeated occasions was unable to recall having made anyone cry in the course of her employment. The applicant was unable to recall whether an acrimonious argument had occurred between herself and Ms Carmen Kendal. In cross examination the applicant was aware that Ms Elliott's parents had contacted the respondent to advise Ms Elliott would not be at work because of the bullying treatment she was receiving from the applicant. The applicant following that acknowledgement went on to testify;

> "… I know what incident we're specifically talking about and I didn't bully her. She over-reacted."
>
> (Transcript page 88)

45 Counsel for the respondent put the following questions to the applicant in cross examination;

> "We're in a position where there's at least four names that I've suggested to you, Carmen Kendall, Kerryn Elliot, Lindy Foley, Heather Ricketts, where those people have been the subject of arguments, aggressive, abrupt, harsh language from you, and they have complained to others about it. Keith Webb, Campbell McGlynn, Kerryn Elliott and Dale Gration will all give evidence about some of those instances? ... Mmm hmm.
>
> They'll all say these things happened but you don't seem to accept any of these things happened? … I didn't say I didn't accept them. I said I don't recall - - "
>
> (Transcript page 96)

46 On a number of occasions during cross examination the applicant denied that events had occurred particularly as they related to accessing Ms Elliott's personal emails, matters being raised directly with the applicant by managers and other employees of the respondent, or employees being reduced to tears by behaviour demonstrated by the applicant. In cross examination the applicant conceded that Mr Thompson was not trying to hasten the conclusion of the applicant's employment with the respondent. The applicant in cross examination considered that there had been a conspiracy waged against her by a number of other managers in the project division including Mr McGlynn, Mr Webb, Mr Roland and Mr Digby. In cross examination the applicant agreed that the concept of red circling implemented by the respondent would mean that the potential for pay increases would be less. In cross examination the applicant clarified she sought reinstatement as an executive assistant, job level 6 in the projects division notwithstanding that a number of managers who had worked with her had concerns about her behaviour and the way she treated other people.

47 Ms Jenni Anne Cotton, administrative assistant for the Middle Eastern Africa Team of the respondent gave evidence. Ms Cotton testified that she approached the applicant to cover a position in her absence given that the applicant knew the respondent's systems. The concept of temporary relief by the applicant was approved by the respondent. Ms Cotton testified that the applicant was competent and able to do the job and could be relied upon. Ms Cotton described the relationship between herself and the applicant outside of work as one of friendship.

48 Ms Cotton testified that she attended the meeting with Mr Hollingsworth, the applicant and Ms Warman at the beginning of May 2005. Ms Cotton testified that she recalled a comment made by Mr Hollingsworth during the meeting that Mr Thompson's capacity to give feedback was limited. During the meeting a discussion of alternative positions for the applicant was held, Ms Cotton testifying that no specific positions were mentioned but Mr Hollingsworth outlined that if the applicant were not to take one of the lower job levels then she would be terminated. Ms Cotton testified that the meeting in her view was factual and pretty flat and not a lot of emotion was demonstrated:

> "…well, in my opinion it was sort of a little bit threatening, that if she didn't take it - - he wanted to get rid of the situation, I thought and, you know, if she could take one of these positions then it - - you know, it would relieve a lot of drama for everybody."
>
> (Transcript page 136)

49 Ms Cotton testified that in her view there was no defined outcome to the meeting. In cross examination Ms Cotton indicated she had not worked in the projects division with the exception of a short period at the end of 2004. Ms Cotton confirmed that in the meeting with Mr Hollingsworth in May 2005 he had explained to the applicant that there were very few administrative job level 6 roles available within the respondent's organisation. Ms Cotton confirmed in cross examination he also explained the issue of red circling to the applicant. Ms Cotton testified that red circling was a concept that was known and established in the respondent's organisation and had been for some 4 years. Red circling had happened to a number of people.

50 Written testimony was submitted by the applicant from Dr Frances Cadden. The correspondence was dated 8 November 2006. Dr Cadden testified she knew the applicant on a professional basis and was dealing with issues in the latter part of 2004 and 2005. Dr Cadden testified that the applicant was isolated, and felt devalued by her employer. Through written testimony, Dr Cadden wrote:

> "I can confirm on the basis of many consults since 28th January 2005 to 22nd October 2006 (some 30 consultations) that Ms Mazalevskis has continually complained about her treatment from Woodside and expressed her deep hurt, distress, and bafflement by it."
>
> (Written submission from Dr Cadden – 13 November 2006)

Respondent's Submissions and Evidence

Submissions

51 The respondent submits that the applicant was technically competent in her employment however over a period of time her performance reviews demonstrated that problems developed with the applicant and her behaviour, particularly in relation to her communication skills and dealing with other personnel within the organisation. These issues worsened over time and triggered the events of January/February 2005 which then commenced a process leading eventually to the termination of the applicant's employment on 22 July 2005.

52 The respondent submitted that on 9 February 2005 Mr Thompson met with the applicant advising of her inappropriate behaviour and attitude particularly with administrative staff and that a suitable alternative position would be found for the applicant having regard for her skills. Thereafter the applicant did not return to the organisation with the exception of the period of one week when leave cover was provided for another administrative assistant.

53 The respondent submitted that efforts were made to find an alternative position within the organisation, a process that was continued for some five months by Ms Warman. The respondent submitted all available administrative positions were provided to the applicant encouraging her to consider any of interest, overall some 20 to 25 positions. Of these a range of levels were included, level 6 and job levels 4 and 5. It was submitted the applicant indicated a reluctance to consider any position below job level 6 and that the applicant was quite inflexible during this process agreeing to participate in only two interviews. On 4 July 2005 the respondent submitted a job was offered to the applicant for the position of supply chain assistant co-ordinator in the supply chain department, a job level 5 position providing the opportunity to develop and move into a level 6. As part of the job package, the position would be subject to a condition known within the organisation as red circling.

54 Red circling meant that the applicant's current job level 6 remuneration would be maintained however her base salary would be increased by half the annual market movement each year so that eventually, the gap between the applicant's base salary and the maximum job level 5 would close.

55 A series of communications including a letter dated 1 July 2005 were made by the respondent to the applicant identifying that red circling was integral to the offer in the supply chain department. Importantly the applicant was advised that if she did not accept the offer of employment, the organisation would terminate her employment. The applicant rejected the offer on 21 July 2005 and on 22 July 2005 her employment was terminated, effective as of that date.

56 In response to the written testimony of the applicant's general practitioner Dr Frances Cadden, the respondent submitted that the evidence in relation to Dr Cadden ought to be defused on the basis that Dr Cadden had no direct or first hand knowledge of the applicant's employment with the respondent, the termination of the employment and the events and circumstances leading up to the termination. Counsel for the respondent submitted that the evidence of Dr Cadden was largely hearsay insofar as it simply relayed comments made and information provided to Dr Cadden by the applicant. For those parts of Dr Cadden's evidence which were not hearsay, and did relate to the applicant's injuries, medical condition and treatment, counsel for the respondent submitted these were irrelevant as they had no bearing on whether the termination of the applicant by the respondent was harsh, oppressive or unfair. In the alternative it was submitted by the respondent that the Commission ought only admit into evidence those parts of Dr Cadden's statement which were not hearsay.

57 The respondent submits that its decision to terminate the applicant was fair and reasonable given the totality of circumstances that had occurred in the lead up to the termination. In support of this submission the respondent relied on several decisions and the principles contained therein namely *Lloyd Edwinson v Public Service Commissioner* (No. PSAB 3 of 1990) 71 WAIG 809, and *Vermeesch v Harvey World Travel Franchises Pty Ltd* (1997) 74 IR 364.

58 The respondent submits that a number of alternative positions were put to the applicant between February 2005 and July 2005. The position offered in the supply chain department when it was made clear that the red circling condition was integral to the offer and the applicant's refusal to accept the red circling was a rejection of the entire offer which was, in the circumstances, unreasonable. The respondent relied on its submissions citing a number of decisions; *Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch v Eurest Catering* (2003) 83 WAIG 4157 and *Clothing and Allied Trades Union of Australia v Hot Tuna Pty Ltd* (1988) 27 IR 226.

59 The respondent submitted the only party who acted unreasonably throughout the process was the applicant and the termination was not unfair. The applicant's claim for a redundancy payment in accordance with the respondent's redundancy policy was rejected. The respondent submitted the applicant's employment was not terminated by way of redundancy given between February and July 2005 the position had been filled by temporary staff and following the applicant's termination the respondent filled the role permanently.

60 The respondent submitted in relation to the issue of remedy that the applicant's dismissal was not harsh or oppressive and therefore the applicant was not entitled to any remedy pursuant to s23A of the Act. As an alternative if the Commission did determine that the applicant has made out her claim pursuant to s29(1)(b)(i) of the Act, the respondent submitted that the remedies of reinstatement and re-employment pursuant to ss23A(3) and 23A(4) respectively were impracticable and that any consideration of remedy by the Commission ought be restricted to monetary compensation only. Detailed submissions were made to the Commission outlining the respondent's view that reinstatement was impracticable given the evidence that had been led on this issue.

61 The respondent submitted the Commission ought not order the respondent pay any monetary compensation given the applicant had not suffered any loss or injury as a result of the termination of her employment. The respondent submitted that it was not the role of the Commission to order that compensation be paid in cases of termination as a penalty on an employer relying on the decision of *Garbett v Midland Brick Company Pty Ltd* (2003) WASCA 36, 83 WAIG 893. In the alternative, the respondent submitted that if the Commission were to find that the applicant had been unfairly dismissed and had suffered loss following the termination of her employment then such loss was brought about by the applicant's own failure to adequately

mitigate her loss. The respondent submitted the applicant's level of skill, technical ability and experience would enhance her ability to secure another job within a very short period following the termination. The respondent submitted in relation to the issue of fitness to work in the event the applicant was not medically fit or fit only for limited duties due to the injuries sustained that had been the subject of the workers' compensation accepted by the respondent the fact that payments had ceased on 22 August 2005 was a result of the applicant's failure to respond to the prescribed notice issued under s61(1) and (2) of the *Workers' Compensation and Injury Management Act 1981* (WA). It was submitted by the respondent that this demonstrated a failure by the applicant to mitigate her own loss following the termination of employment.

62 In concluding, the respondent submitted that orders were sought dismissing the application on the basis that no case of harsh, oppressive or unfair dismissal had been made out. In the alternative if it was found by the Commission that the applicant had successfully made out her claim then the only remedy the Commission ought consider would be that of monetary compensation and that any monetary compensation the Commission considered granting to the applicant ought be reduced by an amount equivalent to the payments that continued to be made to the applicant by way of workers' compensation entitlements and income received from other employment following 22 July 2005.

Evidence

63 Mr Thompson for the respondent, testified that the applicant became his secretary when he took over his current role. The evidence was at times that the applicant was a little abrupt particularly in her dealings and demeanour with people in the division:

> "I just recall the very tense atmosphere whenever another secretary came near the - - the door. There was certainly - - that relationship was poor and, indeed, the managers themselves started to feed back to me that they felt there was some sort of barrier there and they weren't impressed with the - - with Rita's demeanour towards them."
>
> (Transcript page 150)

64 In response to a question from counsel put to Mr Thompson as to whether there was a difference in the way the applicant dealt with secretaries and managers. Mr Thompson testified:

> "There was. There was an obvious tenseness there, and I was not particularly in a position to witness the dialogue that went on but what did occur was secretaries stopped coming round. They'd do the business on the telephone and I did receive complaints via their managers about their secretaries feeling very stressed coming to - - coming to my office or dealing with - - dealing with Rita."
>
> (Transcript page 151)

65 When asked by counsel to explain the comment "defensive" in relation to the applicant Mr Thompson testified:

> "… If Rita had friction with - - with another secretary or with a manager invariably she'd come and see me and we'd talk about it, and in trying to give some advice or to some direction as to "You must consider the other person's stance in evaluating what's right and what's wrong", Rita could not accept it. She could not accept that she was anything but 100 per cent correct, and that is never the case in any - - argument… Rita found it very difficult to take advice of that nature. She felt that she was 100 per cent correct all of the time."
>
> (Transcript page 152)

66 Mr Thompson testified that through the process of assessment of individual employees by the respondent, the abrupt nature of the applicant's approach particularly to junior personnel had been raised directly with the applicant on a number of occasions. A specific problem relating to Ms Elliott had emerged in late 2004 and between discussions at the performance review at that time and again in early 2005 Mr Thompson testified he had discussions regarding the applicant's role with key managers in the organisation. There was interruption to the workflow as a result of the applicant's behaviour and a number of proposals were considered by the management group. Mr Thompson testified that on 9 February 2005 he and the applicant had a discussion regarding the situation. Ms Elliott had been moved out of the section given the intolerable situation that had been reached in the relationship between the applicant and Ms Elliott. Mr Thompson testified that the applicant was advised that she would be transferred to a different position within the organisation providing her with an opportunity to make a fresh start. Mr Thompson went on to testify that the applicant did not accept this advice, she was upset and denied that anything was amiss:

> "…I've done nothing wrong; it's not my fault. And I think this is most unfair and I don't accept it." And Rita walked out. She was in tears and I felt terrible about it but the fact of the matter was the situation was intolerable and in the most sensitive way I could I tried to explain to her the situation and …"
>
> (Transcript page 159)

Mr Thompson testified the applicant did not return to work with the exception of a meeting that occurred between himself and Ms Warman a week later.

67 Mr Thompson testified in relation to the sharing of emails between the applicant and Ms Elliott whereby there had been an incident when the applicant had accessed Ms Elliott's emails. In response to a question Mr Thompson denied giving approval for that to occur and went on to testify that email access within the respondent's organisation was determined between the manager and individual employees.

68 Mr Thompson testified that if the applicant was to be reinstated in her previous employment this would not work given the damage that had already been done. It would be extremely disruptive for the respondent and there would be a significant impact on other employees. Mr Thompson testified there had been indications from secretarial staff that they would leave should the applicant be reinstated. In cross examination Mr Thompson agreed he had not had any form of discussion with the applicant over a period of some four months following the discussion in February 2005 and prior to her termination in July 2005.

69 In cross examination Mr Thompson reiterated that he had discussed with the applicant her abruptness and sharpness in addressing people and the importance of information coming into his office rather than being restricted by the applicant. He had spoken about the issue with the applicant in 2002 and again it had been raised in the applicant's mid-term assessment in 2003, again in 2004 and at the discussion between the applicant and Mr Thompson in February 2005. Mr Thompson in cross examination testified that the respondent was planning to implement administrative assistance for the applicant with a reporting line to the services manager encouraging the applicant to demonstrate correct behaviour amongst peers. Mr Thompson testified that the events with Ms Elliott overtook these arrangements.

70 In cross examination the question was asked of Mr Thompson whether he had ever given any written warnings to the applicant:

> "- - -No, I didn't, and the reason for that is I worked quite closely with - - Rita over a period of 3 years. We'd been through everything. We did have discussions. Rita knew the shortfalls and I probably ought to have but did not, and it got out of hand before I got to the point of a written warning. That sort of thing quite often relates when you intend to get rid of someone. I was trying to do something for the betterment of Rita and for the betterment of the division, not get rid of Rita. It was to try and alleviate a problem that prevailed for 3 years."

(Transcript page 180)

71 In cross examination Mr Thompson identified that the specific issues that caused him to change his mind from pursuing general feedback meetings between himself and the applicant was the growing tension in early January 2005 between Ms Elliott and the applicant and the applicant's inability to accept that she may be a contributor to that tension. Mr Thompson testified that at no stage of that process had he considered issuing a warning.

72 Mr Webb, for the respondent, testified that the applicant, in working and communicating with others was:

> "… very aggressive and outspoken … depending on who she was dealing with, probably more so with subordinates than - - than with the senior members..."

(Transcript page 198)

73 Mr Webb specifically referred to employees within the respondent's organisation and their interactions with the applicant. As a direct result of overhearing exchanges between specific employees and the applicant it was clear that employees became upset. There were occasions when they had ended up in tears. Mr Webb testified this had an effect on staff morale and staff turnover causing one employee to transfer out of Mr Webb's section due to the difficulties in dealing with the applicant. Mr Webb observed that the applicant and Ms Elliott were having difficulties. Towards the end of December 2004 or the beginning of 2005, Mr Webb testified that Ms Elliott was upset, approached Mr Webb and advised she was looking to get out of the section. Mr Webb agreed that no concern regarding these issues with the applicant had ever been expressed directly by him to the applicant although on a number of occasions the matters had been raised within a senior management group.

74 Mr Dale Gration, delivery manager, gave evidence on behalf of the respondent. Mr Gration testified that he first met the applicant in late 1998 or early 1999. Mr Gration testified that he did witness one incident in late 2002, early 2003 where there was an argument between the applicant and another technical assistant, Ms Kendall. Mr Gration testified that:

> "- - -I came in at the tail end of an argument and because it was a public argument, I asked Rita to come and talk to me. We went to the project director's office and I asked her how she felt after that altercation. She said she felt terrible. I then said, "Well, the other lady is probably feeling terrible too" and then we discussed what options she had and - - and I expressed the view that she had an option to actually engage in coaching the individual who had let her down and in that way the individual next time would know, you know, what was expected of her and perhaps not make the same mistake again."

(Transcript page 235)

75 In cross examination Mr Gration testified that during his time working with the applicant there was a very heavy work load and tight schedules to meet, the demands going directly to the workload of the applicant. Mr Gration testified that the applicant was a highly motivated employee however an incident regarding an altercation in late 2002 or early 2003 between the applicant and another project employee Ms Kendall had been observed by Mr Gration. He testified it had occurred in public and that directly after the event he had spoken to the applicant. Mr Gration testified he had contributed to multi source feedback documents submitting that the applicant needed to improve on her behaviour towards peers.

76 Mr Hollingsworth, for the respondent testified he had first become aware of the difficulties the respondent had with the applicant in or around December 2004. Mr Hollingsworth testified he had a meeting regarding the issues of concern with the applicant on or about 5 May 2005. Mr Hollingsworth encouraged the applicant to keep her options open in relation to what job levels or positions in the organisation she would consider. Mr Hollingsworth testified that because the applicant had been in a level 6 position in the projects division it was difficult given the respondent had very few level 6 administrative positions and turnover had been excessively low. Mr Hollingsworth testified the next meeting with the applicant was in June 2005 as there did not appear to have been much progress, and at the meeting the issue of the applicant's behaviour with other administrative assistants was raised, in particular the issue with Ms Elliott. At the meeting the issue of red circling was discussed and a full explanation of the policy of the respondent was outlined to the applicant. At the conclusion of the meeting there was no clear resolution other than to urge the applicant and the parties present, including Ms Warman, to assist in the process of locating an alternative position

77 Mr Hollingsworth testified that reinstatement of the applicant with the respondent would be inappropriate on the basis that alternative positions had already been sought and an extensive period had been extended, some 4 or 5 months the respondent continued to pay the applicant while such opportunities were located. The applicant did not appear enthusiastic about the process or indeed about locating another position. Mr Hollingsworth testified the respondent was now under cost pressures, a position which was quite public, and turnover was low. Importantly the respondent had already been down the path of locating

an alternative position within the supply chain department and that had been rejected by the applicant. Mr Hollingsworth testified that such an opportunity was rare and further, reinstatement of the applicant would have an impact on other employees in the respondent's organisation.

78 Mr Hollingsworth in cross examination denied that a proposal had been put to the applicant in the May 2005 meeting that she was to take one of the alternative positions or her employment would be terminated but agreed it was a proposal put at the June 2005 meeting. Mr Hollingsworth testified he ultimately had the responsibility to bring the employment of the applicant to an end and his principle concern was that the applicant was still receiving payment.

79 Mr Hollingsworth in cross examination indicated that the respondent's policy on red circling was discretionary and the respondent was not prepared to vary the circumstances for the supply chain position. Under cross examination Mr Hollingsworth confirmed he was the person who ultimately made the decision that the applicant would either accept the supply chain position or be terminated:

> "- - that was my decision, but I also consulted Mr Masson…- -The factors I based that decision was that we had a situation whereby we had been paying Rita for 4 to 5 months. We were looking for opportunities and this was an exceptional opportunity and the - - we wanted Rita to take that position at that time because it was - - like as I said before, was a rare opportunity that was a terrific situation"
>
> (Transcript page 270 and 271)

80 Mr Hollingsworth in cross examination denied that the respondent's position that the applicant take the supply chain position or be terminated involved substantial pressure on the applicant as the matter had been going on for some 4 months. Mr Hollingsworth was not aware of the exact date that the applicant had received a clearance to return to duties following a period of extended sick leave.

81 Mr Hollingsworth in cross examination was taken to the issue of red circling indicating there would be no financial impact on the applicant if she were to take the position until the next salary review and thereafter the salary would be gradually pared back to the specific job level applied to the position.

82 Ms Kerryn Elliott, an administrative assistant with the respondent, testified she had worked with the applicant in the projects division commencing August 2003. Ms Elliott testified that her role was as a second administrative assistant to Mr Thompson taking on the overflow of additional work. Ms Elliott testified that initially her relationship with the applicant was positive, having made a decision not to get on the wrong side of the applicant as she observed that the applicant was a person she would not want to cross. Ms Elliott testified that during her time working with the applicant she was micro managed and given little room to work on her own other than menial tasks. Ms Elliott testified that her belief was the applicant needed to control everything.

83 Ms Elliott testified that around December 2004 her relationship with the applicant changed when an issue occurred regarding a community initiative, the Salvation Army Christmas appeal. An argument had emerged between the applicant and Ms Elliott. Ms Elliott determined she would not retaliate. Ms Elliott testified that following an exchange between the applicant and herself the applicant spoke in her normal manner:

> "…you know, with aggression and - - and speaking down to me like I'd performed, you know, the worst act ever but after when - - when Rita took me into the room my voice was raised."
>
> (Transcript page 279)

Ms Elliott testified she was attempting to complete a task not having being part of the community initiative before and was simply liaising with the applicant to attempt to procure an outcome.

84 There was a further incident in November or December 2004, again relating to the community initiative. Matters had become fairly hostile and clearly the applicant had an issue with Ms Elliott. The issue culminated in the applicant snapping at her, Ms Elliott testified that she raised the matter in her performance review asking the respondent why the applicant went out of her way to make life difficult:

> "…Oh I did say to Rita that she spoke - - I think Rita may have asked me for an example which was with the salvation army and I said, "You know, you speak very aggressively" to which she said "No, I speak assertively." I think Rita had actually said, "You know, I do tend to speak assertively which can be taken the wrong way sometimes" to which I said, "Well, no, actually, it's aggressive. There's quite a difference between assertive and aggressive and you are quite aggressive, not only with me but with other people and I don't like being on the receiving end of it on a daily basis. And there needs to be some recognition that this is the case."…It was going no where so I think it ended shortly after that."
>
> (Transcript page 281)

85 Ms Elliott testified she spoke to Mr McGlynn regarding a transfer out of the department due to her relationship with the applicant. Ms Elliott testified she also discussed the matter with Mr Webb and the fact she was unhappy. On one occasion Mr Roland overheard something between the applicant and Ms Elliott and offered to take Ms Elliott for a coffee. Ms Elliott testified that following her discussions with Mr McGlynn she approached the applicant informing her she had applied for a position. Ms Elliott testified that the applicant's reaction was:

> "- -was quite full on. She had - - yelled at me and said that I was appalling, and my behaviour was disgusting, that I had completely abused the opportunity that she'd given me to which I replied, "I haven't even got the job yet but obviously it's not working out between us and it would be best if I left." and I walked out."
>
> (Transcript page 283)

86 Ms Elliott testified following this exchange the applicant became more difficult than previously to work with and was hostile. Ms Elliott testified that; "after I had left the department the applicant had accessed my emails". Ms Elliott testified it was clear

to her the applicant was overseeing her email inbox as the particular email concerned had been deleted after 2 or 3 seconds. On the issue of reinstatement Ms Elliott testified that if the applicant were to be reinstated she would leave immediately.

87 Ms Elliot agreed in cross examination that the applicant in completing Ms Elliott's multi-source feedback document had made some positive comments but denied that overall the document was positive.

88 Mr Brett Smith, general manager of the supply chain for the respondent gave evidence testifying that he commenced with the respondent in the middle of 2005 and had been looking for a competent administrative assistant. Mr Smith testified a meeting with the applicant was arranged regarding the role itself; covering the activities and the focus of the job around accuracy. Mr Smith testified the applicant appeared capable and enthusiastic and following a discussion with Ms Warman, the human resources manager, a plan was set in place to make a formal offer to the applicant. Mr Smith testified a further meeting took place with the applicant and Ms Warman present, the job was offered as the supply chain administrative assistant at job level 5 with the qualification of red circling. Mr Smith testified that the applicant indicated it would be difficult for her to accept for various reasons but undertook to think about the role and inform the respondent of her views. Mr Smith testified that the applicant declined the role. Thereafter Mr Smith testified, the role was filled by another employee.

89 Ms Maria Warman, human resources manager for the projects division gave evidence for the respondent. Ms Warman testified she first became aware of issues relating to the applicant when she commenced in the position of human resources manager. Ms Warman testified she had been asked to meet with the applicant to assist with locating an alternative role for the applicant. Ms Warman testified she initially met with Mr Thompson and following that meeting had meetings with the applicant, principally to procure an understanding of what had occurred and to locate a suitable alternative role within the respondent's organisation. Ms Warman testified the meetings with the applicant took place at the Mount Street Cafe occurred on 4, possibly 5 occasions during which time the applicant explained in detail her grievances with the process that had occurred.

90 Ms Warman testified that on each occasion she met with the applicant the meetings were initiated by her and were lengthy meetings. Ms Warman testified that during one of the meetings the applicant indicated she felt there had been a conspiracy amongst the group of senior managers within the projects division and they had formed the view that she could no longer work in the division and the decision to remove her had been made by them. Ms Warman testified that in addition to meeting with the applicant she consulted with other human resources managers and advisors in an attempt to find an alternative role. The recruitment team within the respondent's organisation was also made aware of the situation. Ms Warman testified in discussion with managers about alternative roles for the applicant she had outlined to managers there had been a breakdown of trust between the applicant and Mr Thompson and furthermore the relationship had broken down to the point it was no longer tenable for her to remain in her role within the projects division.

91 Ms Warman testified there were very few level 6 administrative assistant roles within the respondent's organisation. Of some 130 administrative assistant roles within the organisation currently only 14 were permanent level 6. Ms Warman testified that she sought information on the current level 6 roles from managers to appraise herself of whether there were any fixed term employees or temporary employees whose terms were coming to an end. Ms Warman testified that there was an opportunity emerging in the supply chain department.

92 Ms Warman testified there was a further meeting with the applicant and Mr Hollingsworth where Ms Warman raised the difficulties the respondent was having in identifying a suitable alternative role. Mr Hollingsworth raised the difficulties that were occurring as a result of:

> "…a reputation that preceded Ms Mazalevskis….He explained that he's spoken to several managers - and I don't know who all those managers are but he had spoken to several of them – and had discussed Ms Mazalevskis' work practices and reputation. There appeared to be no suggestion of her being incapable of doing the role but just that she had had difficulties in her relations with people in the past."
>
> (Transcript page 324)

Ms Warman testified that during this meeting the applicant was angry and disappointed and raised her disappointments with Mr Hollingsworth and herself.

93 Ms Warman testified that on 9 February 2005, the day that the meeting had occurred between Mr Thompson and the applicant, confirmation had been received by the respondent that the applicant was unable to work for the entire period through to the end of April 2005. Ms Warman testified a workers' compensation progress medical certificate had been received confirming that the applicant would be fit to return to modified or other duties from 26 April 2005.

94 Ms Warman testified that up until the meeting held on 3 June 2005 and following the applicant's transfer out of the projects division there were some 25 roles put to the applicant to consider as alternative positions.

95 Ms Warman testified that one of the principal concerns of the applicant in looking at the alternative jobs on offer was the issue of red circling. Ms Warman outlined that the applicant was concerned there would be a reduction in her salary and a removal of entitlements and benefits. Ms Warman testified that under red circling entitlements could not be removed and the respondent would not be decreasing her salary. Red circling meant that any increases to her base rate would be at an incremental rate rather than the full market rate and that would occur until such time as the lower base rate reached her current salary level which would be maintained. Ms Warman testified that the base rate of the respondent was known as parv and is the figure used to determine superannuation salaries. It is the base to which allowances are added. Ms Warman testified that at the second meeting with Mr Brett Smith where the job offer within the supply chain department was discussed the applicant, she was advised that the job title had been changed in accordance with her wishes, that red circling would apply and the offer was conditional to her accepting red circling. Ms Warman testified the applicant wanted some time to think about it. It was explained at the meeting that if the applicant chose not to accept the offer it may impact on her future with the respondent. Ms Warman testified the applicant was given a deadline of 7 July 2005 to respond after which Ms Warman telephoned the applicant and was advised that red circling would not be accepted however she was keen to take on the role. Thereafter Ms Warman testified she wrote to the applicant demonstrating how red circling would impact on her salary and giving an example

of how it operated in practice. The correspondence also outlined that if she was not able to accept the position then it could potentially lead to termination of employment. Ms Warman testified that the correspondence outlined the need for the applicant to respond by 18 July 2005 with regards to her acceptance or otherwise of the offer. No response was received and Ms Warman testified she had difficulties in getting through to the applicant by telephone in an attempt to ascertain the applicant's response. The applicant then requested an extension and Ms Warman testified that was agreed to by the respondent and confirmed in correspondence. The date given in the correspondence allowing for the extension of time was the 21 July 2005:

> "On the 21st of July we had a conversation which I think went from about 5pm till about 7pm where Ms Mazalevskis continually repeated that she was keen to take - - keen to accept the position, wanted to remain with Woodside however she wouldn't accept the red circling. And I continually explained to her that she didn't have a choice with regards to red circling, that the offer was conditional upon her accepting red circling and that if she didn't accept that, then she wasn't accepting the offer; she was, in fact, rejecting the offer and Woodside would therefore be required to terminate her employment."

(Transcript page 335)

96 Ms Warman testified that the decision ultimately to terminate the applicant was made by Mr Hollingsworth and Mr Masson. Ms Warman testified that following the lengthy telephone conversation in which the applicant refused to accept the position she was informed by correspondence that as she had rejected the respondent's offer of employment the respondent was terminating her employment.

97 Ms Warman testified that once the applicant's employment had been terminated the respondent advertised the position around September 2005 and filled the role with a permanent employee. Ms Warman testified that with respect to reinstatement there were certain administrative assistants who had indicated to her that they would resign immediately if the applicant were to return. One of those administrative assistants was Ms Elliott and there were others currently working in the projects division.

98 Ms Warman in cross examination agreed that after 26 April 2005 when the applicant was fit to resume duties with the respondent she was stood down on full pay, a decision made by Mr Hollingsworth, Mr Masson and Mr Thompson on the basis that the relationship of trust had broken down. Ms Warman in cross examination agreed that the supply chain position working with Mr Brett Smith was the first real offer that had been put by the respondent to the applicant.

99 In cross examination Ms Warman informed the commission that she believed the applicant deserved an opportunity and accordingly provided a reference. Ms Warman in cross examination admitted:

> "We hadn't followed a counselling and - - and disciplinary process appropriately and hadn't afforded her procedural fairness."

(Transcript page 345)

Findings and Conclusions

Credibility

100 The Commission has considered carefully the evidence given by each witness and closely observed each witness. I have concerns regarding some evidence particularly that given by the applicant. The Commission finds that at times the applicant was not convincing and her constant denials or inability to recall events was unhelpful particularly when the applicant claimed that there was a conspiracy to remove her from the projects division. The Commission in determining the applicant's credibility has taken into account, not only the documentation tendered at the hearing which outlined problems experienced by the applicant in the workplace that had been formally identified as an issue since 2002 with respect to interacting with her peers but also the verbal testimony from a range of witnesses. In reaching a decision regarding the applicant's evidence the Commission has not relied upon the hearsay evidence lead as part of the respondent's testimony. The Commission found that at times the applicant's evidence was inconsistent. For example when the applicant testified repeatedly that she did not treat other persons in the workplace in a negative manner in spite of the weight of evidence against her. The Commission notes that the applicant did finally concede that this happened from time to time. In the circumstances I have major concerns regarding the credibility of the evidence given by the applicant about her conduct.

101 The Commission is of the view that the evidence given by Ms Cotton, Mr Thompson and all other witnesses was, in the main, credible and was given to the best of their recollection. The Commission finds that the evidence given by all of the other witnesses in these proceedings is therefore accepted and to the extent of any inconsistencies in evidence between the applicant and other witnesses the Commission accepts the evidence of Ms Cotton and other witnesses.

102 The test for determining whether a dismissal in all the circumstances is unfair or not is well settled. The question to be asked is whether the respondent acted harshly, unfairly or oppressively in dismissing the applicant. In making this determination the Commission has adopted the principles as outlined in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia Hospital Service and Miscellaneous Branch WA Branch (1985)* 65 WAIG 385. In such matters the onus is on the applicant to establish whether the dismissal was, in all the circumstances, unfair. The first question the Commission needs to consider is whether the right of the employer to terminate the employment has been exercised so harshly or oppressively against the applicant by the respondent as to amount to an abuse of the right. When considering whether a dismissal within the meaning of the Act is fair or not the Commission may take into consideration a number of issues. For example, if such a dismissal is effected in a manner which is unfair. Terminating an employment contract in a manner which is procedurally irregular may not in itself mean that the dismissal is unfair as outlined in the principles adopted in *Shire of Esperance v Mourtiz (1991*) (op cit). The Commission has considered the substantial amount of documentation tendered in proceedings in addition to the oral evidence given by a number of witnesses. In all of the circumstances the Commission finds that the decision made by the respondent to terminate the applicant based on her conduct and her subsequent failure to accept the

position offered by the respondent in the supply chain department was unfair for one principle reason, that being procedural unfairness.

103 The Commission finds that the applicant had an extensive period of employment with the respondent in Karratha and Perth, in total some 18 years. It was not in dispute and in fact conceded by a number of the respondent's witnesses that the applicant was technically competent, rising through administration roles with the respondent from job level 4 through to executive assistant job level 6 at the time of her termination.

104 The Commission finds that in 2002, 2003, 2004 and again in 2005 the applicant received negative comments on her performance as it related to interaction with peers. In addition, discussions were held between managers and the applicant regarding her inability to relate appropriately to junior administrative staff. It is apparent to the Commission that a number of issues with regard to the applicant's conduct came to the attention to the respondent's managers on an ongoing basis between 2002 and 2004. The Commission finds that on each occasion the matters were raised with the applicant either in writing or in conversation between a manager and the applicant there was a failure on the part of the respondent to identify the consequences to the applicant of failing to improve the conduct complained of. The Commission finds that this failure amounted to procedural unfairness in later relying on that conduct to transfer the applicant from the projects division following a meeting with Mr Thompson in February 2005. The Commission finds that at no stage was the applicant given notice that her employment was at risk until the meeting with Mr Hollingsworth in May 2005 when it became clear that if she did not accept an alternative position within the supply chain section of the respondent then the applicant would be terminated. Failure to do so is in the Commission's view, industrially unfair.

105 Kenner C in *Scott v Consolidated Paper Industries (WA) Pty Ltd* (1998) 78 WAIG 4940 outlined the law and principles associated with industrial fairness where poor performance of an employee is raised. In that decision Kenner C observed at 4943:

> "… That is not for the Commission to assume the role of manager in considering whether the dismissal is or is not unfair. The test is an objective one and in accordance with the Commission's duty to pursue section s.26(1)(a) and (c) of "the Act".
>
> Moreover contemporary standards of industrial fairness require, in my view, that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his or her performance or conduct has not improved as required by the employer. This requires more than a mere exhortation to improve to improve and should place the employee of being in no doubt that their employment may be terminated unless they take appropriate remedial steps; *Bogunovich v Bayside Western Australia Pty* (1998) 78 WAIG 3635. It should be emphasised that whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however it may be a most important factor, depending upon the circumstances on the particular case; *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. "It follows however that a dismissal will not necessarily be unfair in the event of procedural unfairness alone, as all the circumstances need to be considered."

106 The Commission finds it was reasonable for the applicant to have expected some feedback as to consequences in relation to poor conduct with her peers from 2002 onwards given it was that issue on which the respondent later relied to transfer the applicant out of the projects division, ultimately leading to her termination in July 2005. The Commission finds the respondent failed both the applicant, Ms Elliot, and other employees of the respondent when it did not implement a formal process to monitor the interaction of the applicant with her peers and, in particular, junior staff. It was not until the respondent was contacted by Ms Elliot's mother that the organisation took any pro-active steps to deal with the issue of intimidation of employees by the applicant, an issue that the Commission finds had been ongoing for some 3 to 4 years. Given the number of employees within the respondent's organisation and the standards of occupational health and safety expected from employers and employees, the failure of the respondent take action on an issue for such a long period is considered inappropriate, particularly where there was an awareness amongst managers regarding the problems associated with the applicant.

107 The Commission finds that the evidence of Dr Cadden identifies that at the time of the applicant's dismissal she felt isolated, devalued and disregarded. Insofar as this assists the Commission for the purposes of assessing remedy, the finding of injury to the applicant as a result of the dismissal is so made.

108 The terms of the Act are clear in that the principle remedy available pursuant to s23A in the case where a finding has been made by the Commission that an employee has been dismissed harshly, oppressively or unfairly is reinstatement or re-employment. The alternative remedy pursuant to s23A is compensation however, compensation in only available to the Commission where it is able to be established that reinstatement or re-employment is impracticable or alternatively where the employer offers to pay compensation instead of reinstatement or re-employment. The onus to establish whether reinstatement or re-employment is impracticable lies with the employer having regard for the principles established in *Gilmore v Cecil Bros FDR Pty Ltd* (1996) 76 WAIG 4434. Counsel for the respondent has discharged the onus required. There was significant evidence before the Commission and I am satisfied that reinstatement or re-employment of the applicant by the respondent would be, in all of the circumstances, impracticable. In reaching this decision the Commission has excluded views expressed by the respondent's witnesses who had had no experience of working alongside the applicant and were relying principally on hearsay evidence.

109 The Commission has found, based on the principles of the *Undercliffe* case (op cit), that the applicant was unfairly dismissed and that the applicant's dismissal by the respondent was procedurally unfair given that at no stage did the respondent permit the applicant to return to the workplace even though she was cleared by the medical profession to return on 26 April 2005. The Commission finds that the applicant in these circumstances was not given a warning however she had little opportunity to improve given that following the meeting with Mr Thompson on 9 February 2005 she did not return to the workplace. There was an opportunity for the applicant to improve her performance between 26 April 2005 and the date on which the termination became effective; 22 July 2005. Given the number of occasions on which the applicant's poor attitude and conduct had been identified from 2002 on it is the Commission's view that should the applicant have returned to work in that period there would

have been little or no improvement in the conduct complained of by the respondent. The Commission finds that the manner and the way in which the applicant responded to questions relating to her own conduct in the witness box was defensive and principally denied any wrongdoing, illustrating the very conduct complained of by the respondent. The Commission finds however, based on the evidence of both the respondent's witnesses and the applicant herself, that the applicant may have been dismissed some two months following her return to work.

110 The Commission finds the applicant's loss of income ought therefore be limited to overall income the applicant would have received had she been returned to the workplace for a period of two months, less any workers compensation payments the applicant received in that two month period following her termination. In making this finding the Commission has relied on the principles expressed by the Industrial Appeal Court in *Elderslie Finance Corporation Ltd v Dellys* (2003) 82 WAIG 1193.

111 The Commission finds the applicant has met the onus required to mitigate her loss.

112 Turning to the issue of compensation for injury the Commission is satisfied the applicant has suffered an injury as a result of the manner of hertermination. The callous way in which the applicant was treated by the respondent, in my view, caused the applicant injury in the form of shock, accordingly an award of $2000 will be made for injury as a result of the dismissal. The Commission makes such a finding based on the evidence presented and reflecting on the principles in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8.

113 The Commission therefore requests written submissions from the parties on the total income for compensation for loss the applicant would have received had she continued to be employed from 22 July 2005 through to 22 September 2005 to be submitted to the Commission within 15 working days of the issuance of these reasons.

114 Thereafter a minute of order will issue reflecting these reasons for decision.

2007 WAIRC 00351

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RITA MARIA MAZALEVSKIS
	APPLICANT
	-v-
	WOODSIDE ENERGY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 10 APRIL 2007
FILE NO.	APPL 843 OF 2005
CITATION NO.	2007 WAIRC 00351

Catchwords	Consideration of remuneration for the purposes of compensation of loss as per the *Industrial Relations Act 1979*
Result	Order issued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr N Ellery (of counsel)

Supplementary Reasons for Decision

1 On 28 February 2007 the Commission issued its Reasons for Decision in this matter. In paragraph [113] of those Reasons the Commission requested written submissions from the parties on compensation for loss, in particular, total income the applicant would have received had she continued to be employed from 22 July 2005 through to 22 September 2005 by the respondent, to be submitted to the Commission.

Applicant's submissions

2 The applicant submitted total income should be interpreted as those amounts under the contract of employment with a monetary value able to be determined and should include all items to which a monetary value has been assigned except for payments which can be considered a "once off" payment.

3 The applicant submitted her annual rate of remuneration was $79,357 producing a weekly rate of $1,526.10 (gross). In considering aspects that ought be incorporated into the nine week compensation for loss the applicant submitted annual leave loading ought be included given that such a provision would have been received had the employment not been terminated. The applicant conceded that it ought be applied proportionately.

4 The applicant submitted that health allowance was an ongoing entitlement paid on a regular basis as part of her remuneration and ought be included. Similarly, superannuation for the period was a benefit that otherwise would have been paid to the applicant throughout the period and ought be included. The applicant submitted that PBP JL 1-11 was a bonus component based on the performance assessment and related to the annual bonus paid by the respondent and ought be applied proportionately as the period would have contributed to the applicant's ultimate entitlement. The applicant submitted the share plan value as demonstrated on Exhibit 9, being the value to the applicant at the level of her participation ought be applied, given it is a benefit tied directly to the employment contract. The applicant submitted that the amount reflected on Exhibit 9 allocated to salary continuance was an amount paid on behalf of the applicant on a regular basis and therefore ought be regarded as part of the total income that would have been received for the period.

5 The applicant submitted that the Commission ought make an order for the weekly assessment multiplied by 9 (less applicable taxation) reflecting the components of a full year's remuneration that would have been received for the period.

6 The applicant submits such an approach is assisted by the term used in the *Industrial Relations Act 1979* (the Act) for determining compensation, namely remuneration. This term has a much wider meaning than salary or wages and has been held to include contractual benefits such as motor vehicles and insurance payments on behalf of an employee, including bonuses. It was submitted by the applicant to pay less would provide the respondent with a windfall gain comprising the aggregate of the deducted elements compared to the respondent's own calculation of the remuneration package, tendered into evidence by agreement of the parties.

Respondent's submissions

7 The respondent submitted that various elements of the applicant's salary package (including PBP JL 1-11), the share plan and salary continuance insurance ought be ignored for the purpose of calculating the applicant's income for the period 22 July 2005 to 22 September 2005. It was submitted by the respondent such items were merely "notional" and could not be considered income or benefits the applicant was entitled to receive, or would have received, as part of her monthly remuneration entitlements in either July, August or September 2005.

8 The respondent submitted that in the period 22 July 2005 to 22 September 2005, $5,281.76 was paid to the applicant in workers' compensation payments. In accordance with the Commission's findings at paragraph [110] the total amount of compensation to be awarded ought exclude such an amount. In the alternative the respondent submitted that the applicant ought receive a payment inclusive of what would otherwise be paid by the respondent as superannuation in respect of the applicant for the period of 22 July 2005 to 22 September 2005 namely $3,954.74.

9 In the second alternative, the respondent submitted the applicant ought receive a payment inclusive of PAYG taxation for the period 22 July 2005 to 22 September 2005, namely $5,297.74.

10 In the third alternative, the respondent submitted the applicant ought receive a payment inclusive of both a superannuation payment for the period 22 July 2005 to 22 September 2005 and PAYG taxation for the same period. The respondent submitted this amount would total $6,632.74.

Findings by the Commission

11 In considering this aspect of the decision the Commission has had regard for the submissions of the parties and the Act insofar as it refers to "remuneration" at s 23A(5)(b). The Commission has reflected on the principles espoused by the Full Bench in *Capewell v Cadbury Schweppes Australia Ltd* (1997) 78 WAIG 299.

12 The Commission finds on the issue of compensation for loss the applicant would have received had she continued to be employed from 22 July 2005 through to 22 September 2005 aspects of remuneration ought include pre-allowance remuneration value (PARV), annual leave loading, health allowance and superannuation contributions with an associated divisor of 52, a total of $12,372.76.

13 The Commission, based on its findings in paragraph [109] of the Reasons for Decision, finds that the applicant would not have received performance based pay in that particular year.

14 The Commission finds that the applicant ought receive a notional amount based on the share plan and salary continuance insurance. Given the Commission's findings in paragraph [109] the devisor used for the purposes of assessing compensation for loss has been 37.514 the number of weeks up to and including 22 September 2005. Compensation for loss for the share plan and salary continuance insurance total $789.30 (nett).

15 The total compensation for loss for the specified period the Commission finds is $13,162.06 (gross). In accordance with the Commission's findings on injury, $2,000 (nett) is to be added to that amount, less $5,281.76 (nett), monies already received by the applicant in workers' compensation payments.

16 A Minute of Order will issue reflecting the Reasons for Decision.

2007 WAIRC 00377

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RITA MARIA MAZALEVSKIS
	APPLICANT
	-v-
	WOODSIDE ENERGY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 12 APRIL 2007
FILE NO	APPL 843 OF 2005
CITATION NO.	2007 WAIRC 00377

Result	Order issued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr N Ellery (of counsel)

Order

HAVING heard Mr K Trainer (as agent) on behalf of the applicant and Mr N Ellery (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby –

1. DECLARES that the applicant was unfairly dismissed from her employment with the respondent on or about 22 July 2005;
2. DECLARES that it is impracticable to reinstate the applicant to her former position; and
3. ORDERS that the respondent pay to the applicant within 14 days of the issuance of this order the sum of $13,162.06 (gross) by way of compensation for loss in addition to $2,000 (nett) for compensation for injury, less $5,281.76 (nett).

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2007 WAIRC 00392

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER MONAGHAN
	APPLICANT
	-v-
	HIGHAM'S PTY LTD, TRADING AS OH&S CONSULTING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 20 APRIL 2007
FILE NO	B 7 OF 2007
CITATION NO.	2007 WAIRC 00392

Result	Application dismissed for want of prosecution

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS the matter was listed for a show cause hearing on 20 April 2007 and the applicant was advised that failure to attend would lead to the application being dismissed; and

WHEREAS the applicant did not attend the hearing;

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

THAT the application be and is hereby dismissed for want of prosecution.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2007 WAIRC 00419

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RAGNAR PURJE
	APPLICANT
	-v-
	THE STATE DIRECTOR CATHOLIC EDUCATION OFFICE PERTH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 4 MAY 2007
FILE NO/S	B 5 OF 2007
CITATION NO.	2007 WAIRC 00419

Result	Dismissed
Representation	
Applicant	In Person
Respondent	Mr Ian Curlewis of counsel instructed by Lavan Legal

Order

HAVING heard Mr R Purje on his own behalf and Mr I Curlewis of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2007 WAIRC 00429

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORRETTA BERNARDETTE ROLLINSON
	APPLICANT
	-v-
	COMMISSIONER DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	FRIDAY, 9 FEBRUARY 2007, WEDNESDAY, 11 APRIL 2007,
DELIVERED	WEDNESDAY, 9 MAY 2007
FILE NO.	U 561 OF 2006
CITATION NO.	2007 WAIRC 00429

CatchWords	Industrial Law - Termination of employment - Harsh, Oppressive and unfair dismissal -Whether applicant dismissed - Relevant principles applied - No dismissal to attract Commission's jurisdiction - *Industrial Relation Act* 1979 29(1)(b)(i)
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms R Hartley of counsel instructed by the Department of Corrective Services

Reasons for Decision

1. The applicant has commenced these proceedings pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"), alleging that on or about 30 November 2006, her employment as a prison officer was terminated by the respondent, in circumstances which were harsh, oppressive, and unfair.

2. The applicant by her particulars of claim does not seek reinstatement but rather seeks "an alternative equal safe place of employment, medical treatment for me that was terminated by the Department's actions". The applicant also seeks compensation for loss.

3. The respondent by its notice of answer and counterproposal denies the applicant's claim generally. Additionally the respondent alleges that the applicant was never dismissed from her employment as a prison officer and as at the time of her application being filed on 22 December 2006, remained a prison officer employed under the terms of the Prisons Act 1981 and the relevant industrial instruments.

Factual Background

4. The applicant testified that she commenced employment as a prison officer in May 1986. From 2002 the applicant was based at the Eastern Goldfields Regional Prison. She said that in September 2002, prison officers at that prison took part in industrial action involving a withdrawal of their labour. The applicant did not withdraw her labour and attended for duty. The applicant testified that thereafter, she was subject to various acts of discrimination and harassment by other prison officers which she said was as a consequence of her not participating in the industrial action which took place. The applicant complained to the respondent about these matters and whilst it is not necessary for the purposes of this matter to consider such issues in detail, an inquiry was undertaken in relation to the grievances raised by the applicant which was the subject of a detailed written report tendered as exhibit A1.

5. As a consequence of these events, the applicant suffered stress and proceeded on workers compensation in October 2002. Subsequently, the applicant was transferred to the Bunbury Regional Prison in November 2002 where she said she felt isolated and was under stress. Various further complaints were made by the applicant in relation to her grievances including a complaint to the Public Sector Standards Commission about the conduct of the respondent and some of its officers.

6. From the applicant's demeanour in giving her evidence, these matters were obviously very stressful for her and her family.

7. The applicant subsequently went back on workers compensation and has not performed the duties of a prison officer since. The applicant gave evidence that she had been receiving medical assistance and that as at the time of these proceedings, was still medically unfit to resume her duties.

8. The first significant event in relation to the issue of whether the applicant was dismissed was a letter dated 14 December 2005, from the applicant to Mr Johnson the Commissioner for Corrective Services, tendered as exhibit A2. By this letter, the applicant purported to submit her written resignation effective 31 December 2005. In the letter, the applicant said that she was aware of her obligation to give one month's notice of resignation, but sought a waiver of that period of notice for various reasons set out in the letter. The applicant said that at the time she wrote the letter of resignation, she felt she had no option but to do so because of her then financial circumstances. The period of notice given was therefore some two weeks less than that required of her.

9. It seems that following receipt of this letter, the respondent through Mr Johnson and Ms Butler, his then Executive Assistant, discussed the applicant's circumstances with her and visited the applicant at her home, in light of the matters raised in her letter of 14 December 2005. Ms Butler's evidence was that the respondent was concerned that the applicant may have been making an emotional decision in haste which may prejudice her. It would appear that at this time, there was a process underway in relation to the applicant's complaint to the Public Sector Standards Commission. By an email from Ms Butler to the applicant dated 4 January 2006, tendered as exhibit A4, Ms Butler informed the applicant that the Commissioner of Corrections had, in light of the ongoing issues raised by the applicant, decided to continue the applicant's salary and continuity of employment, seemingly on an "interim basis", because of the ongoing process before the Public Sector Standards Commission. This was so notwithstanding that the applicant had no further entitlements to be paid salary from this time, without impacting on her leave entitlements. This arrangement was accepted by the applicant in an email from her to Ms Butler dated 6 January 2006, which was tendered as exhibit R13.

10. As it turned out, this arrangement, gratuitous though it was from the respondent, continued from January 2006 up to and including 30 November 2006. In this period it seems that various attempts to resolve the applicant's grievances were unsuccessful. Offers made by the respondent to settle the various claims advanced by the applicant were not accepted by her. It was Ms Butler's evidence that the "interim arrangement" put in place in January 2006, was for the applicant's benefit.

11. By letter dated 7 November 2006, tendered as exhibit R7, Mr Johnson wrote to the applicant informing her that the respondent's then settlement offer in relation to various matters in dispute would remain open until 30 November 2006. Whilst the respondent would be prepared to continue discussing the matter with the applicant after that date, the worker's compensation component of the settlement offer would be withdrawn. The applicant was also advised that from 30 November 2006, the salary payments which had been made by the respondent from January 2006 would cease. Subsequently, those events came to pass.

12. Mr Tosh the Manager of Personnel Services for the Department of the Attorney General, testified that the "interim arrangement" from January to November 2006, was put in place by the respondent in order that the conciliation process in relation to the applicant's complaint to the Public Sector Standards Commission, could take its course, without the applicant having to use her leave entitlements. Once the process had been completed and the matters were not resolved,

in order for the applicant to continue to be paid, he said she would have to access leave entitlements in relation to which appropriate steps were taken. Tendered as exhibits R1 to R6 inclusive were copies of electronic employee payslips and email communications between Mr Tosh and the applicant, advising of this. It seems from Mr Tosh's evidence, that from 1 December 2006 to 20 March 2007, the applicant was paid personal leave.

13. It would seem that on or about 29 January 2007 the applicant again wrote to Mr Johnson, raising the issue of her resignation submitted in December 2005. Mr Johnson replied by letter of 5 February 2007, a copy of which was tendered as exhibit R10. In his reply, Mr Johnson sought from the applicant, in light of the events which had transpired during the course of the year, a written current confirmation of her intention to resign from the respondent. Subsequently, by letter dated 12 February 2007, a copy of which was tendered as exhibit A3, the applicant wrote to Mr Johnson which formal parts omitted, read as follows:

> *"I consider that by ceasing to pay my normal wages, the Department has effectively terminated my employment.*
>
> *As a result, I find myself in an untenable financial position and therefore, under duress, I hereby tender my resignation…."*

14. Mr Johnson replied to the applicant's letter by letter dated 15 February 2007 advising that the respondent had not terminated the applicant's employment and that the applicant has remained a permanent prison officer with the status "being leave with no pay". The letter went on to state that the respondent did not accept the applicant's assertion that her resignation was made under duress and advised that "I am unable to accept your resignation under those circumstances." It would seem that there was further communication between the parties in early March 2007. In a letter dated 14 March 2007, a copy of which was tendered as exhibit R12, Mr Johnson advised the applicant that whilst again disputing the applicant's assertion that her resignation was made under duress, indicated that the resignation would be "accepted" effective 20 March 2007. At that time the applicant was paid all of her accrued entitlements.

15. I find accordingly.

Consideration

16. As noted at the outset of these reasons, a threshold issue arises as to whether the applicant was dismissed on 30 November 2006 in order to attract the jurisdiction of the Commission under s 29(1)(b)(i) of the Act. This is a jurisdictional fact necessary to be found in order for the Commission to further consider whether any such dismissal is harsh, oppressive or unfair: *Gallotti v Argyle Diamond Mines Pty Ltd trading as Argyle Diamonds* (2003) 83 WAIG 919; (2003) 83 WAIG 3053; *JL and V Haydar Family Restaurants t/a as McDonalds* (2003) 83 WAIG 3303.

17. In this case the applicant in effect advances two contentions. The first is that her "original" letter of resignation dated 14 December 2005 was still "alive" as at 30 November 2006 and she was forced to resign. Secondly and in any event, the cessation of her salary payments as at 30 November 2006, constituted her termination of employment by the respondent.

18. For the following reasons, the Commission is not persuaded that the applicant's claims in this regard can be maintained. Accordingly, the applicant was not dismissed by the respondent on either 30 November or 22 December 2006, the latter being the date on which these proceedings were commenced.

19. Dealing with the first issue of the applicant's letter of resignation of 14 December 2005, it is trite to observe that a valid notice of termination of employment operates in accordance with its terms and that a contract of employment will come to an end on the expiration of the notice: *Hill v Parsons* [1972] 1 Ch 305 at 313-314; *Grout v Gunnedah Shire Council (No 1)* (1994) 1 IRCR 143 at 152; *APESMA v Skilled Engineering Pty Ltd* (1994) 1 IRCR 106 at 118. Acceptance by an employer of valid notice from an employee is not necessary to bring the contract of employment to an end.

20. Where an employee gives an employer inadequate notice either under their contract of employment or any relevant industrial instrument, that notice is essentially a repudiation of the contract of employment and will not be effective. However, it is open to an employer, in clear and unambiguous terms, to accept an inadequate period of notice which will bring the contract of employment to an end at that time: *Gunnedah; Heyman v Darwins Ltd* [1942] AC 356 at 361; *Gunton v Richmond–Upon–Thames LBC* [1981] Ch 448 at 467-468.

21. In this case the applicant's purported letter of resignation dated 14 December 2005, providing two weeks notice of termination of employment, was contrary to the requirements of cl 10.3 of the then Department of Justice Prison Officers Enterprise Agreement 2005, which required that an employee "shall give the employer written notice of termination of not less than four weeks…". Whilst in the applicant's letter she requested the respondent to accept a lesser period of notice, plainly on the evidence it did not do so. Instead, the respondent entered into discussions with the applicant and put in place an arrangement whereby she would continue to receive her salary payments, despite not having any entitlement to same, whilst other matters between the parties were the subject of mediation. There was no clear and unambiguous acceptance of the inadequate notice given by the applicant. For that reason alone in my opinion, the notice of resignation was invalid and ineffective. Moreover however, the applicant's intention to resign at that time was overtaken by her conduct, in accepting the respondent's proposal that she remain an employee and continue to be paid her normal entitlements, which as it turned out, continued up until 30 November 2006. Implicitly in my opinion, any intention to resign at that point was overtaken by the applicant's conduct in participating in such an arrangement.

22. This position was essentially affirmed when the applicant again, at least on the evidence on two occasions in early 2007, submitted notices of resignation. The applicant's written resignation given in February 2007, in my opinion, operates as an estoppel by conduct against any argument that the December 2005 resignation could be in law, effective: *Smith and Another v Blandford Gee Cementation Co Ltd* [1970] 3 All ER 154. Furthermore, I am well satisfied on the evidence and I find, that despite the cessation of the applicant's salary payments on 30 November 2006, because the parties were not able to resolve their differences, that the applicant remained employed by the respondent as a prison officer, and her various leave entitlements were utilised, with her consent, so that she could continue to receive remuneration.

23. In all of the circumstances, in light of the foregoing, in my opinion, it cannot be said that the applicant was dismissed by the respondent on 30 November 2006, or indeed at the time the applicant commenced these proceedings on 22 December 2006. The cessation of gratuitous salary payments made by the respondent, without any lawful obligation to make them, on 30 November 2006, cannot constitute a termination of employment in my opinion. Circumstances may well have been different, if the applicant had a lawful entitlement to be remunerated under her contract of employment at this time, and the respondent unilaterally ceased making such payments. In those circumstances, it may be open to argue that there was in effect, a repudiation of the contract of employment by the employer leading to its termination. However, that is not the case in this matter.

24. Whilst the Commission has some sympathy for the applicant in terms of the anguish which she obviously endured in the earlier stages of the present dispute with the respondent, it must be recognised that the respondent, during the course of 2006, went out of its way to ensure that the applicant was not financially disadvantaged, in circumstances where it had no legal obligation to do so.

25. For all of the foregoing reasons, I am not satisfied that at the time of the institution of these proceedings the applicant was dismissed by the respondent so as to attract the Commission's jurisdiction. The application must therefore be dismissed.

2007 WAIRC 00428

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORRETTA BERNARDETTE ROLLINSON
	APPLICANT
	-v-
	COMMISSIONER DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 9 MAY 2007
FILE NO/S	U 561 OF 2006
CITATION NO.	2007 WAIRC 00428

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms R Hartley of counsel instructed by the Department of Corrective Services

Order

HAVING heard Ms L B Rollinson on her own behalf and Ms R Hartley 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.

2007 WAIRC 00425

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL TOMMY SIMES
	APPLICANT
	-v-
	TIMES PUBLISHING
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 8 MAY 2007
FILE NO/S	B 13 OF 2007
CITATION NO.	2007 WAIRC 00425

Result Application Dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS on Thursday, the 1st day of March 2007, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties reached agreement in principle in respect of the application; and

WHEREAS on Tuesday, the 8th day of May 2007, the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2007 WAIRC 00426

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DANIEL TOMMY SIMES

APPLICANT

-v-

TIMES PUBLISHING

RESPONDENT

CORAM COMMISSIONER P E SCOTT
DATE TUESDAY, 8 MAY 2007
FILE NO/S U 13 OF 2007
CITATION NO. 2007 WAIRC 00426

Result Application Dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on Thursday, the 1st day of March 2007, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties reached agreement in principle in respect of the application; and

WHEREAS on Tuesday, the 8th day of May 2007, the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2007 WAIRC 00431

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SARAH STEPHENS

APPLICANT

-v-

ROBIN GROOM OF COLOUR DROP GARDEN CENTER

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE WEDNESDAY, 9 MAY 2007
FILE NO B 35 OF 2007
CITATION NO. 2007 WAIRC 00431

Result	Application discontinued
Representation	
Applicant	Ms S Stephens
Respondent	Mr D Rosovsky as agent

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 17 April 2007 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 1 May 2007 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2007 WAIRC 00410

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID TAYLOR
	APPLICANT
	-v-
	ROTTNEST ISLAND AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 2 MAY 2007
FILE NO/S	U 547 OF 2006
CITATION NO.	2007 WAIRC 00410

Result	Application Dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on Thursday, the 1st day of March 2007, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the conference was adjourned to enable the parties to have further discussions; and

WHEREAS on Tuesday, the 1st day of May 2007, the Applicant advised the Commission that he no longer intended to pursue the application and agreed to an order issuing to dismiss the application;

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

THAT this application be, and is hereby dismissed.

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

2007 WAIRC 00403

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARREN CHRISTOPHER TURNER
	APPLICANT
	-v-
	MR PETER S. DE CHIERA PROFESSIONALS DUNSBOROUGH TRADING AS DE CHIERA & CO PTY LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 1 MAY 2007
FILE NO/S	B 18 OF 2007
CITATION NO.	2007 WAIRC 00403

Result Application Dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS on Thursday, the 22nd day of March 2007, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties reached agreement in principle in respect of the application; and

WHEREAS on the 24th day of April 2007, the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2007 WAIRC 00402

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARREN CHRISTOPHER TURNER
	APPLICANT
	-v-
	MR PETER S. DE CHIERA PROFESSIONALS DUNSBOROUGH TRADING AS DE CHIERA & CO PTY LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 1 MAY 2007
FILE NO/S	U 18 OF 2007
CITATION NO.	2007 WAIRC 00402

Result Application Dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on Thursday, the 22nd day of March 2007, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties reached agreement in principle in respect of the application; and

WHEREAS on the 24th day of April 2007, the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2007 WAIRC 00424

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BART PETER VAN BRUINESSEN
	APPLICANT
	-v-
	MMP MANAGEMENT SERVICES PTY LTD T/A TOP HAT CLEANING & MAINTENANCE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 8 MAY 2007
FILE NO/S	B 40 OF 2007
CITATION NO.	2007 WAIRC 00424

Result	Application Dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS on Tuesday, the 8th day of May 2007, the Applicant advised the Commission that the dispute was resolved and agreed to an order issuing to dismiss the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P.E. SCOTT,
Commissioner.

[L.S.]

2007 WAIRC 00404

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEE FRANCIS WHITE
	APPLICANT
	-v-
	BRETT WELSTEAD (OPPOSITE LOCK MIDLAND)
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 30 APRIL 2007
FILE NO/S	U 23 OF 2007
CITATION NO.	2007 WAIRC 00404

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr R H Gifford (as agent)

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 19 February 2007, the Commission wrote to the Applicant requesting that he provide reasons in writing within 28 days why the Commission may have jurisdiction to hear and determine his claim;

AND WHEREAS on 2 April 2007, the Applicant had not submitted his reasons nor had he contacted these chambers in respect of this matter;

AND WHEREAS on 2 April 2007, the Commission wrote to the Applicant requesting that if he did not file a Notice of withdrawal or discontinuance or contact this chambers within 14 days, Senior Commission would dismiss his application;

AND WHEREAS on 30 April 2007, the Applicant had not responded to the letter dated 2 April 2007 nor had he contacted these chambers in respect of this matter;

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

THAT the application be and is hereby dismissed for want of prosecution.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

CONFERENCES—Matters referred—

2007 WAIRC 00379

DISPUTE REGARDING PRODUCTION OF INFORMATION TO UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER OF POLICE, WESTERN AUSTRALIAN POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
HEARD	THURSDAY, 1 MARCH 2007
DELIVERED	MONDAY, 16 APRIL 2007
FILE NO.	PSACR 1 OF 2007
CITATION NO.	2007 WAIRC 00379

CatchWords	Public Service Arbitrator - Application to cease respondent's disciplinary proceedings regarding allegations against applicant's member - Whether allegations are baseless - Whether grounds on which the respondent could suspect breach of discipline - Applicant's members explanation not to be considered by the Public Service Arbitrator - Allegations found not to be baseless - Matter dismissed - *Industrial Relations Act 1979* (WA) ss 27(1)(a)(iv) and 44 - *Public Sector Management Act 1994* (WA) ss 9(a)(iii) and (b), 83(1)(b) and 86(4)(a) - *WA Police Administrative Policy AD* s 17.6 - *WA Police Code of Conduct*
Result	Matter dismissed
Representation	
Applicant	Mr W Claydon
Respondent	Mr R Bathurst (of counsel)

Reasons for Decision

1 The matter referred for hearing and determination is in the following terms:

"1. The Applicant says that:

(a) On or about 16 January 2006 the Respondent advised Mr Murray Simmons by letter that it had authorised an independent investigation into a suspected breach of discipline.

(b) In that letter the Respondent alleged that Mr Simmons utilised during the period between 4 January 2002 and 27 April 2005 the WA Police Computer System to access information for non-work related purposes in that he performed numerous unauthorised accesses into the Name Inquiry System ["NIS"] and the Frontline Incident Management System ["FIMS"] and viewed information relating to a Mr Marlee for your own personal reasons.

(c) The Respondent further alleged that during the same period Mr Simmons supplied confidential information from the MNIS and FIMS to Mr Marlee.

(d) By letter dated 11 August 2006 the Respondent charged Mr Simmons with a serious breach of discipline under s. 83(1)(b) of the Public Sector Management Act 1994.

(d)(sic) By that letter the respondent identified the serious breach of discipline as:

(i) WA Police Administrative Policy AD – 17.6 Restricted Access to information by accessing information on the computer system that was not related to Mr Simmons' work tasks; and

(ii) WA Police Code of conduct – confidentiality by accessing and disclosing WA Police information obtained in the course of his duties without proper authorisation ; and

(iii) In so doing contravened sections 9(a)(iii) and 9(b) of the Public Sector Management Act by failing to comply with General Principles of conduct.

(e) The same letter listed 12 incidents of access, which it particularised as "unauthorised *accesses into the WA Police Mainframe Name Inquiry system (NIS) and the Frontline Incident Management System (IMS) to view information relating to Mr…Marlee, during the period 4 January 2002 to 27 April 2005, as follows:…. "*

(f) By letter dated 18 August 2006 Mr Simmons advised the Respondent that he denied the charges.

(g) By letter dated 26 November 2006 the Respondent notified Mr Simmons of its intentions to proceed with an inquiry and suspended him from work with full pay pending the outcome of the inquiry.

(h) Mr Simmons has cooperated with the Respondent's initial inquiry and provided evidence in the form of two statutory declarations.

(i) Mr Simmons actions were within the authority of his Job Description Form ("JDF") and occurred in the ordinary course of employment and accordingly there is no basis for a disciplinary inquiry.

(j) Mr Simmons denied using the information for personal gain.

(k) There is no other evidence available to contradict Mr Simmons' explanations in response to the Respondent's correspondence, and the investigation.

2. The Applicant seeks an order of the Public Service Arbitrator that the inquiry, pursuant to the disciplinary process of the Public Sector Management Act 1994, be ceased on the grounds that the allegations are baseless.

3. The Respondent rejects the Applicant's claim and says that:

(a) The Public Sector Investigation Unit of WA Police received information via a confidential source known to the Organised Crime Squad that identified Mr Simmons as accessing information in the WA Police Computer System regarding Mr Graham Marlee for his own personal reasons. The information provided further alleged that Mr Simmons provided the confidential information to Mr Marlee.

(b) An audit of the WA Police mainframe computer database for accesses performed by Mr Simmons in relation to Mr Graham Marlee indicated that between 4 January 2002 and 27 April 2005, Mr Simmons had accessed information pertaining to Mr Marlee on a number of occasions.

(c) In November and December 2005, the allegations that Mr Simmons accessed information regarding Mr Marlee in the WA Police Computer System without authorisation and for his own personal reasons and provided these confidential information to Mr Marlee were put to Mr Simmons. Mr Simmons denied these allegations and therefore, an investigation was conducted.

(d) At the conclusion of the investigation, the investigator found that there was sufficient evidence to suggest that Mr Simmons had performed unauthorised accesses into the WA Police computer system to view and provide information to Mr Graham Marlee for his own personal reasons.

(e) Following consideration of all evidence before him, the Director Human Resources charged Mr Simmons with a serious breach of discipline in correspondence dated 11 August 2006. Mr Simmons denied the allegations put to him and therefore, an inquiry was initiated in accordance with section 86(4)(a) of the Public Sector Management Act 1994.

(f) The inquiry is being undertaken by an independent inquirer and involves a new investigation. Following the inquiry, the Respondent will be in a position to make a finding regarding Mr Simmons's suspected breach of discipline.

4. The Respondent asserts that when information is received by WA Police suggesting that an employee is accessing information without authorisation and for non work related reasons from within the WA Police Computer System and providing this information to an external party and a computer audit confirms that this information has been viewed by the employee, there is sufficient evidence to warrant investigation and the matter is dealt with through the discipline process. Therefore, the Respondent denies that the Applicant is entitled to the relief sought or any relief at all."

2 The matter was set down for hearing, however, prior to the hearing commencing, the respondent advised the Public Service Arbitrator ("the Arbitrator") that it sought to have the hearing discontinued pursuant to s 27(1)(a)(iv) of *the Industrial Relations Act 1979* (WA) ("the Act") on the basis of the decision in *Civil Service Association of Western Australia Incorporated v Director General of Department for Community Development* (IAC) (2002) 82 WAIG 2845 at [18] to [21] ("*CSA v DG, DCD*"). The respondent says that this decision:

> "made it clear that while it is proper for the Public Service Arbitrator to stop "baseless" disciplinary proceedings, the judgement as to whether the proceedings are, or are not, "baseless" should be made by reference only to the matters alleged against the employee and without the hearing of evidence. Determining whether allegations are "baseless" in this context does not involve an assessment of the strength of the evidence supporting the allegations. Rather, in our submission, the role of the Public Service Arbitrator is limited to assessing whether the allegations made against the employee are *capable* of constituting an actionable breach of discipline. If the allegations are capable of constituting an actionable breach of discipline, then they are not "baseless" and the employing authority should be allowed to conduct its disciplinary proceedings." *(Respondent's letter of 16 February 2007)*

3 The respondent seeks that the Arbitrator decide whether or not allegations against Mr Simmons are "baseless" or whether they are capable of constituting a breach of discipline, by reference only to the matters alleged against Mr Simmons.

4 The applicant seeks to distinguish the decision in *CSA v DG, DCD* (supra) as that decision dealt with disciplining a staff member due to out of work activities whereas the allegations against Mr Simmons relate to activities undertaken in the course of his work. The applicant says, by reference to the decision in *CSA v DG, DCD* (supra), that:

> "the question to be asked was whether if all of the factual material disclosed grounds on which the Director could suspect that the staff member had committed a breach of discipline whilst serving as an employee." *(Applicant's letter of 26 February 2007)*

5 The applicant agreed that the Arbitrator could decide the matter on the papers, including Mr Simmons's Job Description Form ("JDF"); the questions that were asked by one of the investigators; the computer restriction notice; the respondent's administrative policy dealing with restricted access to the Police computer system; and the WA Police Code of Conduct as referred to in the letters to Mr Simmons of 21 December 2005 and 11 August 2006.

6 The applicant also says that the issue of the allegations being baseless because of the restricted access policy and the Code of Conduct does not answer the question of by whom and to whom the authorisation to obtain access is given but rather the JDF does. The applicant says "unless Mr Simmons received an explicit direction not to give out the information specified in the allegations, he had colour of right. Accordingly the allegations are baseless." (ibid)

7 The parties have agreed that the matter be dealt with on the papers.

Consideration and Conclusions

8 In this matter, there is no dispute that Mr Simmons utilised the WA Police computer system to gain access to certain information in the NIS and the FIMS. It is alleged that this access was unauthorised and that he passed that information on to another person. It is alleged that he did so for non-work related purposes and passed that information on to Mr Marlee for his own personal reasons.

9 The dispute between the parties appears not to be about the facts of what Mr Simmons did, but whether in doing so, he committed breaches of discipline by reference to policies, codes of conduct and principles of conduct. Mr Simmons says his actions were authorised by his JDF.

10 The decision of Anderson J, with whom Parker and Hasluck JJ agreed, in *CSA v DG, DCD* (supra), dealt with the role of the Arbitrator in dealing with a claim seeking to have the Arbitrator stop the employer's investigation into allegations of misconduct by the employee. Although the particular circumstances in that case are different to those arising from the allegations against Mr Simmons in this case, the issue is one of principle about the role of the Arbitrator and the issues to be considered when dealing with an application for an order that an employer cease a disciplinary process. In that decision Anderson J said that:

> "18 There is a rather curious feature of the proceedings before the Arbitrator. The appellant's main contention was that the respondent had no right to conduct an investigation into the conduct of Mr H because that conduct did not "occur in the workplace or in the course of an employee discharging authorised duties ... in the employment relationship", to use the words of the application. The appellant's case was that it was a private matter and not a breach of discipline "whilst serving as an employee" within the meaning of s 81(1) of the *Public Sector Management Act*. In short, it was the appellant's case that the conduct alleged could not be misconduct.
>
> 19 In examining this contention, the Arbitrator might have been expected to confine herself to those facts which were alleged by Ms S in support of her complaint. The Arbitrator might have been expected to simply ask herself the question whether if all of the factual material put forward by Ms S in support of her complaint was true, did that factual material disclose grounds on which the Director could suspect that Mr H had committed a breach of discipline whilst serving as an employee. I think that would have been the proper and better approach. Instead the Arbitrator heard evidence from Mr H, and only from him. Mr H was allowed to give evidence to the Arbitrator to the effect that his "official duties" ceased when he left the training venue to return to his motel. He was allowed to give his version of the circumstances under which he, Ms S and the other members of the group came to be socialising. He gave his version of his behaviour and of the behaviour of Ms S and as to how events unfolded during the course of the evening and early morning; and he was allowed to give evidence contradicting the account given by Ms S of the sexual assault upon her.
>
> 20 I do not consider that this was appropriate. If an employing authority suspects that there may have been an actionable breach of discipline, and there are reasonable grounds for that suspicion, the authority ought to be allowed to carry out its statutory duty to conduct an investigation to see whether there was in truth an actionable breach of discipline. *Prima facie* it would not seem to be a proper exercise of jurisdiction by the Public Service Arbitrator to stop the employing authority from doing so on the basis of the Public Service Arbitrator's own investigation of the facts. No doubt it is perfectly proper for the Public Service Arbitrator to stop baseless disciplinary proceedings. However, I think the judgment as to whether the proceedings are or are not baseless should be made by reference only to the matters alleged in the complaint.
>
> 21 As it happens, I think that in the end this is exactly what the Arbitrator did in fact do in this case. Although the Arbitrator summarised Mr H.s evidence, it appears from her reasons for decision that she looked only at the conduct that was "alleged in respect of [Mr H] ..", as she put it, in order to determine whether she should put a stop to the investigations, which she did. There is little or no indication in her reasons that her decision to do so was based on the evidence given by Mr H. It would have been better if at the outset the Arbitrator had declined to hear that evidence."

11 In the context of the Arbitrator being asked to stop the respondent's investigation, and applying Anderson J's reasoning to this case, the question to be answered is whether, if all factual material put forward by the respondent in support of the allegation being true, that material discloses grounds on which the respondent could suspect that Mr Simmons had committed a breach of discipline. It is not, according to Anderson J, a proper exercise of the Arbitrator's jurisdiction to undertake its own investigation of the facts, but it would be proper to stop baseless disciplinary proceedings. The Arbitrator is not to examine the employee's responses to ascertain whether the allegations are baseless.

12 Therefore, in this case, Mr Simmons's explanation of the action being permissible by reference to his JDF is not an appropriate consideration for the Arbitrator. For the Arbitrator to examine his responses and explanations would be to go beyond what is necessary to find whether there is a basis for the disciplinary proceedings rather than to examine whether he had a reasonable explanation for what he did. According to the Industrial Appeal Court, that is a matter for the employer to consider at this stage of the investigation, not for the Arbitrator. Therefore, Mr Simmons explanation is not to be taken into account.

13 Although Mr Simmons does not deny that he had access to the computer system as alleged, the question is whether, if the factual material put forward by the respondent were true, did that factual material disclose grounds on which the employer could suspect that Mr Simmons has committed a breach of discipline?

14 In the circumstances of this case, the allegations are of conduct which could reasonably be the basis for a suspicion that Mr Simmons had in the course of his employment gained access to information which he was not entitled to access and passed that information on. Whether there is a reasonable explanation for Mr Simmons's conduct, including right of colour, is not a matter for the Arbitrator, but is for the employer at this point. If that explanation is reasonable, then the matter might go no further. Alternatively, if the matter does proceed to the point where a breach of discipline is found, then other processes and appeal rights exist. It is not appropriate for the Arbitrator to step into the investigation process where there is a basis for such an investigation as there is in this case. Mr Simmons's conduct may be investigated by the respondent as the allegations are baseless.

15 Accordingly an order of dismissal is the appropriate resolution of the matter.

2007 WAIRC 00380

DISPUTE REGARDING PRODUCTION OF INFORMATION TO UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER OF POLICE, WESTERN AUSTRALIAN POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	MONDAY, 16 APRIL 2007
FILE NO	PSACR 1 OF 2007
CITATION NO.	2007 WAIRC 00380

Result	Matter dismissed

Order

HAVING heard Mr W Claydon on behalf of the applicant and Mr R Bathurst (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Commissioner of Police	The Western Australian Police Union of Workers	Scott C	PSAC 23/2006	3/08/2006 22/08/2006 1/09/2006 5/09/2006 13/09/2006 4/10/2006 31/10/2006 3/11/2006 7/11/2006 9/11/2006 16/11/2006 22/11/2006 28/11/2006 4/12/2006 6/12/2006 11/12/2006	Dispute regarding bargaining for an industrial agreement	Concluded
The Civil Service Association of Western Australia Incorporated	Executive Director, Western Australian Alcohol and Drug Authority, Director General, Health Department of Western Australia, The Honourable Minister for Health	Scott C	PSAC 49/2005	N/A	Dispute regarding the award and agreement coverage of union members	Concluded
The Civil Service Association of Western Australia Incorporated	Commissioner of Police, Western Australian Police	Scott C	PSAC 1/2007	17/01/2007	Dispute regarding production of information to union member	Referred
The Civil Service Association of Western Australia Incorporated	The Chief Executive Officer, Swan TAFE Western Australia	Kenner C	PSAC 13/2007	20/03/2007 27/03/2007	Dispute regarding alleged failure of employer to consult employees in relation to change	Discontinued
The Director General Department for Planning And Infrastructure	The Civil Service Association of Western Australia Incorporated	Kenner C	PSAC 9/2007	20/02/2007	Dispute regarding reclassifications	Concluded

CORRECTIONS—

2007 WAIRC 00442

CORRIGENDUM

Whereas an error occurred in the Publication of the "Variation Schedule" at 86 WAIG 1858-59 following the General Order which issued on 4 July 2006 in application 957 of 2005, the "Variation Schedule" with respect to the "Cultural Centre Award 1987 No. A 28 of 1988" is hereby republished.

Dated at Perth this 11th day of May 2007.

J.A. SPURLING,
Registrar.

CULTURAL CENTRE AWARD 1987 NO. A 28 OF 1988

1B. - 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 $504.40 per week payable on and from 7 July 2006.

(3) The minimum adult award wage 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 piece workers 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 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.

(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 2006 General Order Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the adult minimum wage.

(9) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $421.70 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 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 apprenticeship.

(d) Nothing in this 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.

16. - WAGES

(1) (a) The minimum weekly rate of wage payable to employees covered by this award, shall be as follows:

	Base Rate	Arbitrated Safety Net Adjustment	Minimum Award Wage
Cleaner			
1st year of employment	370.10	179.00	549.10
2nd year of employment	374.10	179.00	553.10
3rd year of employment and thereafter	378.30	179.00	557.30
Groundskeeper			
1st year of employment	378.00	179.00	557.00
2nd year of employment	385.60	179.00	564.60
3rd year of employment and thereafter	393.70	179.00	572.70
Attendant or Receptionist			

	Base Rate	Arbitrated Safety Net Adjustment	Minimum Award Wage
Attendant			
1st year of employment	394.30	179.00	573.30
2nd year of employment	402.70	179.00	581.70
3rd year of employment and thereafter	411.10	179.00	590.10
Security Officer			
1st year of employment	394.30	179.00	573.30
2nd year of employment	402.70	179.00	581.70
3rd year of employment and thereafter	411.10	179.00	590.10
Assistant Supervisor			
1st year of employment	432.00	181.00	613.00
2nd year of employment	440.20	181.00	621.20
3rd year of employment and thereafter	448.40	181.00	629.40
Installation Assistant			
1st year of employment	461.30	181.00	642.30
2nd year of employment	468.40	179.00	647.40
3rd year of employment and thereafter	476.30	179.00	655.30
Attendant Supervisor			
1st year of employment	476.20	179.00	655.20
2nd year of employment and thereafter	491.50	179.00	670.50
Installation Supervisor			
1st year of employment	521.30	179.00	700.30
2nd year of employment and thereafter	535.40	179.00	714.40
Regional Attendant			
1st year of employment	432.00	181.00	613.00
2nd year of employment	440.20	181.00	621.20
3rd year of employment and thereafter	448.40	181.00	629.40

(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) 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 one and more than five other employees	20.80
(b)	if placed in charge of more than six and not more than ten other employees	32.00
(c)	if placed in charge of more than 11 other employees	41.10

(3) A casual employee shall receive 20% of the ordinary rate in addition to the ordinary rate for their class of work.

2007 WAIRC 00444

CORRIGENDUM

Whereas an error occurred in the Publication of the "Variation Schedule" at 85 WAIG 2594-95 following the General Order which issued on 4 July 2005 in application 576 of 2005, the "Variation Schedule" with respect to the "Landscape Gardening Industry Award No. R 18 of 1978" is hereby republished.

Dated at Perth this 11th day of May 2007.

J.A. SPURLING,
Registrar.

LANDSCAPE GARDENING INDUSTRY AWARD NO. R 18 OF 1978

25. - WAGES

The following shall be the minimum weekly rates of wages payable to employees covered by this award:

		TOTAL RATE PER WEEK $
(1)	Adult Employees:	
	(a) Landscape Tradesperson	532.30
	(b) Landscape Employee Grade 1	484.40

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) Apprentices

An Apprentice shall be paid the following percentage amounts of the "Landscape Tradesperson's" rate:

4 Year Term	%
First year	42
Second year	55
Third year	75
Fourth year	88

(3) Junior Employees:

Wage per week expressed as a percentage of the "Landscape Employee Grade 1" rate:

	%
Under 16 years of age	40
16 years of age	50
17 years of age	60
18 years of age	70
19 years of age	80
20 years of age	90

(4) Leading Hands: in addition to the appropriate rate prescribed in subclause (1) of this clause a leading hand shall be paid -

		$
(a)	If placed in charge of not less than three and not more than ten other employees	20.16
(b)	If placed in charge of more than ten and not more than twenty other employees	30.94
(c)	If placed in charge of more than twenty other employees	39.80

(5) A casual employee shall be paid 20 per cent in addition to the rate prescribed in this clause for the work performed.

(6) Minimum Adult Award Wage

(a) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(b) The Minimum Adult Award Wage for full time adult employees is $484.40 per week payable on and from 7th July 2005.

(c) The Minimum Adult Award Wage of $484.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(d) 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.

(e) 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.

(f)

(i) 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.

(ii) 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.

(g) Subject to this clause the Minimum Adult Award Wage shall -

(i) apply to all work in ordinary hours.

(ii) 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.

(h) Minimum Adult Award Wage

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.

(i) 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 in 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.

APPENDIX 1 – MAKE UP OF TOTAL WAGE

This appendix shows how the total wages paid to employees under this award are made up. It details both base wage rates and safety net adjustments as well as the total rate before adjustment for the 2005 Adult Minimum Award Wage and the total rate after adjustment which is published above in Clause 25. – Wages.

(1) Adult Employees:	**Base Rate Per Week$**	**Arbitrated Safety Net Adjustments$**	**Total Rate Before Adjustment$**	**Total Rate After Adjustment for 2005 Adult Minimum Award Wage$**
(a) Landscape Tradesperson	373.30	159.00	532.30	532.30
(b) Landscape Employee Grade 1	302.00	159.00	461.00	484.40

2007 WAIRC 00443

CORRIGENDUM

Whereas an error occurred in the Publication of the "Variation Schedule" at 86 WAIG 2125-26 following the General Order which issued on 4 July 2006 in application 957 of 2005, the "Variation Schedule" with respect to the "Landscape Gardening Industry Award No. R 18 of 1978" is hereby republished.

Dated at Perth this 14th day of May 2007.

J.A. SPURLING,
Registrar.

LANDSCAPE GARDENING INDUSTRY AWARD NO. R 18 OF 1978

25. - WAGES

The following shall be the minimum weekly rates of wages payable to employees covered by this award:

		TOTAL RATE PER WEEK $
(1)	Adult Employees:	
	(a) Landscape Tradesperson	552.30
	(b) Landscape Employee Grade 1	504.40

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) Apprentices

An Apprentice shall be paid the following percentage amounts of the "Landscape Tradesperson's" rate:

4 Year Term	%
First year	42
Second year	55
Third year	75
Fourth year	88

(3) Junior Employees:

Wage per week expressed as a percentage of the "Landscape Employee Grade 1" rate:

	%
Under 16 years of age	40
16 years of age	50
17 years of age	60
18 years of age	70
19 years of age	80
20 years of age	90

(4) Leading Hands: in addition to the appropriate rate prescribed in subclause (1) of this clause a leading hand shall be paid -

		$
(a)	If placed in charge of not less than three and not more than ten other employees	20.16
(b)	If placed in charge of more than ten and not more than twenty other employees	30.94
(c)	If placed in charge of more than twenty other employees	39.80

(5) A casual employee shall be paid 20 per cent in addition to the rate prescribed in this clause for the work performed.

(6) Minimum Adult Award Wage

(a) No adult employee shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(b) The minimum adult award wage for full time adult employees is $504.40 per week payable on and from 7th July 2006.

(c) The minimum adult award wage is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

(d) 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.

(e) 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.

(f)

(i) 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.

(ii) 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.

(g) Subject to this clause the minimum adult award wage shall:

(i) apply to all work in ordinary hours.

(ii) 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.

(h) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2006 General Order 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 adult minimum wage.

(i) Adult Apprentices

(i) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $421.70 per week.

(ii) The rate paid in 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 apprenticeship.

(iv) Nothing in this 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.

APPENDIX 1 – MAKE UP OF TOTAL WAGE

This appendix shows how the total wages paid to employees under this award are made up. It details both base wage rates and safety net adjustments as well as the total rate before adjustment for the 2006 Adult Minimum Award Wage and the total rate after adjustment which is published above in Clause 25. – Wages.

(1) Adult Employees:	**Base Rate Per Week$**	**Arbitrated Safety Net Adjustments$**	**Total Rate Before Adjustment$**	**Total Rate After Adjustment for 2006 Adult Minimum Award Wage$**
(a) Landscape Tradesperson	373.30	179.00	552.30	552.30
(b) Landscape Employee Grade 1	302.00	179.00	481.00	504.40

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 27/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Congregation of The Presentation Sisters WA Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 21/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Institute of the Blessed Virgin Mary Non-Teaching Staff Enterprise Bargaining Agreement 2006 AG 17/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees; Catholic Education Office of Western Australia; Liquor, Hospitality and Miscellaneous Union, Western Australian Branch; The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement registered
John XXIII College Council Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 22/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Commissioner S J Kenner	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Norbertine Canons Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 19/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement registered
Roman Catholic Archbishop of Perth Non - Teaching Staff Enterprise Bargaining Agreement 2006 - The AG 32/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Roman Catholic Bishop of Broome Non - Teaching Staff Enterprise Bargaining Agreement 2006 - The AG 24/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Roman Catholic Bishop of Bunbury Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 29/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Commissioner S J Kenner	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Roman Catholic Bishop of Geraldton Non - Teaching Staff Enterprise Staff Bargaining Agreement 2006 - The AG 23/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Servite College Council Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 26/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Sisters of Mercy Perth (Amalgamated) Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 30/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Sisters of Mercy West Perth Congregation Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 20/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Sisters of The Good Shepherd Non - Teaching Staff Enterprise Bargaining Agreement 2006 AG 28/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, The Australian Nursing Federation, Industrial Union of Workers Perth, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Sisters of The Holy Family of Nazareth Non - Teaching Staff Enterprise Bargaining Agreement 2006 - The AG 31/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Trustees of the Christian Brothers in WA Non - Teaching Staff Enterprise Bargaining Agreement 2006 - The AG 25/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees, Catholic Education Office of Western Australia, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Trustees of the Marist Brothers Southern Province Non -Teaching Staff Enterprise Bargaining Agreement 2006 AG 18/2007	4/04/2007	The Independent Education Union of Western Australia, Union of Employees	(Not applicable)	Commissioner S J Kenner	Agreement registered

NOTICES—Appointments—

2007 WAIRC 00398

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, Commissioner JL Harrison to be an additional Public Service Arbitrator for a further period of one year from the 30th day of April, 2007.

Dated the 24th day of April, 2007.

CHIEF COMMISSIONER A.R. BEECH

RECLASSIFICATION APPEALS—

2007 WAIRC 00400

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ERNEST BULLEN
	APPELLANT
	-v-
	WORKERS' COMPENSATION & INJURY MANAGEMENT COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
HEARD	MONDAY, 26 FEBRUARY 2007
DELIVERED	MONDAY, 30 APRIL 2007
FILE NO.	PSA 30 OF 2006
CITATION NO.	2007 WAIRC 00400

CatchWords	Public Service Arbitrator - Claim for Temporary Special Allowance - Previous appeal withdrawn and Deed of Severance signed - Whether an Industrial Matter - Employment relationship ended not to be restored - No jurisdiction - Appellant has no standing to bring claim - No enforcement of existing entitlement - Appeal Dismissed - *Industrial Relations Act 1979* (WA) ss 7 and 80E
Result	Appeal Dismissed
Representation	
Applicant	Appeared on his own behalf
Respondent	Mr R Bathurst (of counsel)

Reasons for Decision

Background

1 Until 16 June 2006, the appellant, Mr Bullen, was employed by the respondent as a public servant. On 6 June 2006, Mr Bullen and the respondent signed a Deed of Severance ("the Deed") which recorded that his employment was to come to an end at the close of business 16 June 2006. As part of the agreement reflected in the Deed, Mr Bullen received a redundancy payment.

2 At the time the Deed was signed, Mr Bullen was the appellant in PSA 48 of 2005 by which he claimed reclassification of the position he held to Level 9 and/or a Temporary Special Allowance ("TSA").

3 The Deed contained, amongst other provisions, the following:

"2. The Employee

(a) acknowledges that his employment with the Employing Authority has been terminated with effect from close of business 16 June 2006.

(b) subject to subclause 2(f), will take the payment in full accord and satisfaction of all suits, actions, causes of action, and other claims or demands whatsoever arising out of his employment on the termination of that employment.

(c) subject to subclause 2(f) and in receipt of the redundancy payment, releases and forever discharges the Employing Authority and its servants or agents from all claims, suits, actions, causes of action and other demands whatsoever which the Employee or any persons claiming through the Employee or under statute or otherwise now has or any time hereafter but for the execution of this Deed might have had against the Employing Authority, its servants or agents in respect of or in any way arising out to the said employment or its termination.

(d) further to subclause 2(c) and subject to subclause 2(f) specifically withdraws all matters before the Western Australian Industrial Relations Commission which form part of Application No. PSA 48 of 2005, namely reclassification to Class 1 and/or temporary special allowance in accordance with the recommendation of the Coleman Report.

(e) subject to subclause 2(f) and in receipt of the redundancy payment, agrees at all times to keep effectually indemnified the Employing Authority and its servants or agents against all such claims, suits, causes of action and other demands as aforesaid which may be brought or made by any person claiming through or on behalf of the Employee or his/her estate.

(f) does not hereby release or discharge the Employing Authority from any liability which has arisen or may arise in connection with the said employment to:

(i) pay workers' compensation or pay damages for personal injuries at common law, or

(ii) make good the underpayment of wages, salaries or other entitlements."

4 On 26 June 2006, Mr Bullen advised the Public Service Arbitrator ("the Arbitrator") that he wished to discontinue the appeal in PSA 48 of 2005.

This Appeal

5 On 21 November 2006, a Notice of Appeal to the Public Service Arbitrator/Railway Classification Board Form 10 which "instituted an appeal against the salary/range of salary/title* of the office occupied by [him]" was filed by Mr Bullen. This claim was for "payment of TSA in accordance with the report of Mr W. Coleman of 27th May 2005." The ground on which the claim was made was that "[a]ll other review officers, as they then were, have been paid this TSA voluntarily by the Department."

6 The Arbitrator convened a conference in respect of this appeal on 26 February 2007, however, no agreement was reached. Mr Bullen provided details of the evidence he was to rely upon and put forward a submission on jurisdiction in respect of the appeal. The parties agreed that the matter be dealt with on the papers and Mr Bullen then filed a further submission on 8 March 2007 regarding jurisdiction, as was agreed at the conference held on 26 February 2007. The respondent filed a submission on 15 March 2007 in which it challenged the jurisdiction of the Arbitrator to deal with the matter on a number of grounds. Mr Bullen made a submission in reply on 23 March 2007.

Consideration and Conclusions – Industrial Matter

7 The first issue raised by the respondent is whether there is an industrial matter before the Arbitrator.

8 The Arbitrator's jurisdiction is set out in s 80E of the *Industrial Relations Act 1979* ("the Act"). Subsections (1) and (2) are of particular relevance. They provide:

"(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —

(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and

(b) a claim in respect of a decision of an employer to downgrade any office that is vacant."

9 Subsection (2), by the words "without limiting the generality of subsection (1), the matters listed in subsection (2) elaborate on, rather than extend, the meaning of the term "industrial matter" referred to in subsection (1). Therefore, the jurisdiction of the Arbitrator is to deal with industrial matters, some particular types of which are contained within subsection (2).

10 "Industrial matter" is defined in s 7 of the Act as:

"industrial matter" means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —

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

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

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

(ca) the relationship between employers and employees;

(d) any established custom or usage of any industry, either generally or in the particular locality affected;

(e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;

(f) in respect of apprentices or trainees —

(i) their wage rates; and

(ii) subject to the *Industrial Training Act 1975* —

(I) their other conditions of employment; and

(II) the rights, duties, and liabilities of the parties to any agreement of apprenticeship or training agreement;

(g) any matter relating to the collection of subscriptions to an organisation of employees with the agreement of the employee from whom the subscriptions are collected including —

(i) the restoration of a practice of collecting subscriptions to an organisation of employees where that practice has been stopped by an employer; or

(ii) the implementation of an agreement between an organisation of employees and an employer under which the employer agrees to collect subscriptions to the organisation;

[(h) deleted]

(i) any matter, whether falling within the preceding part of this interpretation or not, where —

(i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and

(ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include —

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

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

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

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

11 In *Coles Myer Ltd v Coppin and Ors* (1993) 73 WAIG 1754 at 1756 - 1757, the Industrial Appeal Court found that for the Commission to have jurisdiction, the industrial matter to which the matter relates requires that the relationship of employer and employee actually exists or is expected to come into existence, or if it did not exist, then is to be restored. There are two exceptions to this requirement. Only in respect of claims relating to unfair dismissal and refusal or failure to allow an employee a benefit under the contract of employment, remain industrial matters "even though their relationship as employee and employer has ended" (s 7(1a) of the Act). Accordingly, unless the matter relates to a dismissal or a denied contractual benefit, there is no industrial matter once the employment relationship has come to an end and is not to be restored.

12 In this case, the employment relationship came to an end in June 2006 and it is not sought to be restored. The appeal was filed on 21 November 2006. The application does not deal with the issue of dismissal.

13 A denied contractual benefit is a benefit to which the employee has an existing right, not one which is to be created by the claim (*Simons v Business Computers International Pty Ltd* 65 WAIG 2039; *RRIA v ADSTE* 658 WAIG 11, per Kennedy J at page 17). Therefore, to be a contractual benefit, the TSA must be a benefit to which Mr Bullen already has a right. This is not the case in this matter, as Mr Bullen is seeking that the Arbitrator create this right for him as it applies to others, but has not been applied to him.

14 As the matter before the Arbitrator is not in respect of a dismissal or a contractual benefit, neither of the two exceptions set out in s 7(1a) are met. Rather, it seeks the creation of a new entitlement, being the TSA. As there is no relationship of employer and employee between the parties, the provisions of section 80E(1), which require the existence of an industrial matter relating to a government officer, are not met. Therefore, there is no jurisdiction in the Arbitrator to deal with the claim.

Appellant's Standing

15 Even though there is no jurisdiction to deal with the appeal due to there being no industrial matter, it is useful to also deal with the respondent's second issue, being whether Mr Bullen has the right to bring this appeal. Section 80F sets out by whom matters may be referred to the Arbitrator. A claim mentioned in s 80E(2)(a), which is a claim in respect of a salary, range of salary or title allocated to the office occupied by the government officer (which is the basis for the Arbitrator dealing with

claims related to reclassifications or, as in this case, a TSA equivalent to that classification) is a matter which may be referred to the Arbitrator by the government officer concerned, or by an organisation on his or her behalf, or by the employer.

16 Mr Bullen was previously a government officer but at the time of filing the Notice of Appeal, he was no longer a government officer and no longer occupied the office to which the claim relates. Therefore, there is no capacity for him to refer the matter to the Arbitrator.

The Deed

17 The respondent also says that the appeal is barred by the Deed. The relevant terms of the Deed are set out in paragraph 3 above. In the Deed, Mr Bullen agreed to withdraw all matters before the Arbitrator and application PSA 48 of 2005 was specifically identified as being "reclassification to Class 1 and/or Temporary Special Allowance in accordance with the recommendation of the Coleman Report." The subject of this appeal is payment of the TSA in accordance with "the report of Mr W. Coleman".

18 Having agreed to withdraw application no. PSA 48 of 2005 as part of the Deed, it is not open for Mr Bullen to attempt to reinstate the claim. There is no other provision within the Deed which would allow him to pursue this claim.

19 The TSA is not a benefit to which Mr Bullen is entitled under his contract of employment. Rather it is a benefit he seeks to create by this appeal pursuant to section 80E(2)(a). Reference to the Deed not releasing the Employing Authority (i.e. the respondent) from any liability that has arisen or may arise in connection with the employment to "make good the underpayment of wages, salaries or other entitlements" (clause 2(f)(ii) of the Deed), relates to existing entitlements, not to the creation of new ones (see *Watts v Perth Finishing College* (FB) 69 WAIG 2307). No other relevant exemption for such an appeal is made within the Deed.

20 Accordingly, as the Arbitrator is without jurisdiction to deal with matter on the basis that it is not an industrial matter; that the appellant has no standing to bring the appeal, and the appeal is a matter which the parties agreed in the Deed was not to be pursued, the appeal must be dismissed.

2007 WAIRC 00399

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ERNEST BULLEN
	APPELLANT
	-v-
	WORKERS' COMPENSATION & INJURY MANAGEMENT COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	MONDAY, 30 APRIL 2007
FILE NO	PSA 30 OF 2006
CITATION NO.	2007 WAIRC 00399

Result	Reclassification Appeal Dismissed

Order

HAVING heard the appellant on his own behalf and Mr R Bathurst (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 51/2005	Carmel Scott	Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act1927 as the WA Country Health Service	Scott C	Reclassification Appeal Dismissed	30/04/2007

NOTICES—Union Matters—

2007 WAIRC 00432

NOTICE

FBM 5 of 2007

Notice is given of an application by "The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees" to the Full Bench of the Western Australian Industrial Relations Commission for the alteration to Rule 4 - Membership.

Existing Rule 4 - Membership

(1) The following persons shall be eligible for membership of the Organisation:-

(a) any person temporarily, permanently or usually employed within Western Australia or in any place where the Act applies on a full-time or part-time basis for hire or reward in or in connection with the industry or vocation or craft of engineering provided that:

(b) he or she is or has been a Corporate Member or Graduate Member of the Institution of Engineers, Australia or

(c) he or she has passed the prescribed examinations for or is the holder of qualifications published by The Institution of Engineers, Australia, as granting eligibility for Graduate or Corporate Membership of the said Institution, or

(d) the Committee has received written notification from The Institution of Engineers, Australia, that the qualifications of the applicant would render the applicant eligible for Graduate or Corporate Membership of the said Institution.

(e) any other person whether employed in the industry of engineering or not who is or hereafter becomes an officer of the Organisation and admitted as a member hereof.

(2) Provided that the following persons shall not be eligible for membership of the Organisation:-

(a) any person who is eligible for membership of the Hospital Salaried Officers Association of Western Australia (Union of Workers) at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

(b) any person who is eligible for membership of the University Salaried Officers Association of Western Australia (Union of Workers) at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

(c) any person employed under the provisions of the Public Service Act, 1978 as that Act was constituted on the first day of July, 1987.

(d) any person who is eligible for membership of the Union of Australian College Academics, (W.A. Branch) Industrial Union of Workers at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

(e) any person who is eligible for membership of the Federated Clerks' Union of Australia Industrial Union of Workers, W.A. Branch at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

(f) any person who is eligible for membership of The Civil Service Association of Western Australia (Inc.) at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

Proposed Rule 4 – Membership

The proposed alterations are indicated in bold print and underlined. Note that some alterations reflect re-numbering of existing sub-rules.

"4 – MEMBERSHIP

(1) The following persons shall be eligible for membership of the Organisation:-

(a) any person temporarily, permanently or usually employed within Western Australia or in any place where the Act applies on a full-time or part-time basis for hire or reward in or in connection with the industry or vocation or craft of engineering provided that:

(i) he or she is or has been a Corporate Member or Graduate Member of the Institution of Engineers, Australia, or

(ii) he or she has passed the prescribed examinations for or is the holder of qualifications published by The Institution of Engineers, Australia, as granting eligibility for Graduate or Corporate Membership of the said Institution, or

(iii) the Committee has received written notification from The Institution of Engineers, Australia, that the qualifications of the applicant would render the applicant eligible for Graduate or Corporate Membership of the said Institution, or

(iv) is registered on the National Professional Engineers Register; or

(b) any other person whether employed in the industry of engineering or not who is or hereafter becomes an officer of the Organisation and admitted as a member hereof, or

(c) any person employed by the Commissioner of Main Roads (WA) as an engineer and who undertakes the role and responsibility of a professional engineer; or

(d) any person engaged permanently or temporarily in a professional engineering capacity in or in connection with the construction, maintenance, development, operation or control of a railway or railways and/or tramway or tramways and/or road transport and/or aerial transport.

(2) Provided that the following persons shall not be eligible for membership of the Organisation:-

(a) any person who is eligible for membership of the Hospital Salaried Officers Association of Western Australia (Union of Workers) at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

(b) any person who is eligible for membership of the University Salaried Officers Association of Western Australia (Union of Workers) at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

(c) any person employed under the provisions of the Public Service Act, 1978 as that Act was constituted on the first day of July, 1987.

(d) any person who is eligible for membership of the Union of Australian College Academics, (W.A. Branch) Industrial Union of Workers at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

(e) any person who is eligible for membership of the Federated Clerks' Union of Australia Industrial Union of Workers, W.A. Branch at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

(f) **subject to sub rule (1)(c) of this rule 4**, any person who is eligible for membership of The Civil Service Association of Western Australia (Inc.) at the date of registration of The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees."

The matter has been listed before the Full Bench at 10:30 am on Tuesday, 26 June 2007 in the President's Court (Floor 17). A copy of the Rules of the organisation and the proposed rule alterations may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005.*

S TUNA
DEPUTY REGISTRAR 9 May 2007

2007 WAIRC 00412

NOTICE

FBM 2 of 2007

Notice is given of an application by "The Electrical and Communications Association of Western Australia (Union of Employers)" to the Full Bench of the Western Australian Industrial Relations Commission for the alteration to its name rule, being Rule 1 - Name.

The name of the Association in Rule 1 is to be altered to include the word "National" before the word "Electrical". The proposed alteration is underlined below:

1 - NAME

> The name of the Association shall be "The **National** Electrical and Communications Association of Western Australia (Union of Employers)". The registered office of the Association at which the business of the Association shall be conducted shall be at 22 Prowse Street, West Perth or at such other place or places as the Management Committee shall from time to time decide.

The matter has been listed before the Full Bench at 10:30 am on Wednesday 8 August in the President's Court (Floor 17). A copy of the Rules of the organisation and the proposed rule alteration may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005.*

S TUNA
DEPUTY REGISTRAR 2 May 2007