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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2009] WASCA 162

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	IRELAND -v- IAN JOHNSON CEO OF THE DEPARTMENT OF CORRECTIVE SERVICES [2009] WASCA 162
CORAM	:	WHEELER JA
		PULLIN JA
		LE MIERE J
HEARD	:	3 JUNE 2009
DELIVERED	:	3 SEPTEMBER 2009
FILE NO/S	:	IAC 2 of 2009
BETWEEN	:	MARK GRAEME IRELAND
		Appellant
		AND
		IAN JOHNSON CEO OF THE DEPARTMENT OF CORRECTIVE SERVICES
		Respondent
ON APPEAL FROM:		
Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	RITTER AP
		BEECH CC
		SCOTT C
Citation	:	IRELAND v IAN JOHNSON CEO OF THE DEPARTMENT OF CORRECTIVE SERVICES [2009] WAIRC 00123
File No	:	FBA 10 of 2008

Catchwords:

Industrial law - Appeal against decision of the Full Bench of the Western Australian Industrial Relations Commission - Claim for benefits denied under a contract of employment - Whether prisoner an employee

Legislation:

Industrial Relations Act 1979 (WA)

Prisons Act 1981 (WA)

Prisons Regulations 1982 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Mr D J Matthews

Solicitors:

Appellant	:	In person
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Australian Woollen Mills Pty Ltd v The Commonwealth (1954) 92 CLR 424

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers [2006] WASCA 49

Cody v J H Nelson Pty Ltd (1947) 74 CLR 629

Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 95

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

WHEELER JA: I agree with Le Miere J.
PULLIN JA: I agree with Le Miere J.
LE MIERE J:

Introduction

1 This appeal turns on whether the appellant was employed by the respondent under a contract of employment when he carried out work at Hakea Prison, first as a remand prisoner and later as a sentenced prisoner.

2 The appellant was a remand prisoner at Hakea Prison between 16 November 2005 and late September or early October 2007. The appellant was then sentenced to a term of imprisonment and transferred to Wooroloo Prison. He remained in that prison as a sentenced prisoner until his release on 15 July 2008. During the time he was in prison the appellant was engaged in work. He first did cleaning work at Hakea Prison. He then did work in the prison kitchen. At Wooroloo Prison he worked in the kitchen.

3 After his release from prison the appellant applied to the Western Australian Industrial Relations Commission (Commission) for an order in respect of his claim that he had not been allowed a benefit to which he was entitled under his contract of employment. The appellant claimed that he had been entitled to benefits under a contract of employment with the respondent who is the Commissioner, Corrective Services of the Department of Corrective Services. The appellant's particulars of claim did not specify the contractual benefits which he claimed to have been denied. The respondent filed an answer in which he submitted that the applicant was under the custody of the Commissioner, Department of Corrective Services and at no time was there a contract of employment between the applicant and the respondent. The respondent submitted that the Commission lacks the jurisdiction to hear and determine the application.

4 The Commission then issued a notice requiring the applicant to show cause why his application should not be dismissed pursuant to s 27(1) of the *Industrial Relations Act 1979* (the Act) on the ground that the Commission does not have jurisdiction to hear the matter. The Commissioner stated that in order to ground jurisdiction for his claims the applicant must establish that at the material times he was an employee employed under a contract of employment with the respondent.

5 The Commission dismissed the applicant's application on the grounds that there was no contract of employment between the appellant and the respondent and the appellant was not an employee of the respondent.

6 The appellant appealed to the Full Bench of the Commission. The Full Bench dismissed the appeal. The Acting President, with whom the other members of the Full Bench agreed, found that there was no contract of employment between the appellant and the respondent because there was no intention to create legal relations and because there was no consideration. The Acting President found that the relationship between the appellant and respondent was a prison authority-prisoner relationship and the applicant was not an employee.

This appeal

7 The appellant now appeals against the decision of the Full Bench. The appellant says that there was a contract of employment between him and the respondent and that he was an employee of the respondent. Before considering the grounds of appeal it is convenient to refer to the decision of the Full Bench and the appellant's argument in support of his appeal to this court. The finding of the Acting President was based upon the status of the appellant as a prisoner and the statutory provisions governing that relationship. I will outline some of the important statutory provisions governing the relationship between the appellant and the respondent.

Statutory framework

8 Section 16(1) of the *Prisons Act 1981* (WA) (Prisons Act) provides that every prisoner is deemed to be in the custody of the chief executive officer. Section 16(4) provides that a 'prisoner on remand shall be treated in the same manner as other prisoners except in so far as regulations provide otherwise'.

9 Part IX of the Prisons Act, which includes s 95, is presently headed 'Prisoner wellbeing and rehabilitation'. Part IX of the Prisons Act complements s 7(1) which provides that, subject to the Prisons Act and to the control of the Minister, the chief executive officer is responsible for the management, control and security of all prisons and the welfare and safe custody of all prisoners. The present s 95 commenced on 4 April 2007. Accordingly both the present and former s 95 of the Prisons Act applied to the appellant during the relevant time he was a prisoner. There is no material difference between the present s 95 and the former s 95. For convenience, I will refer only to the present s 95.

10 Section 95(1) provides that the chief executive officer may arrange for the provision of services and programmes for the wellbeing and rehabilitation of prisoners. Section 95(2) provides that in particular, services and programmes may be designed and instituted with the intention of:

> …
>
> (b) enabling prisoners to acquire knowledge and skills that will assist them to adopt law abiding lifestyles on release; and
>
> …
>
> (f) providing opportunities for prisoners to utilise their time in prison in a constructive and beneficial manner by means of educational and occupational training programmes and other means of self improvement; and
>
> (g) providing opportunities for work, leisure activities and recreation.

A prisoner cannot be compelled to use, or participate in, the services or programmes provided under s 95 except that s 95(4) provides that as long as a prisoner is medically fit the prisoner may be required to work.

11 It is a minor prison offence for a prisoner to disobey a lawful order of a prison officer or officer having control or authority over him. It is a specific offence for a prisoner to be idle, negligent or careless in his work. A minor prison offence is subject to the penalties prescribed in s 77 which include cancellation of gratuities for a period not exceeding 14 days.

12 Section 110(1) of the Prisons Act provides that the Governor may make regulations:

> (f) regulating the custody classification, separation, diet, instruction, health, employment, discipline, medical and other treatment of prisoners; and
>
> …
>
> (h) making provision for the classification of labour performed by prisoners; and
>
> (i) prescribing the gratuities that may be credited to prisoners and the conditions upon which gratuities may be so credited; and
>
> …
>
> (u) regulating the treatment of prisoners on remand.
>
> …

13 Regulation 43 of the *Prisons Regulations 1982* (WA) (Prisons Regulations) provides:

> (1) Subject to subregulation (2), a prisoner who is able to work may be employed as the superintendent directs.
>
> (2) A prisoner on remand shall not be required to work.
>
> (3) A prisoner on remand may apply in writing to the superintendent to work and, if such application is granted, the prisoner may, be employed in the prison in which he is confined, and be credited with gratuities accordingly.

14 Whilst he was a remand prisoner the appellant applied to work as provided for in reg 43(3). The appellant completed an application in form C101. The form had the subheading 'Application for Remand Prisoners to be Employed at Prison'. It included:

> I HEREBY MAKE application to be put to such employment as may be approved by the Superintendent.

> I understand that such employment will not alter any status as a Remand Prisoner, and the application is made so that I may be paid gratuities, and occupy my time in prison.
>
> …
>
> I understand that I may be required to be employed in the capacity of general worker … or as directed by any Officer of the prison.
>
> Should this application be approved I shall remain in employment during the period of my imprisonment at the prison. A further election not to work must be made to the Superintendent in writing on a form C101.

15 Regulation 40 requires a prisoner to obey an order given to him by a prison officer and to obey the rules and standing orders of the prison. Regulation 44 provides that labour performed by prisoners is to be classified by the chief executive officer according to the specified levels. The levels distinguish between work requiring different levels of skill, aptitude and diligence. The level at which work is classified is at the discretion of the chief executive officer.

16 Regulation 45 provides the rates of gratuities in relation to the levels of labour performed by prisoners. Regulation 45A provides that a prisoner shall be allocated such level of labour as is determined by the chief executive officer. Regulation 45B provides that in certain circumstances a prisoner shall not be allocated any work and shall not be credited with any gratuity. The circumstances include where the superintendent, in the interests of the preservation of prison security or prison property, has directed that a prisoner is not to work, where a prisoner consistently refuses to work or where a prisoner is undergoing a penalty of confinement in his sleeping quarters or separate confinement in a punishment cell. Regulation 45B(2) provides that where a prisoner's gratuities are cancelled for a period not exceeding 14 days under pt VII of the Prisons Act, which is the part dealing with prisoner offences, that prisoner shall for that period continue to perform work. Regulation 45D provides for the proportionate payment of gratuities where a prisoner is not allocated a particular level of work for a whole week and where the prisoner has not performed work on a public holiday. Regulation 45E provides that the chief executive officer may at his or her absolute discretion determine that the gratuity to be credited to a prisoner shall be higher than the rate prescribed under the Prisons Regulations in relation to the level of work performed by the prisoner or if the chief executive officer is of the opinion that a prisoner is not carrying out the duties of a particular level of work in a satisfactory manner, shall be at a lower rate than the level prescribed in relation to the level of work normally performed by the prisoner. Regulation 47 regulates what a prisoner may spend gratuities on and how. Regulation 49 authorises the chief executive officer to order a deduction from the gratuities of a prisoner to defray the costs of property damaged or destroyed by the prisoner.

Reasons of Acting President

17 The Acting President considered the relationship between the appellant and the respondent including the statutory regime governing that relationship. The Acting President found that the word 'employment' in s 110(1)(f) of the Prisons Act means 'the state of being employed' and 'employed' in turn refers to 'to use the services of … keep busy or at work'. That is, the Acting President held that 'employed' in this context refers to engagement to do work in the absence of a contract. The Acting President held that the word 'employed' in subregulations 43(1) and 43(3) has the same meaning. The Acting President accepted that when the appellant was a remand prisoner he was not required to work and that it was a matter of choice that he became employed on work in the prison. Having regard to the terms of the form C101 completed by the appellant and the statutory regime the Acting President found that there was no intention to create legal relations both when the appellant was on remand and when he was a sentenced prisoner. The Acting President found that the arrangement between the appellant and the respondent did not involve mutual consideration which is a necessary element of an enforceable contract.

18 The Acting President commenced his analysis by saying that the appeal to the Full Bench turned 'upon whether the Commissioner erred in deciding the appellant was not the employee of the respondent'. The Acting President concluded that there was no employment contract between the appellant and the respondent. The term 'employee' is defined in s 7(1) of the Act. The definition is not confined to a person engaged under a contract of employment. However, an employee may only bring a claim under s 29(1)(b)(ii) of the Act if he has not been allowed by his employer a benefit where he is entitled to the benefit under his contract of employment. That is, an employee does not have standing to bring a claim for denied contractual benefits unless he was employed by his employer under a contract of employment. Accordingly, in this case it is necessary for the appellant to establish that he was employed by the respondent under a contract of employment.

The appellant's argument

19 The appellant submits that when he was on remand he was not required to work. He applied to work and his application was granted. The appellant accepts that when he was a sentenced prisoner he was required to work but nevertheless submits that he was an employee during the time he was a sentenced prisoner as well as when he was on remand.

20 In accordance with the regulations the appellant was credited with gratuities which, in accordance with the regulations, depended on the labour performed by the prisoner and classified by the respondent according to specified skill levels. The appellant underwent training to carry out the work he performed. He was supervised in carrying out his work. The appellant submitted that in carrying out his work in prison he was required to observe health and safety requirements.

21 The appellant says that his relationship with the respondent has all the hallmarks of an ordinary employer-employee relationship. The appellant says that he was trained, he was supervised, he performed duties which involved skill and initiative. He was paid. He was paid for his work at different levels depending upon the amount of

skill involved. He was required to comply with a variety of occupational health and safety requirements. The appellant submits, in effect, that having regard to the indicia of a contract of employment referred to by the High Court in ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 and ***Hollis v Vabu Pty Ltd*** (2001) 207 CLR 21 the relationship between the appellant and the respondent is properly to be seen as that of employer and employee.

Jurisdiction

22 Section 90(1) of the Act provides that an appeal lies to this court from a decision of the Full Bench on the grounds set out in [(a)], [(b)] and [(c)] of that subsection but upon no other ground. None of the appellant's grounds of appeal fall within [(a)] or [(c)] of s 90(1) of the Act. Section 90(1)(b) of the Act provides that an appeal lies to the court from any decision of the Full Bench:

> on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making a decision appealed against.

Grounds 1, 3 and 4

23 The appellant's notice of appeal contains four grounds of appeal. During the hearing of the appeal the appellant was granted leave to amend his grounds of appeal to add a further ground of appeal which I will refer to as ground 5.

24 Ground 1 of the appeal is:

> The Commission erred in law when it failed to take into account that the appellant's common law rights were not extinguished in law and he was able to enter into legal agreements with the prison authorities whilst a remand prisoner, and a sentenced prisoner.

25 Ground 3 is:

> The Commission erred in law when it failed to take into account of the supporting documents, and the legal contents of said documents, as the documents support the fact that a prisoner cannot be forced to work as a sentenced prisoner, unless the prisoner agrees, having signed the relevant documents as these documents are of a legal nature and can be used in evidence in a court of law.

26 Ground 4 is:

> The Commission erred in law when it did not take an objective assessment of the state of affairs between the parties and of the meaning of the word management in the Prisons Act.

27 An appeal does not lie to this court on any of these grounds. None of them raise a ground specified in s 90(1) of the Act as the only grounds on which an appeal may be brought to this court.

Ground 2

28 Ground 2 of the appeal is:

> The Commission erred in law when it failed to apply the proper meaning to the word 'employment' and 'employed' in the *Prisons Act 1981* (WA) s 110(1)(f) and *Prisons Regulations 1982* (WA) reg 43 and the form C101.

29 The respondent says that the decision of the Full Bench did, in part, turn on the interpretation of the terms 'employed' and employment' in the Prisons Act and Regulations and it is arguable that this court has jurisdiction to hear appeal ground 2 pursuant to s 90(1)(b) of the Act. The respondent submits that this ground of appeal turns on whether, if a prisoner is 'employed' under the regulations pursuant to the power to make regulations for 'employment' of prisoners, a prisoner is subject to a 'contract of employment' for the purposes of s 29(1)(b)(ii) of the Act.

30 The Acting President, with whom the other members of the Full Bench agreed, reviewed the relationship between the appellant and the respondent. The Acting President had regard to the Prisons Act and the Prisons Regulations.

31 The Acting President correctly said that in their natural and ordinary meaning the words 'employment' and 'employed' are not confined to a person being engaged under a contract of service. The meaning of 'employment' includes the state of being employed and the meaning of 'employed' includes 'to use the services of or to keep busy or at work'. Words take colour from their surroundings and words of wide signification may be limited by their context. However, such a limitation must be demonstrated. If general words are used, they should be given their plain and ordinary meaning unless the contrary is shown: ***Cody v J H Nelson Pty Ltd*** (1947) 74 CLR 629, 647 Dixon J. There is nothing in the context of s 110 of the Prisons Act to show that the word 'employment' is to be given less than its full meaning.

32 In reg 43(3) the context in which the word 'employed' appears shows that the word means 'engaged in work' and is not confined to work under a contract of service. The regulation says that the prisoner may be employed in the prison if he has applied in writing to work and the application is granted. Similarly, the context in which the word 'employed' appears in the form C101 does not show that it has the narrow meaning of employed under a contract of service.

33 The Acting President made no error in construing or interpreting the relevant provisions of the Prisons Act and the Prisons Regulations. Ground 2 is not made out.

Ground 5

34 Ground 5 of the appeal is to the effect that the Full Bench erred in law in that it erred in the construction or interpretation of the Act in that it failed to find that the appellant was an employee within the meaning of s 29(1)(b)(ii) of the Act and that there was a contract of employment between the appellant and the respondent within the meaning of s 29(1)(b)(ii) of the Act.

35 The respondent does not dispute that ground 5 raises a ground of appeal that is within the jurisdiction of the court. The primary facts are not in dispute. The appellant's case is that on those facts the Full Bench should have found that he was an employee within the meaning of the Act and that there was a contract of employment between the appellant and the respondent within the meaning of s 29(1)(b)(ii) of the Act. The appellant's case is that in failing to find that the appellant was an employee employed by the respondent under a contract of employment the Full Bench erred in law in that it misconstrued the words 'employee' and 'contract of employment' in s 29(1)(b) of the Act.

36 The appellant's case is that the appeal falls within s 90(1)(b) of the Act because the Full Bench wrongly construed the provisions of the Act relating to 'employee' and 'contract of employment' by wrongly determining that the statutory criteria were not satisfied. The appellant did not put his submissions in those words but that is the effect of his case. There is some doubt whether an appeal on that basis necessarily raises an error of law in the construction or interpretation of the Act. Some grounds of appeal asserting that the Full Bench erred in law in finding that a person was not an employee of another person may be on the ground that there has been an error in the construction or interpretation of the word 'employee' in the Act but not all appeals on the ground that the Full Bench erred in finding that a person was not an employee are appeals on the ground that there has been an error in the construction or interpretation of 'employee' in the Act: see ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers*** [2006] WASCA 49.

37 It is not appropriate to decide that matter in this appeal for two reasons. First, the matter was not addressed by the parties in argument. Second, I have come to the view that the Full Bench was correct in finding that there was no contract of employment between the appellant and the respondent.

38 In ***Hollis v Vabu*** and ***Stevens v Brodribb*** the High Court set out the common law principles for distinguishing between an employee and a contractor. These principles rely on a test which involves the consideration of a number of established factors or indicia, some of which are characteristic of a contract of service and others of which suggest a principal-contractor relationship. The task of the court, which must assess the employment status of a worker, is to consider the parties' relationship in light of each of these indicia and to determine, on balance, into which legal category the relationship falls. The test applied in ***Hollis v Vabu*** and ***Stevens v Brodribb*** is a test generally applied to determine whether a contractual relationship is a relationship of employer and employee or a relationship of principal and contractor or, to put the same matter another way, whether the contract is a contract of service (or employment) or a contract for services. That is not the issue in this case. The question is whether there is any relevant contract between the appellant and the respondent.

39 The Acting President found that there was no contract of employment, and implicitly that there was no contract at all, between the appellant and the respondent for three interrelated reasons. The first is that the relationship between the appellant and respondent was that of prison authority and prisoner. The second is that the respondent did not intend to enter into contractual relations with the appellant. The third is that the arrangement, to use a neutral word, between the appellant and the respondent did not involve mutual consideration.

40 It is convenient to consider the position of the appellant when he was working as a sentenced prisoner before considering the position when he was a remand prisoner.

41 Work performed by the appellant as a sentenced prisoner has a number of unique features that distinguish it from work performed in the free labour market. First, the appellant did not perform prison work voluntarily. The effect of s 95 of the Prisons Act and reg 43 of the Prisons Regulations is that the appellant was obliged to work. Second, in carrying out prison work the appellant was required to carry out work and in the manner in which he was directed to do so by a prison officer. To disobey an order, including an order in relation to performing work, was a minor prison offence. Third, the performance of work by the appellant as a sentenced prisoner was regulated by the Prisons Act, the Prisons Regulations, rules and standing orders. A prisoner's life, including the performance of work, is closely and completely controlled by the prison system in which they are incarcerated: see C Fenwick 'Regulating Prisoners' Labour in Australia: A Preliminary View' (2003) 16 AJLL 284.

42 It is of the essence of a contract that there is a voluntary assumption of a legally enforceable duty: ***Ermogenous v Greek Orthodox Community of SA Inc*** (2002) 209 CLR 95, [24] (Gaudron, McHugh, Hayne and Callinan JJ); ***Australian Woollen Mills Pty Ltd v The Commonwealth*** (1954) 92 CLR 424, 457 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

43 When he was a sentenced prisoner the appellant could not voluntarily enter into a contract of employment with the respondent to work because the legislation which governed his imprisonment required him to work at the discretion of, and under the supervision and control of, the respondent.

44 The appellant could not, and did not, bargain with the respondent about his pay, in the form of gratuities, and working conditions, nor did any organisation on his behalf. Those matters were determined by the State through the operation of the Prisons Act, the Prisons Regulations and rules.

45 Whilst the appellant was a remand prisoner he was not required by the Prisons Act or the Prisons Regulations to work. The appellant voluntarily applied to work. However, that was the only choice that he made. Having applied to work and having had his application granted the relationship between the appellant and the respondent was governed by

the Prisons Act, the Prisons Regulations, rules and standing orders and not by any contract freely negotiated and freely entered into by the appellant. Whilst carrying out work the appellant was required to obey orders of prison officers and subject to the discipline of the prison system. The relationship between the appellant and the respondent was not governed by any contract or arrangement freely entered into by the appellant, it was regulated by the Prisons Act, the Prisons Regulations, the rules and standing orders. There was no scope for the appellant to enter into any contract with the respondent concerning what work he would carry out, the hours of his work, the conditions under which he would work or what he would be paid for performing his work.

46 The Acting President was correct to find that the relationship between the appellant and the respondent was that of prison authority and prisoner. That relationship arose from the appellant's status as a prisoner and the Prisons Act, Prisons Regulations, rules and standing orders that govern their relationship.

47 There is no legally enforceable contract unless the parties intended to create contractual relations. In ***Ermogenous v Greek Orthodox Community*** Gaudron, McHugh, Hayne and Callinan JJ explained:

> Although the word 'intention' is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties [25].

The enquiry whether the parties intended to create contractual relations may take account of the subject matter of the arrangement, the status of the parties to it, their relationship to one another and other surrounding circumstances. The search for the 'intention to create contractual relations' requires an objective assessment of the state of affairs between the parties: ***Ermogenous v Greek Orthodox Community***; Gaudron, McHugh, Hayne and Callinan JJ [25].

48 The evidence in this matter does not establish any intention to create contractual relations. There is no basis for a conclusion that the respondent intended to enter into a contractual relationship with the appellant. To the contrary, the appellant was deemed to be in the custody of the respondent. The respondent was responsible for the appellant's welfare and safe custody. In discharging his statutory responsibilities the respondent provided work for the appellant. The status of the appellant and the respondent, their relationship to one another and the statutory framework which regulated that relationship are inconsistent with any intention to create contractual relations whilst the appellant was a sentenced prisoner or when he was on remand.

49 For those reasons, the Full Bench was correct to find that there was no contract of employment between the appellant and the respondent. Ground 5 is not made out.

Conclusion

50 The appeal must be dismissed.

2009 WAIRC 01182

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO. FBA 10 OF 2008 GIVEN ON 17 MARCH 2009

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	MARK GREAME IRELAND
	APPELLANT
	-v-
	IAN JOHNSON CEO OF THE DEPT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	WHEELER JA
	PULLIN JA
	LE MIERE J
DATE HEARD	WEDNESDAY, 3 JUNE 2009
DATE DELIVERED	THURSDAY, 3 SEPTEMBER 2009
FILE NO/S	IAC 2 OF 2009
CITATION NO.	2009 WAIRC 01182

Result	Appeal Dismissed
Representation	
Appellant	Mr MG Ireland (In person)
Respondent	Mr DJ Matthews (of Counsel), on behalf of the Respondent

Order

Having heard Mr M G Ireland on his own behalf and Mr DJ Matthews (of Counsel), on behalf of the Respondent THE COURT HEREBY ORDERS THAT:-

The appeal is dismissed.

(Sgd.) J SPURLING,
[L.S.] Clerk of Court.

FULL BENCH—Appeals against decision of Commission—

2009 WAIRC 01155

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 01155
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		COMMISSIONER P E SCOTT
		COMMISSIONER S M MAYMAN
HEARD	**:**	WEDNESDAY, 12 AUGUST 2009; FINAL WRITTEN SUBMISSIONS RECEIVED FRIDAY, 16 OCTOBER 2009
DELIVERED	**:**	TUESDAY, 3 NOVEMBER 2009
FILE NO.	**:**	FBA 4 OF 2009
BETWEEN	**:**	KRYSTI GUEST
		Appellant
		AND
		KIMBERLEY LAND COUNCIL
		Respondent

ON APPEAL FROM:

Jurisdiction:	Western Australian Industrial Relations Commission
Coram:	Commissioner S Wood
Citation:	2009 WAIRC 00443
File No:	U161 of 2008

CatchWords:

Industrial Law (WA) – Supplementary reasons for decision – Notices pursuant to s78B *Judiciary Act 1903* (Cth) not required – Question of jurisdiction was a constitutional or statutory fact – Order not to be disturbed despite error by Commissioner – Appeal dismissed

Legislation:

Commonwealth Constitution: s109

Industrial Relations Act 1979 (WA): s35

Judiciary Act 1903 (Cth): s78B

Workplace Relations Act 1996 (Cth).

Result:

Appeal dismissed

Representation:

Counsel:

Appellant:	Mr S Millman (of Counsel), by leave
Respondent:	Mr D Schapper (of Counsel), by leave

Solicitors:

Appellant:	Slater & Gordon
Respondent:	Derek Schapper, Barrister and Solicitor, Parry Street Chambers

Case(s) referred to in reasons:

Breen v Sneddon (1961) 106 CLR 406

Commonwealth Freighters Pty Ltd v Sneddon (1959) 102 CLR 280

Gerhardy v Brown (1985) 159 CLR 70

The State of South Australia v Tanner (1989) 166 CLR 161

Thomas v Mowbray (2007) 233 CLR 307

Case(s) also cited:

Aboriginal Legal Service (Inc) v Lawrence [No2] (2008) 252 ALR 136

Bray v F. Hoffman-La Roche Ltd (2003) 200 ALR 607

Draughtsman of Australia (1950) 82 CLR 54

Federation Engine Drivers and Fireman's Association of Australia v BHP (1911) 12 CLR 398

Levy v The State of Victoria (1997) 189 CLR 579

New South Wales v Commonwealth (2006) 229 CLR 1

"Shin Kobe Maru" v Empire Shipping Company Inc (1994) 181 CLR 404

Sportodds Systems Pty Ltd b new South Wales (2003) 202 ALR 98

R v Blakely; ex parte The Association of Architects Engineers Surveyors and Woods v Multi-Sport Holdings Pty Ltd (2002) 298 CLR 460

Supplementary Reasons for Decision

RITTER AP:

Introduction

1 In this appeal, reasons for decision were published on 15 September 2009. In the final paragraph of my reasons (agreed with by Scott and Mayman CC) I said that additional written submissions should be received on the appropriate course to take and orders to be made having regard to the reasons. I said that the timing of the provision of submissions and any orders to be made for that purpose could be resolved administratively.

2 After communication between my associate and the legal representatives of the parties, it was decided that additional submissions should be filed and served on or before 16 October 2009. This has now occurred.

Submissions of the KLC

3 The KLC submitted, as postulated at [84] of my reasons, that leave to appeal should be granted and the appeal dismissed. In summary, this was because:

(a) Both decisions made by the Commissioner at first instance were in error because they were determined by the application of an onus of proof.

(b) Whether or not the KLC is a trading corporation is a constitutional or statutory fact and the evidence to date does not allow a satisfactory finding to be made.

(c) The unsatisfactory state of the evidence cannot be overcome or avoided by resort to an onus.

(d) The re-opening of the hearing and the taking of additional evidence is the only way in which the present uncertainty about whether the KLC is a trading corporation can be overcome.

Submissions of Ms Guest

4 In contrast, Ms Guest submitted that the appeal be allowed and the orders made by the Commission on 9 July 2009 be quashed.

5 Essentially, this was because the Commissioner was in error in deciding to re-open the question of jurisdiction on the basis that he had applied an incorrect onus of proof. The first decision, however, in which the Commissioner reasoned that the KLC had not established it was a trading corporation and that therefore the Commission had jurisdiction, was correct. In making this submission Ms Guest contended that I was in error in deciding the question of whether the KLC is a trading corporation should have been determined as a constitutional or statutory fact in accordance with the process described by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142 and the other decisions referred to in my reasons at [75]-[80].

Section 78B of the *Judiciary Act*

6 As a preliminary issue, Ms Guest submitted the points made by me at [82] of my reasons raised constitutional issues. It was argued that, accordingly, s78B of the *Judiciary Act 1903* (Cth) now compels the Full Bench not to proceed with the hearing and determination of the appeal until the relevant notices have been given to the Attorneys-General of the Commonwealth and the States.

7 I do not accept this submission. The points which I made at [82] of my reasons were about the way in which the Commissioner, as a matter of onus and procedure, had decided to re-open the question of jurisdiction. They also covered the basis upon which and the way the Commission should receive evidence to determine whether a respondent is a trading corporation. That is, the function of the Commission in deciding that question. Those points do not involve a "matter arising

under the Constitution or involving its interpretation", which is the required criteria for the issuing of s78B notices. The characterisation of the KLC as a trading corporation or otherwise, an issue which would require the issuing of s78B notices, does not arise in this appeal.

Analysis of the Submissions of Ms Guest

8 As I have said, Ms Guest submitted that I was in error in deciding that the issue of whether the KLC is a trading corporation should be determined in accordance with the observations of Brennan J in *Gerhardy*. Instead, it was submitted that whether the KLC is a trading corporation is a jurisdictional fact to be determined in accordance with the usual course of evidence and procedure; as the Commissioner had done in his first decision. In making this contention, lengthy submissions were made about each of the authorities which were cited in my reasons at [75]-[80]. I have carefully considered these submissions, although I do not find it necessary to refer to them in detail.

9 I remain of the opinion that the issue which had to be determined by the Commissioner was squarely within the observations made by Brennan J in *Gerhardy*. In my opinion, the following sentence of what Brennan J said at 142 is directly applicable:

> "When the validity of a State law is attacked under s109 of the *Constitution* and the scope of the Commonwealth law with which it is thought to be inconsistent depends on matters of fact (which I shall call the statutory facts) the function of a court is analogous to its function in determining the constitutional validity of a law whose validity depends on matters of fact."

10 I also note that Gibbs CJ in *Gerhardy* at 87 adopted a similar approach to that of Brennan J. The assertion by the KLC that the Commission does not have jurisdiction involves an attack on the validity of the *Industrial Relations Act 1979* (WA) (*the Act*), in the sense that via s109 of the Constitution, *the Act* does not operate so as to apply to the KLC. Whether this is so depends upon the scope of the *Workplace Relations Act 1996* (Cth). In turn, this depends upon a matter of fact; being whether the KLC is a trading corporation.

11 Consequently, the points made by Dixon CJ in *Breen v Sneddon* (1961) 106 CLR 406 at 411 and in *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292, relied upon by Brennan J in *Gerhardy*, apply. Accordingly:

(a) The question of fact of whether the KLC is a trading corporation is not simply an issue between the parties.

(b) That fact must be ascertained by the Commission as best as it can.

(c) The Commission may invite and receive assistance from the parties to decide the statutory fact.

12 Additionally, as Brennan J stated in *The State of South Australia v Tanner* (1989) 166 CLR 161 at 179, "to the extent that validity depends on some matter of fact, there is no onus on a challenging party which, being undischarged, will necessarily result in a declaration of validity".

13 In her written submissions, Ms Guest quoted at length from the reasons of Heydon J in *Thomas v Mowbray* (2007) 233 CLR 307. In my opinion, his Honour's reasons do not lead to the conclusion that the reasons of Brennan J in *Gerhardy* do not apply to the resolution of the question of whether the KLC is a trading corporation. At [639] of *Thomas*, Heydon J said that the questions he had posed, as a consequence of his reasoning at [613] ff, were to be reserved for resolution in a future case. Furthermore, his Honour at [628] quoted with approval that part of the reasons of Dixon CJ in *Breen* in which his Honour said that questions about constitutional facts did not form issues between the parties to be tried like ordinary facts in issue. In the following paragraph Heydon J referred, without disapproval, to the suggestion that courts determining constitutional facts may require the parties to provide further factual material. Additionally, *Gerhardy* involved the issue of the scope and applicability of a Commonwealth statute being dependent upon a factual issue; as is the present position. There is no binding decision of the High Court which leads to the conclusion that the observations of Brennan J should not be followed on the issue before the Full Bench.

14 Accordingly, I do not accept Ms Guest's submission that whether the KLC is a trading corporation is an ordinary jurisdictional fact to be determined in accordance with the usual rules of evidence and procedure.

15 The submissions of Ms Guest also criticised my reasons at [81], where I said that the KLC had submitted the Commissioner had to be positively satisfied that he had jurisdiction before proceeding to hear and determine Ms Guest's application. It was submitted by the KLC that the state of satisfaction could not be achieved by uncertainty as to whether the KLC was a trading corporation based upon an insufficiency of evidence. I said that these submissions were supported by the principle that it is the first duty of a statutory court or tribunal to decide whether it has jurisdiction. I cited authorities in support of this contention. The appellant submitted that I had incorrectly referred to the first duty as being an elevated duty, as opposed to one to be determined first in a temporal sense. It was submitted that having wrongly characterised the "first duty" as an elevated duty, I decided that its resolution involved different methods of proof of the relevant facts. I do not accept this. The reason that the different procedures described by Brennan J in *Gerhardy* apply, as I have said, is not simply because a question of jurisdiction was involved. It is because the question of jurisdiction involved the applicability of a Commonwealth statute, the scope of which in turn depended upon a question of fact. Further discussion about the precise meaning of "first duty" in this context is unnecessary. I would have thought however that it could be understood in a temporal sense and/or as specifying a primary duty of a court or tribunal.

16 For these reasons I do not accept the submissions of Ms Guest leading to the assertion that the appeal should be allowed.

Orders

17 I accept the submissions made by the KLC about the orders which should be made. These submissions followed the observations which were made at [84] of my reasons.

18 In my opinion the appeal should be dismissed. Although Ms Guest has established that the Commissioner erred in his consideration of the onus of proof issue, this did not mean that the jurisdictional question should not have been re-opened. In my opinion it should have been re-opened because the reasons of the Commissioner in the first decision demonstrate that he did not have sufficient evidence and information to determine whether the KLC is a trading corporation. The dismissal of the appeal will mean that the matter is returned to the Commissioner who can then act in accordance with the order which was appealed against.

19 Accordingly, the appropriate orders which should be made are:

1. Leave to appeal is granted; and
2. The appeal is dismissed.

Minute of Order

20 In my opinion, to strictly comply with s35 of *the Act*, a minute of proposed order in these terms should be published. If either party wishes to speak to the minute by way of written submissions, they may do so within 3 days of the publication of these reasons and the minute.

SCOTT C:

21 I have had the benefit of reading the draft Supplementary Reasons for Decision of the Acting President and agree with them.

MAYMAN C:

22 I have had the benefit of reading the Supplementary Reasons for Decision of his Honour, the Acting President. I agree with those reasons and have nothing further to add.

2009 WAIRC 01175

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRYSTI GUEST
	APPLICANT
	-v-
	KIMBERLEY LAND COUNCIL
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 9 NOVEMBER 2009
FILE NO/S	FBA 4 OF 2009
CITATION NO.	2009 WAIRC 01175

Result	Appeal dismissed
Representation	
Applicant	Mr S Millman (of Counsel), by leave
Respondent	Mr D Schapper (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 12 August 2009, and having heard Mr S Millman (of Counsel), by leave, on behalf of the appellant and Mr D Schapper (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 3 November 2009, it is this day, 9 November 2009, ordered that:

1. Leave to appeal is granted; and
2. The appeal is dismissed

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 01180

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 01180
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 15 AUGUST 2007, WEDNESDAY, 12 SEPTEMBER 2007, TUESDAY, 15 JANUARY 2008, TUESDAY, 11 MARCH 2008, TUESDAY, 25 MARCH 2008, WEDNESDAY, 2 APRIL 2008, FRIDAY, 30 MAY 2008, THURSDAY, 3 JULY 2008, TUESDAY, 26 AUGUST 2008, MONDAY, 17 NOVEMBER 2008, THURSDAY, 13 AUGUST 2009; FINAL WRITTEN SUBMISSIONS RECEIVED THURSDAY 20 AUGUST 2009 AND FRIDAY 28 AUGUST 2009
DELIVERED	**:**	TUESDAY, 10 NOVEMBER. 2009
FILE NO.	**:**	FBA 27 OF 2006
BETWEEN	**:**	EDWARD MICHAEL Appellant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING Respondent

ON APPEAL FROM:

Jurisdiction:	Western Australian Industrial Relations Commission
Coram:	Commissioner J L Harrison
Citation:	2006 WAIRC 04786
File No:	U 116 of 2005

CatchWords:

Industrial Law (WA) – Appeal against decision of the Commission – Claim of unfair dismissal – Complaint about conduct of the Commissioner and Counsel – Consideration of documentary evidence – Decision turns on its own facts – Appeal dismissed

Legislation:

Industrial Relations Act 1979 (WA): s23A

Public Sector Management Act 1984 WA: s79(5).

Result:

Appeal dismissed

Representation:

Counsel:

Appellant:	In person
Respondent:	Ms R Hartley (of Counsel), by leave

Solicitors:

Respondent:	State Solicitor's Office

Case(s) referred to in reasons:

Byrne and Frew v Australian Airlines Ltd (1995) 185 CLR 410.

Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission (2000) 203 CLR 194.

Gronow v Gronow (1979) 144 CLR 513.

House v King (1936) 55 CLR 499.

Jago v District Court (NSW) (1989) 168 CLR 23

Michael v Director-General, Department of Education and Training (2008) 89 WAIG 1.

Michael v Director General, Department of Education and Training (2008) 88 WAIG 592.

Monteleone v The Owners of the Old Soap Factory [2007] WASCA 79

Norbis v Norbis (1986) 161 CLR 513

Shire of Esperance v Mouritz (1991) 71 WAIG 891.

Undercliffe Nursing Home v Federation Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch (1985) 65 WAIG 385.

Reasons for Decision

RITTER AP:

The Application, Hearing and Decision

1 On 14 October 2005 the appellant filed a notice of application seeking an order pursuant to s23A of the *Industrial Relations Act 1979* (WA) (*the Act*). The application was made on the ground that the appellant's dismissal as a state school mathematics teacher, on 21 September 2005, was 'harsh, unjust and unreasonable'. The appellant was then teaching at Pinjarra Senior High School although the dismissal was for his substandard teaching performance as a mathematics teacher at John Willcock College in Geraldton (the College) in 2004. The appellant sought reinstatement and compensation. The application was defended and proceeded to a hearing. The appellant was at that stage represented by solicitors and counsel.

2 The hearing took place on 20 and 21 April 2006. Final written submissions were then filed and reasons for decision were delivered on 24 July 2006. On the same date an order was made dismissing the application.

The Progress of the Appeal

3 On 14 August 2006 the appellant instituted an appeal against the dismissal of the application. At that time the appellant was still represented by his solicitors. The notice of appeal was accompanied by a document setting out 10 "Grounds of Appeal". After the filing of the notice of appeal the appellant ceased to retain his solicitors.

4 The appeal was not progressed for a lengthy period of time, for a number of reasons which do not need to be presently set out. In the latter half of 2007 the appeal was reactivated. An appeal book and two interlocutory applications were filed on 27 August 2007. In summary the interlocutory applications were for the Full Bench to receive documents in the appeal which were not in evidence at first instance and to view the video record of the proceedings at first instance. Both of the interlocutory applications were dismissed (*Michael v Director General, Department of Education and Training* (2008) 88 WAIG 592). An attempt to appeal against that decision was dismissed by the Industrial Appeal Court (*Michael v Director-General, Department of Education and Training* (2008) 89 WAIG 1).

5 After this there were some additional delays in the hearing of the appeal. Again the reasons for this need not be set out. Then, pursuant to orders made at a directions hearing the appellant filed a document setting out his amended grounds of appeal. This occurred on 7 August 2009. At the hearing of the appeal the appellant elaborated upon and added to his grounds of complaint about the decision at first instance. The appellant said at the beginning of the hearing that his submissions may add to what he had filed. Additionally, due to leave given to the appellant at the hearing of the appeal, documents were filed by the appellant on 20 and 28 August 2009 setting out additional submissions. The respondent was given the opportunity to respond to the latter documents, but did not wish to do so. I will later set out the substance of the complaints made by the appellant about the decision at first instance.

Witnesses

6 At the hearing of the application the appellant was the only witness who gave evidence in support of his application. The respondent called the following witnesses:

(a) Mr Kevin Pilkington, the Principal of the College.

(b) Mrs Kathy Pilkington, the Deputy Principal at Geraldton Senior College and Deputy Principal at the College in 2004. (Mr and Mrs Pilkington were married).

(c) Ms Jillian Stewart, Head of Mathematics Department at the College.

(d) Ms Vicki Jack, at the relevant time the Manager of Operations at the Mid-West District Education Office of the Department of Education, and at the time of the hearing the District Director of the Pilbara Education District.

(e) Ms Meredyth McLarty, the Acting Principal of Pinjarra Senior High School, when the appellant taught there in 2005.

(f) Mr Peter Burgess who was appointed on behalf of the respondent to investigate the appellant's alleged substandard teaching performance.

Relevant Dates

7 The following dates are relevant to understanding the process which led to the termination of the employment of the appellant:

Late 1990	The appellant emigrated to Australia from Egypt. He had obtained a Bachelor of Science and Education in Cairo and taught in Egypt for a number of years.
1999	The appellant taught at Mount Magnet District High School for approximately 6 months.
2003	The appellant taught at Katanning Senior High School during terms 3 and 4.
2004	At the commencement of the school year the appellant was employed full-time in the mathematics department at John Willcock College, Geraldton.
20 May 2004	The appellant was formally advised by Mr K Pilkington that he was not performing to a satisfactory level and was then subject to two Performance Improvement Plans (PIPs).
14 June – 28 July 2004	The first PIP took place.
30 July – 27 August 2004	The second PIP took place.
23 August 2004	The appellant became unwell during the last week of the second PIP.
31 August 2004	The appellant returned to John Willcock College and was involved in an incident which led to him being directed to attend the Department of Education and Training (DET) District office. The appellant did not return to the College afterwards.
31 August 2004	Letter from Mr Pilkington to the appellant advising that he was to recommend that the respondent investigate the appellant's performance.
10 December 2004	Mr Burgess engaged to investigate the performance of the appellant.
26 April 2005	The appellant commenced teaching at Pinjarra Senior High School.
16 June 2005	Mr Burgess sends his report to the Executive Director of Human Resources of the Department of Education and Training.
5 July 2005	The appellant was advised the respondent intended to terminate his employment but was given the opportunity to provide written submissions about this intended action.
9 August 2005	The appellant's solicitor made written submissions to the respondent.
21 September 2005	The appellant was terminated from his employment as a teacher by the respondent.

Documents

8 A key part of the evidence at first instance was comprised by a large number of documents. In my reasons for decision in the interlocutory applications, I described the position regarding the documents in the following way:

> "64 On the first morning of the hearing on 20 April 2006 the appellant's counsel said that he had been provided by the respondent with two folders of documents containing '*about 600 pages*'. Counsel then said the appellant did not '*have any further documents that we'll be referring to*' (T6). The respondent's advocate then explained some colour co-ordination of the files of documents. They were then received as exhibit R1 (T6). The appellant's counsel said the bundle of documents had been provided '*yesterday*' and that he had the chance of briefly going through all of them. He said he did not '*think that there is anything further that the [appellant] wishes to rely on but, because of the timing of the provision of the documents it may take me a while to go through the examination-in-chief*" (T6-7). The appellant then gave evidence. The appellant's examination-in-chief, cross-examination and re-examination were concluded that day. No other documents were received into evidence that day.
>
> 65 The respondent's witnesses gave evidence the next day. During their examination in chief, cross-examination and re-examination no additional documents were tendered by either party.
>
> 66 At the conclusion of the evidence there was discussion between the Commissioner and the appellant's counsel about the documents in exhibit R1. The Commissioner asked counsel whether he took issue with any of the documents (T157). Reference was made to the lack of any objection at the commencement of the hearing. Reference was also made to the evidence of the appellant that he did not sign a document said to include his signature (see T157; the evidence was at

T61 and T71). This document was a lesson plan dated 3 August 2004 at page 347 of exhibit R1. After some discussion the appellant's counsel said he did not have the original of the document (T159). There was then discussion about the appellant's counsel being able to review the original of that lesson plan which could be discussed between advocates after the adjournment for the preparation of written submissions. (The issue was not raised in the written closing submissions).

67 The appellant's counsel then informed the Commissioner there was '*one further document that was referred to in [the appellant's] evidence-in-chief which we weren't able to locate … in the bundle of documents that have been provided*' (T159). Counsel described the document and requested it be received. This was not objected to by the respondent's advocate and the document became exhibit A1. This was a series of notes written by a Ms Ventouras at Pinjarra Senior High School covering the period 27 April 2005 to 29 April 2005.

68 Just before the proceedings were adjourned there was discussion about a handwritten note by a student called "*Holly*". The appellant's counsel made a deliberate decision not to tender this document (T161). This was because he said the evidence of the appellant which the note supported was already sufficiently supported by the document at exhibit R1 pages 436 - 437 which was another handwritten note by "*Holly*" dated 7 June 2004."

Reasons – The Evidence

9 In her reasons for decision the Commissioner set out at some length the evidence which was given by the witnesses at the hearing. Given some of the points relied on by the appellant in support of the appeal, it is necessary to summarise what the Commissioner said about the evidence of the witnesses.

(a) The Appellant

10 The appellant obtained a Bachelor of Science and Education in Cairo and taught for a number of years in Egypt before coming to Australia. The Commissioner summarised the appellant's teaching experience in Western Australia.

11 From his third day at the College the appellant had a poor relationship with Ms Stewart. Ms Stewart and his sub-school leader Ms Barbara Carey had complained to Mr Pilkington about communication difficulties.

12 In March 2004 Ms Stewart told the appellant that his salary was too big. She advised him to change to part-time teaching to allow sufficient time to prepare for lessons. The appellant did not accept this and Ms Stewart then said she would check his lesson plans. During March and April 2004 he had difficulties with Ms Stewart about the teaching of his classes and she was critical of his lessons. She attended one of his lessons and took it over. The appellant became anxious and upset as a result. Ms Stewart continued to review his lessons and required him to submit his lesson plans to her 24 hours in advance of a lesson. This was sometimes difficult to achieve. Ms Stewart did not understand his teaching methods or make positive comments about his teaching. She was against him because he was earning a high income.

13 Difficulties continued with Ms Stewart and also Ms Carey and around the end of March 2004 the appellant complained to Mr Pilkington about their treatment of him. A meeting was arranged with Mrs Pilkington at which the appellant requested a move to another sub-school. He was informed that this could not occur. Mrs Pilkington said she would try and fix the problem and then had meetings with the appellant, Ms Stewart and Ms Carey. An action plan was developed to improve outcomes for the appellant's students (Exhibit R1 489). The appellant had difficulties in adhering to the action plan and all of his actions were constantly being reported to Mr Pilkington. The appellant became depressed and took medication. The appellant's line managers planned to destroy him and kick him out of the school. He was concerned after seeing Ms Stewart and Mrs Pilkington talking after reviewing one of his lessons, instead of independently assessing it. He disagreed with Ms Stewart about methods of teaching.

14 From early in term 1, 2004 the appellant was stressed and believed his capacity to teach was destroyed by Ms Stewart and Ms Carey. He was not given any support from Ms Carey when disciplining students. An example of this was given.

15 Ms Stewart refused to accept year 8 and 9 teaching programmes which he and other colleagues prepared at the start of term 2, 2004.

16 Mr Pilkington also did not support him. He observed a lesson and said that the appellant's students were bored.

17 After the appellant was advised that his teaching performance was unsatisfactory, Mrs Pilkington did not allow him adequate time to meet with his union representative to discuss the issue. They only met for 45 minutes.

18 The only complaints made about the appellant were about and/or from three students. The appellant was discriminated against as his line manager did not treat him in the same way as other teachers when students misbehaved. Mrs Pilkington preferred the accounts of students about the appellant's interactions with them. The appellant complained to Mr Pilkington about Mrs Pilkington and Ms Stewart and requested a new line manager.

19 Nevertheless, during 2004 the appellant's performance improved and this was illustrated by a letter from a parent who had previously complained about him.

20 After the appellant complained to Mr Pilkington about Mrs Pilkington reviewing his classes, this ceased. She was replaced by Ms Jack. The appellant did not however trust Ms Jack.

21 There was an issue about the appellant giving reports to his students before they had been reviewed by Ms Carey. The appellant said he was unaware of the instruction not to do so and completed a written account of the issue (Exhibit R1 322).

22 The appellant was stressed and ill before he ceased working at the College. He was taken to hospital by ambulance on 23 August 2004 and had one week off because of illness.

23 When he returned, Mr Pilkington advised him that he had received a directive that the appellant was not to be left alone in a classroom and was to have an assistant teacher. On the same day the appellant read complaints made about him by a colleague, Mr Saul Molina. The appellant wanted to discuss these complaints with Mr Pilkington however Mr Pilkington directed him to leave the school and to report to Ms Jack. He later visited a general practitioner who said he was unfit for work due to work related stress. In March 2005 he saw a consultant psychiatrist.

24 Although the appellant was on a PIP when at Pinjarra Senior High School in 2005, he was told by the principal that his performance was excellent.

25 In 2005 the appellant was interviewed by Mr Burgess. He did not trust Mr Burgess and believed he was part of the strategy to terminate his employment.

26 When cross-examined the appellant said an assistant who sat in on his classes at the College was used to gather evidence against him.

27 The appellant was asked about a letter written on his behalf by the State School Teachers' Union about his employment at Mount Magnet District High School. The appellant said he had not seen the letter before and disputed that his performance was unsatisfactory at Mount Magnet.

28 The appellant agreed he was given an induction when he commenced at the College and was aware of how it was organised and run. He also acknowledged that in March 2004 a parent complained about him.

29 The appellant also confirmed discussions with Mr Pilkington about his health at the College.

30 The appellant was asked to refer to any documents which supported his view that he was being harassed and treated unfairly. He gave an example of a time when Ms Stewart said to him "monkey see, monkey do" about using a text book when teaching.

31 The appellant said he did not sign a lesson plan dated 3 August 2004 which appeared to contain his signature. He said that it may be a forgery (Exhibit R1 346).

(b) Mr Pilkington

32 Mr Pilkington's experience as a teacher and principal was summarised.

33 From his observations and feedback from line managers, Mr Pilkington became aware the appellant was having difficulties from early on in term 1, 2004. He also received informal complaints from parents. Ms Stewart then had weekly meetings with the appellant who was advised to view the classes of other teachers.

34 During term 1, 2004 the appellant was subject to the usual performance management processes but by the end of the term his performance had not improved. Mr Pilkington was a mentor to the appellant in that term and they had a good relationship.

35 When the appellant's performance did not improve, Mr Pilkington formally notified him on 20 May 2004 that his performance was substandard (Exhibit R1 451). The appellant's response did not acknowledge the concerns raised by Mr Pilkington. Accordingly, Ms Stewart was instructed to agree with the appellant upon a PIP.

36 There was a meeting on 29 July 2004 to review the appellant's progress. The appellant was advised that his performance remained unsatisfactory. On 2 August 2004 the appellant was advised in writing that he was to be subject to a further review period from 30 July 2004 to 27 August 2004.

37 Mr Pilkington referred to his interaction with the appellant on 31 August 2004 and the directive to arrange for the appellant to have a support person in his classes. Mr Pilkington said that on the same day, after the appellant had read Mr Molina's complaint, he entered his office and abused him using foul language. Ms Jack was present at the school at the time and telephoned the District Director about what had occurred. In turn the District Director instructed Mr Pilkington to stand the appellant down with immediate effect. Due to this the appellant was unable to complete the four remaining days of the second PIP. Soon after this Mr Pilkington wrote to the appellant and advised him that he had not demonstrated satisfactory performance and he would recommend to the Director General that his performance be investigated (Exhibit R1 241).

38 Mr Pilkington reviewed one of the appellant's lessons on 11 August 2004 after Mrs Pilkington was removed from the PIP. That occurred because the appellant had asked that both Ms Stewart and Mrs Pilkington be removed from assessing the appellant. After consulting the District Director, Mrs Pilkington was removed from the process for the purpose of transparency, even though Mr Pilkington believed Mrs Pilkington was a highly experienced mathematics teacher who was capable of giving feedback to the appellant. The appellant was advised of Mrs Pilkington's removal from the process by letter dated 18 August 2004 (Exhibit R1 296).

39 Mr Pilkington did not solicit complaints about the appellant from parents. Complaints commenced about the appellant in late term 1, 2004 and they became more serious in term 2, 2004. There was a group of girls who fell out with the appellant and accordingly there was a cluster of complaints made about him at the same time.

40 When cross-examined Mr Pilkington said that in term 1, 2004, the appellant's line managers raised issues with him about the appellant's literacy level. This was discussed with the appellant in a friendly and supportive way. He refused to transfer the appellant to another sub-school because of difficulties in doing so.

41 Mr Pilkington acknowledged the appellant was intelligent and had a good grasp of mathematical concepts and that he had stated to the appellant that he would be a good teacher at University level or TAFE. He accepted that he told the appellant that at best he had the ability of a graduate teacher.

42 Mr Pilkington believed that 20 days was a sufficient period for a teacher to make attempts to improve their performance.

43 Mr Pilkington said that after a parent made a verbal complaint about a teacher he would ask them to put the complaint in writing if they wished to pursue it further.

(c) Mrs Pilkington

44 Mrs Pilkington's teaching experience was summarised.

45 Mrs Pilkington said that Ms Stewart raised concerns about the appellant in the first few weeks of term 1, 2004. The appellant was given a substantial amount of support by Ms Stewart and he was able to access sample lesson plans.

46 When assessment of the appellant's performance became more formal, Mrs Pilkington reviewed lessons given by him. She also reviewed lesson plans prior to viewing the lessons, to give the appellant feedback.

47 Although the appellant was required to submit lesson plans to her prior to the day of lessons which were reviewed, he did not do so. This made it difficult to provide feedback. Also, on most occasions the appellant did not complete the necessary self evaluations of the lessons which were given.

48 Mrs Pilkington said that when the appellant's union representative, Ms Mary Franklin, attended at the College, the appellant was able to meet with her during a double period comprising 106 minutes.

49 Mrs Pilkington did not solicit complaints from parents about the appellant. Nor did Mrs Pilkington undermine the appellant when disciplining students. When there was a disagreement between staff and students, she was to act as an arbitrator in the process and required to investigate both sides of the story. After verbal complaints were made to Mrs Pilkington about the appellant she told parents that if they wanted to take the matter any further they needed to write to Mr Pilkington.

50 The appellant was not prepared to achieve the aims of the PIP and he was focused on putting obstacles in the way of improving his performance.

51 Mrs Pilkington was concerned about the appellant's level of English literacy. She discussed this with Ms Stewart.

52 Mrs Pilkington said the appellant had poor classroom management because he was poorly prepared.

(d) Ms Stewart

53 Ms Stewart's qualifications and teaching experience were described. She has been head of mathematics at the College since 1998.

54 At the commencement of 2004 she discussed the required curriculum framework with the appellant. Weekly review meetings were arranged so that any concerns the appellant may have had could be discussed. As the appellant was a new teacher Ms Stewart also assisted him in constructing programmes and developing weekly and daily lesson plans. The appellant also had access to examples of lesson plans, resource files, library resources and text books.

55 On 20 February 2004 Ms Stewart began to document her discussions with the appellant. This is because she felt he did not understand the feedback and advice he was being given. In March 2004 Ms Stewart discussed with the appellant whether he had any difficulties in reading and understanding information given to him. He said he did not.

56 After concerns arose about the appellant's teaching performance, Ms Stewart arranged to view some of his lessons to assist him. She made summaries of these reviews (Exhibit R1 499-503). The appellant was given feedback but the situation did not improve. Accordingly an action plan was developed in April 2004 as a strategy to assist the appellant (Exhibit R1 489). The plan was not successful however and concerns about the appellant remained.

57 Ms Stewart played a key role in the development of the PIP, which was finalised on 10 June 2004. During the PIP, feedback to the appellant was given by Ms Deb Stone who was trained to assist teachers who experienced classroom management problems (Exhibit R1 427).

58 Ms Stewart said she did not discourage the appellant from using text books but made him aware of other resources which he could use. Her view was that the curriculum could not be taught from a single text book. Other teachers were not required to provide her with lesson plans because it was not necessary for them to do so. The appellant did not take the opportunity which he was given to review other mathematics classes.

59 Ms Stewart said she did not tell the appellant not to teach the programme which he and other teachers had developed for term 2, 2004.

60 Ms Stewart said that although she was aware of the appellant's salary she did not raise that issue with him. She did not advise him to work part-time.

61 Ms Stewart observed seven of the appellant's lessons and took notes about those lessons. The observations were typed out to give to the appellant. She gave the appellant 7-10 days' notice of the lessons to be reviewed by her and other teachers. The appellant was required to submit lesson plans two days before each lesson but he did not do so. Although the appellant had a good knowledge of mathematics his problem was teaching and imparting the knowledge to students.

62 During one class which she observed in term 1, 2004, Ms Stewart starting teaching the students because the lesson had faltered and they did not have any work to do for approximately 20 minutes. Ms Stewart did not undermine the appellant and she wanted him to succeed.

63 Ms Stewart said the appellant failed as a teacher because he could not make the connection between the content he had to teach and where the students were at. The students therefore became disengaged. The PIP sought to address these issues.

(e) Ms Jack

64 Ms Jack's experience was described. In August 2004 she was asked by her District Director to provide an independent assessment of the appellant's classroom management and his teaching and learning strategies. Accordingly, she reviewed two of the appellant's lessons (Exhibit R1 286-289). Ms Jack said the appellant had difficulties engaging students in learning and as a result had classroom management difficulties. When discussing her observations of the lessons with the appellant he became agitated.

65 Ms Jack gave the appellant written feedback after observing one of the lessons. She advised the appellant some students were not listening to him. At the end of one of the lessons, two students spoke to her and requested to be moved to another class.

(f) Ms McLarty

66 Ms McLarty's teaching experience was described. Ms McLarty said the appellant was given particular assistance when at Pinjarra Senior High School because of his prior performance issues. He was subject to a PIP when at Pinjarra Senior High School. Ms McLarty's opinion was that his performance was not satisfactory.

(g) Mr Burgess

67 Mr Burgess' qualifications and experience as a public sector investigator were described.

68 At the end of 2004, Mr Burgess was contracted by the respondent's complaints management unit to investigate the appellant's performance. There was a delay in the investigation because the appellant was ill. Accordingly Mr Burgess was instructed not to interview the appellant until after he commenced employment at Pinjarra Senior High School on 26 April 2005. On 18 May 2005 Mr Burgess interviewed the appellant. A copy of a statement based on the interview was provided on the same date. That was reviewed by the appellant and returned on or about 13 June 2005.

69 During his investigation Mr Burgess found no evidence of collusion or bias against the appellant by teachers at the College.

70 When cross-examined Mr Burgess said he did not provide the appellant with background documentation given to him by the respondent nor copies of witness statements from people he had interviewed. This was because these were confidential. The report completed by Mr Burgess was exhibit R1 45-158. It concluded that the allegation that the appellant's performance was substandard was proven.

Reasons - Submissions

71 The Commissioner summarised the written submissions made by the appellant and the respondent at some length. It is unnecessary to set this out.

Reasons - The Commissioner's Findings and Conclusions

72 The Commissioner commenced this part of her reasons by making findings and observations about credibility. At [106] she said that she had concerns about the evidence given by the appellant. The Commissioner said he was not convincing in his claims about unfair criticism and support by his line managers. The Commissioner said the weight of evidence on the issue was against the appellant given the substantial amount of documentation given to him detailing feedback and strategies designed to assist him to improve his performance. The Commissioner also said that the appellant's claim about being poorly treated was not corroborated and there was no written or oral evidence supporting the claim that his line managers were acting in concert to conspire against him to ensure that he did not succeed. A finding was made that the appellant was deliberately not forthcoming when giving evidence in chief about his interactions with Mr Pilkington on 31 August 2004 (Exhibit R1 241). The Commissioner also said that the appellant's claim that his teaching performance while at Pinjarra Senior High School was excellent was not supported by the documents relevant to that period. The Commissioner set out the pages of the relevant documents in exhibit R1.

73 The appellant's claim that he did not sign the lesson plan dated 3 August 2004 was doubted as the signature was similar to his signature on other documents. The veracity of the evidence given by the appellant was therefore doubted.

74 In contrast the Commissioner said at [107] that all of the evidence by the respondent's witnesses was given honestly and to the best of their recollection. Their evidence was consistent with the evidence given by other witnesses for the respondent and supported by documentary evidence. The Commissioner said that she had no hesitation accepting their evidence. Also, where there was inconsistency in the evidence given by the appellant and the respondent's witnesses, the latter was preferred.

75 The Commissioner then set out her understanding of the legislation and case law relevant to deciding the application. At [113] the Commissioner referred to the appellant being employed for less than two years when he commenced at the College. She said that it therefore appeared that he was on probation when terminated. Clause 12 of the *Government School Teachers' and School Administrators' Certified Agreement 2004* was cited. The Commissioner then set out the law with respect to unfair dismissals when an employee was on probation.

76 The Commissioner then set out issues relevant to the termination of employment of public sector employees where statutory requirements applied. At [117] the Commissioner set out the "test for determining whether a dismissal is unfair or not". Leading authorities of *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1985) 65 WAIG 385, *Shire of Esperance v Mouritz* (1991) 71 WAIG 891 and *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410, were cited. The Commissioner said that the appellant had the onus of establishing that his dismissal was, in all the circumstances, unfair. What needed to be determined by the Commission was whether the right of the employer to terminate the employment was exercised so harshly or oppressively or unfairly as to amount to an abuse of the right. The Commissioner said the termination of employment in a procedurally unfair way may constitute an unfair dismissal.

77 At [118] the Commissioner said:

> "118 I have considered the evidence given in these proceedings and reviewed the substantial amount of documentation tendered at the hearing. On the evidence before me I find it was appropriate for the [appellant's] line managers at the College to determine that the [appellant's] performance was substandard in the areas of teaching skills, planning and preparation, professional characteristics, assessing and reporting on student outcomes and classroom management skills and that as at 31 August 2004 it was open to Mr Pilkington to refer the issue of the [appellant's] substandard performance to the respondent for further consideration. I am also of the view that after the issue of the [appellant's] substandard performance was referred to the respondent by Mr Pilkington, the respondent dealt with the issues surrounding the [appellant's] substandard performance in line with the requirements under the [*Public Sector Management Act 1994* (WA)] and the respondent reviewed relevant documentation about the [appellant's] performance including the report completed by Mr Burgess and I find that the respondent took into account relevant considerations prior to determining that it was appropriate to terminate the [appellant] due to his substandard performance."

78 The Commissioner then made findings about the evidence given about the appellant's teaching performance at the College in 2004. The Commissioner found that Ms Stewart gave the appellant support in term 1, 2004. The Commissioner also found that early in that term it became apparent to Ms Stewart, Mrs Pilkington and Ms Carey that the appellant was experiencing difficulties with his teaching and ensuring that his students were properly managed. The Commissioner found the appellant was given a substantial amount of support and useful feedback. The Commissioner also found that there was a lack of response by the appellant to the instructions and feedback he received. Accordingly, Ms Stewart recorded the expectations required of the appellant and gave him copies of this documentation. Ms Carey and Mrs Pilkington also gave the appellant assistance with lesson planning and feedback to improve his performance. The Commissioner cited exhibit R1 499-503, 490-498, 489, 467 and 466 in support of this. The Commissioner found Mr Pilkington also assisted the appellant in term 1, 2004 with both personal and professional issues. The finding was made that the appellant's line managers gave him a substantial amount of assistance to improve his performance.

79 The Commissioner found that by May 2004 it was apparent that the appellant had not made the required improvements in his teaching. As a result Mr Pilkington decided that the appellant should be subject to a PIP commencing on 14 June 2004 and continuing until 27 August 2004.

80 The Commissioner found that the respondent complied with the applicable policy requirements when handling both of the appellant's PIP periods. At [126] the Commissioner found that "the assistance available to the [appellant] during his PIP formed part of a co-ordinated and systematic process which was designed, in collaboration with the [appellant], to assist the [appellant] to improve his performance in the required areas. I find that Ms Pilkington, Ms Stewart and Ms Jack provided appropriate and relevant feedback to the [appellant] during his PIP so that he could improve his performance within the required timeframes and that Ms Stone, who was specifically trained to assist teachers with classroom management difficulties, also gave feedback to the [appellant]".

81 The Commissioner cited a number of documents in exhibit R1 to support this finding. The Commissioner found that the appellant failed to avail himself of assistance which was provided and that in most instances he did provide lesson plans, as required, to Mrs Pilkington and Ms Stewart.

82 The Commissioner said that the appellant was given sufficient time to demonstrate improvement in his performance. The Commissioner said that the reduced timeframe of PIP 2 did not disadvantage the appellant because by 31 August 2004 he had already been given the benefit of 36 days of monitoring, support and feedback.

83 By reference to the letter from Mr Pilkington to the appellant dated 31 August 2004, the Commissioner found that the appellant had made little if any progress in the required areas during the PIP timeframe. The Commissioner said she accepted the evidence of Mr Pilkington about the appellant's return to school on 31 August 2004. The Commissioner found that the appellant's performance would not have improved to the required standard even if he had obtained the benefit of the four remaining days of PIP 2. This was because there was no evidence that he had demonstrated any improvements in his performance up to 31 August 2004.

84 The Commissioner found that the appellant was afforded procedural fairness during the PIP process. The appellant's claim that Mrs Pilkington made it difficult for the appellant to meet with his union representative was rejected.

85 At [129] the Commissioner also rejected the appellant's claim that his line managers at the College conspired against him to ensure that he was unable to perform successfully. The Commissioner also referred to the removal of Mrs Pilkington from the PIP processes and her replacement by Ms Jack. The Commissioner found Ms Jack to be suitably qualified and independent to give feedback. The Commissioner noted that after observing two lessons, Ms Jack was of the view that the appellant's performance was unsatisfactory (Exhibit R1 286-289). The appellant's claim that he was not supported when disciplining students was also rejected. The Commissioner noted there was no evidence to verify those claims. The Commissioner also did not consider the appellant's health to be a major issue which negatively impacted upon his performance, as there was no evidence that this was a serious issue until an altercation with a parent on 23 August 2004. Although the appellant's health deteriorated towards the end of PIP 2, at that stage he had been given sufficient time to address his performance issues.

86 A claim by the appellant that the College should have arranged for him to attend a professional development course to improve his level of English literacy was rejected. The Commissioner accepted Ms Stewart's evidence that the appellant's communication problems mainly related to the way in which he presented his lessons and not his accent. The Commissioner also said, at [131], after reviewing documentation generated by the appellant during his time at the College, in response to issues raised with him, that he had a reasonable grasp of English. The Commissioner cited 15 documents in support of this finding.

87 The Commissioner found that Mr Pilkington's conclusion that the appellant was experiencing performance difficulties was supported by a number of verbal and written complaints. The Commissioner cited the exhibits which supported this conclusion. The Commissioner accepted the evidence of Mr Pilkington about the complaints he received and that none of the appellant's line managers solicited complaints from parents.

88 The Commissioner referred to a submission by the appellant that the failure to call Ms Carey should lead the Commission to infer that her evidence would have been unhelpful to the respondent or in the alternative the appellant's evidence about his interactions with Ms Carey should be accepted. The Commissioner said that as she had concerns about the credibility of the appellant's evidence she did not accept his evidence about his interactions with Ms Carey. The Commissioner also said that she took into account that the weight of the evidence was against the appellant in relation to his views about how he was treated by his line managers at the College.

89 At [135] the Commissioner said:

> "135 I accept Mr Pilkington's evidence that the [appellant's] performance had not improved to a satisfactory standard as at 31 August 2004 and I therefore find that it was open to Mr Pilkington to determine that the [appellant's] performance was substandard in the areas of teaching skills, planning and preparation, professional characteristics, assessing and reporting on student outcomes and classroom management skills and that the [appellant's] substandard performance should be referred to the respondent for consideration."

90 The Commissioner also rejected the appellant's claim that his performance at Pinjarra Senior High School was satisfactory. This finding was supported by documents which the Commissioner cited.

91 The Commissioner then referred to clause 12.1 of the Certified Agreement about probationary employment. The Commissioner said that when applying the authorities relevant to probationary employment she found that the appellant was given sufficient opportunity and support to demonstrate that he was able to fulfil the teaching and professional standards required of him at the College. Accordingly the respondent was entitled not to continue to employ the appellant as at 21 September 2005. Importantly, the Commissioner found that even if the appellant was not on probation at the time he was terminated, that his performance was substandard and therefore it was open to the respondent to terminate his employment.

92 The Commissioner found that the process undertaken by the respondent to review and effect the appellant's termination "in the main conformed with the required statutory elements and that some minor omissions in the process were not such as to invalidate the whole process". The Commissioner found that as required under s79(5) of the *Public Sector Management Act 1984* (WA), an investigation was undertaken by Mr Burgess into whether the appellant's performance was substandard. The Commissioner said that although Mr Burgess did not provide the appellant with background documents given to him by the respondent, this was not raised as an issue by the appellant. In any event the assertion by the respondent's representatives that the documents were sent to the appellant in December 2004, prior to being interviewed by Mr Burgess, was not contested. The Commissioner concluded that Mr Burgess' investigation was completed in an independent and unbiased fashion. The Commissioner said at [138] that she had "some difficulty that the witness statements of the persons whom Mr Burgess interviewed were not provided to the [appellant], however as all of the persons Mr Burgess interviewed gave evidence in these proceedings I find that this issue has since been overtaken".

93 The Commissioner found that after the respondent received the report from Mr Burgess, the findings he made and the documentation relied upon were reviewed. The respondent then determined that the appellant should be terminated. The appellant was given the opportunity to respond to this decision and the issue of penalty. The appellant did so on 9 August 2005 (Exhibit R1 33). The Commissioner found that after receiving the correspondence and considering the issues raised by the appellant it remained open for the respondent to determine that in all of the circumstances the appellant should be terminated, as his performance at the College had been substandard in two critical areas and the standard of the appellant's performance remained questionable in three other areas, being planning and preparation, professional characteristics and assessing and reporting of student outcomes. The Commissioner said these attributes were fundamental to being a successful teacher. The Commissioner found that in any event it was open for the respondent to terminate the appellant for gross misconduct for the way in which he behaved to Mr Pilkington on 31 August 2004.

94 The Commissioner concluded at [140]:

> "140 In the circumstances and when applying the relevant authorities I find that the applicant's claim that he has been unfairly terminated is without merit and should be dismissed."

The Grounds of Complaint

95 As mentioned earlier the appellant made a number of complaints about the hearing at first instance and the decision made. I have reviewed the appellant's amended grounds of appeal, the submissions he made at the hearing and the submissions made in the documents filed subsequent to the hearing to discern the categories of complaints made by the appellant. I will consider each of these in turn.

There are Additional Documents to Prove the Documents Before the Commissioner were Forgeries

96 As set out earlier one of the interlocutory applications to the Full Bench was for it to receive documents additional to those which were in evidence before the Commissioner. That interlocutory application was rejected. The appellant did not raise any reasons why the Full Bench should review that decision. Accordingly this ground of complaint cannot be established.

97 At the hearing before the Commissioner, there was only one document which was alleged to be forged in that the appellant said he did not sign a lesson plan which had the appearance of bearing his signature. As I have said earlier this claim was not accepted by the Commissioner. The Commissioner gave her reasons for reaching this finding which in my opinion were open to her.

98 The appellant also complained that the report of Mr Burgess contained a forged version of Mr Burgess's interview with him. This is not an issue which was raised at the hearing. It was not the subject of any evidence by the appellant or Mr Burgess. There was accordingly no evidence before the Commissioner to support the proposition. The Commissioner did not therefore have to deal with it. Consequently there is no ground for complaint.

99 In my opinion the grounds of complaint about the decision of the Commissioner which I have just described cannot be sustained.

The Commissioner was Friends with Mrs Pilkington

100 The appellant asserted the Commissioner should not have heard and decided his application because she was friends with Mrs Pilkington.

101 The Commissioner raised her relationship with Mrs Pilkington at the commencement of the hearing. The Commissioner said:

> "At the outset, I do need to raise an issue with the parties. I have reviewed the list of witnesses and I wish to inform the parties that over 20 years ago I did work with Ms Pilkington at Wanneroo Senior High School. Now, I was not working in the same faculty." (T2).

102 The Commissioner then asked counsel for the appellant and the representative for the respondent whether that presented "any issues for the parties". The respondent's representative said that it was not an issue. The appellant's counsel said that he wished to take instructions. The Commissioner then adjourned so that this could occur. Upon resumption the appellant's counsel said he had taken the appellant's "instructions and we're happy to proceed" (T2).

103 There was nothing which emerged during the rest of the hearing nor in the reasons of the Commissioner which was relevant to this point. The appellant's counsel did not make any complaint about the Commissioner hearing the application.

104 In my opinion there is no substance in this complaint by the appellant. Firstly it proceeds upon a false premise being that the Commissioner and Mrs Pilkington were friends. The disclosure, quite properly made by the Commissioner, was simply that she had worked at the same school as Mrs Pilkington some 20 years ago. No friendship was described. The appellant suggested that if the Commissioner and Mrs Pilkington had worked together they could or would have remained friends. In my opinion this suggestion is entirely speculative and there is nothing which supports it.

105 Secondly, as set out in my reasons for decision in the interlocutory applications, the appellant is bound by the way in which his case was conducted at first instance. As I have said, no complaint was made about the Commissioner hearing the application. Indeed the appellant's counsel, having taken instructions from the appellant, advised the Commissioner that they were "happy to proceed". Nothing was said at the time by the appellant which indicated that his counsel was not properly informing the Commissioner of his instructions.

106 In my opinion there is no substance in this complaint.

There was a Deal Between the Appellant's Counsel and the Respondent to Ensure that the Application did not Succeed

107 This ground for complaint can be summarily rejected. There is no evidence or other information before the Full Bench which would suggest that this was correct. There is no indication that the appellant's counsel did not adequately represent him. He made an opening statement, led the appellant through an extensive examination in chief, cross-examined the witnesses for the respondent and made substantial written closing submissions. This included the filing of a document entitled "Applicant's Closing Submissions" on 5 May 2006 containing some 118 paragraphs together with a document described as "Applicant's Final Submissions" filed on 15 May 2006 which replied to the respondent's written closing submissions. In addition, in cross-examining Ms Jack, the appellant's counsel asked her not to "keep looking" at the respondent's representative because it created the wrong impression. Ms Jack replied that she would then look at the Commissioner (T140-141). This was hardly the conduct of counsel who had a deal with the respondent to ensure that the application did not succeed.

108 In my opinion there is no basis upon which this ground of complaint can be sustained.

The Number and Nature of Documents Before the Commissioner

109 I have earlier set out that the respondent tendered, and the Commissioner received as Exhibit R1, a file with a large number of documents. This was reproduced by the respondent for the benefit of the Full Bench. The file contains 570 pages. The appellant complained that the Commissioner was swayed in making her decision by the volume of documents which was before her. In my opinion there is nothing to support this contention. At first instance the appellant's counsel did not complain about the number or nature of documents in Exhibit R1. In addition a review of the Commissioner's reasons, as set out above, reflects that it was the nature and not the number of the documents which the Commissioner relied upon in supporting her reasons and conclusion.

110 The appellant asserted the Commissioner wrongly described the file as containing 600 documents when it only contained 570 pages of documents. Even if the Commissioner had done this, it would not have been any basis for complaint about her reasons for decision as a whole. In any event, the Commissioner did not say this in her reasons for decision. At [4] she simply said that the respondent had "prepared a file of relevant documentation (Exhibit R1)". At the hearing, the appellant's counsel referred to the documents constituting "about 600 pages" (T6). There was then some discussion about the documents and the Commissioner commented that there were 570 pages (T7). Accordingly at that time the Commissioner was under no misapprehension as to the number of pages of documents tendered by the respondent and there is nothing in her reasons which suggests that she later misunderstood this.

111 The appellant also complained that a number of the documents were repeated in the file so that it was made to look bigger. Documents were referred to which the appellant submitted supported this proposition. Upon examination, as discussed with the appellant during the hearing of the appeal, some of the documents referred to were not in fact repeated. It is correct however that some were repeated. For example R1 398-400 was the typed narrative of an appraisal made by Ms Stewart of a lesson of the appellant on 28 June 2004. The same typed written notes were included as R1 403-405, although there are some signatures on this version of the document which did not appear upon the first. Similarly R1 401 was a page of handwritten notes of Ms Stewart about a conversation with the appellant. This document was repeated in the document between R1 408 and R1 409. (The document does not appear to have its own number). Again there was some difference in the signatures upon the copies of the documents but otherwise they were the same. Other examples were given by the appellant which do not need to be separately considered. There should not have been repeats of documents in the file. The appellant's complaint is again however based upon the false premise that the Commissioner in part based her decision upon the volume of documents in the file. As I have said, there is nothing to suggest that this was so.

112 The appellant also complained that some of the documents were unclear. Again this assertion is correct. It only applies however to very few of the documents. An example is R1 262. This is a handwritten letter which cannot, in the form in which it has been reproduced for the benefit of the Full Bench, be properly read. If that was the form in which the document was in the file before the Commissioner, then that should not have occurred. The Commissioner did not however place any reliance upon this document in her reasons for decision. Nor, as I have earlier said, did the Commissioner base any part of her reasons upon the volume of the documents. Again this complaint does not provide any reason for overturning the decision of the Commissioner.

113 The appellant also complained that the file of documents included irrelevant documents. Again this complaint is correct but it only applies to very few documents. For example R1 189 was an email between Mr Newman of the Workplace Relations section of the Department of Education and Ms Jack about the return of Education Department property by the appellant and about the house in which the appellant had stayed in Geraldton. Document R1 190 was an email from Ms Jack to Mr Newman about the painting of the house. Document R1 188 was a letter from Mr Pilkington to the appellant dated 17 December 2004 about the return of two chairs. Other examples were given by the appellant. There are a number of points to be made about this complaint. Firstly, there were only a few of the 570 pages of documents which were not relevant. Secondly, I have earlier set out the approach taken to the file of documents by the appellant's counsel at the hearing. No complaint was made about the contents of the file. As I have earlier said, the appellant is bound by the case he presented at trial. Thirdly, there is no suggestion that the Commissioner based her reasons for decision upon these documents. None of them were mentioned in her reasons.

114 The appellant also argued that if the Commissioner had properly read the file of documents she would have noted in her reasons that some of the documents were irrelevant. In my opinion the Commissioner was not obliged to say this in her reasons. In part this was because no complaint about the relevance of the documents had been made upon the appellant's behalf. Also it does not logically follow that because the Commissioner did not mention irrelevant documents in her reasons for decision, she did not consider the file as a whole. The complaint is not substantiated.

115 To the extent that this submission relies upon the suggestion that the Commissioner was influenced by the volume of documents tendered, I have already rejected that point as set out above.

116 The appellant also had a particular complaint about document R1 221. This was a tax invoice from Dr Crawford of the Joondalup Drive Medical Centre to the College for a consultation with the appellant on 30 August 2004. The appellant submitted the document was not relevant and that it should not have been sent to the College without the appellant's consent (T22). Again, I do not think the presence of this document in the file of documents before the Commissioner in any way undermines her decision. The contents of the document are fairly innocuous and it is clear that the Commissioner did not rely upon the document to the detriment of the appellant.

117 In my opinion none of the complaints about documents which I have described can be sustained.

The Witnesses of the Respondent were not Present in Court when the Appellant gave his Evidence

118 The appellant submitted that there was unfairness because the respondent's witnesses remained out of court when he gave his evidence. Although I have found the appellant's submissions on this point a little difficult to comprehend, I think the complaint was that it gave the opportunity to the respondent's representative to make a note of all of the appellant's evidence and then discuss this with the respondent's witnesses before they gave evidence (T8-9). I do not think there is any substance in this point. The respondent's witnesses remaining out of court whilst the appellant gave evidence is an ordinary practice which generally applies during hearings. There is nothing to suggest that the appellant was unfairly disadvantaged by this. Indeed if the witnesses were present in court it would have given them a greater opportunity to listen to what the appellant had said and then tailor their evidence accordingly.

The Commissioner Prevented the Appellant from giving Evidence or Objecting to the Evidence of the Respondent's Witnesses

119 I have reviewed the transcript of the hearing when the appellant gave evidence. Overall there is no basis upon which to suggest that the Commissioner prevented the appellant from giving the evidence which he wanted to. There was certainly no complaint to that effect by the appellant's counsel. At one point the Commissioner said to the appellant's counsel that the appellant did not need to go into great detail about the incidents he was describing and so requested that counsel "might be able to move it along a bit" (T37). The Commissioner then said that she was not trying to limit the number of examples which the appellant wished to go through but she did not need to know "all of the details of who said to whom in relation to every incident" (T37). Counsel then replied that a lot of the detail was recorded in the letters that the appellant wrote to his line managers and requested the Commissioner read those documents when appropriate. Counsel then said he only had a few more questions and did not need to go through other incidents in as much detail. This exchange occurred during the appellant giving lengthy details about his interaction with three students at the College and the interaction of the students with other members of the staff. I cannot see that on any other occasion the Commissioner inhibited the appellant from giving evidence.

120 Mrs Pilkington, when cross-examined, mentioned discussions she had with Ms Stewart about the appellant's understanding of English (T112-113). She referred to a discussion with the appellant about this when he showed her what she described as a "translator" in which "you would put in the word in English and you'd get the corresponding Egyptian or vice versa". The appellant then interjected that he "never showed that …". The Commissioner interrupted the appellant and said that if he had an issue he should raise it through his counsel and that he should not "shout or become involved in the proceedings when someone else is giving evidence". The appellant said he was sorry. The appellant's counsel then continued with his cross-examination. The issue of the translator was not again raised.

121 In my opinion the interjection by the Commissioner was quite appropriate and this appeared to be acknowledged by the appellant in saying that he was sorry for what had occurred. In any event the issue with the translator was unimportant in the context of the hearing as a whole and did not form a reason for the Commissioner dismissing the application.

122 There was no other occasion when a similar incident occurred. In my opinion this complaint cannot be sustained. The Commissioner did not improperly prevent the appellant from giving evidence or objecting to the evidence given by the respondent's witnesses.

An "Important Conversation" Between the Commissioner and "the Department of Education" was Removed from the Transcript

123 This submission was made in the appellant's amended grounds of appeal dated 7 August 2009. No detail was given about the "important conversation". There is no evidence to suggest that this has occurred. The issue was not raised as a reason for the Full Bench to view the video record of proceedings at first instance during the hearing of the interlocutory applications. (See my reasons in rejecting the interlocutory applications at [124]-[133]). In my opinion this complaint cannot be sustained.

The Commissioner Assisted Mr Pilkington in Answering Questions

124 I have reviewed the transcript of when Mr Pilkington gave evidence. I cannot see any occasion on which the Commissioner inappropriately assisted Mr Pilkington in giving his evidence. On a number of occasions the Commissioner asked questions to obtain clarification or elaboration of what Mr Pilkington was saying. Examples are at T76, 78, 81, 82 and 84. There was nothing untoward about this however. It is an ordinary function of a Commissioner hearing an application to ensure that the evidence is sufficiently clear and detailed for them to be able to properly understand it. I also note that at T79 the Commissioner stopped the respondent's representative from inappropriately asking leading questions of Mr Pilkington. This does not suggest that the Commissioner was seeking to improperly assist Mr Pilkington in the giving of his evidence. I also note that in the appellant's closing written submissions at [52] it was said that Mr Pilkington "appeared as a credible witness".

125 In my opinion there is no substance in this complaint.

The Commissioner did not Stop the "Body Language" Between the Respondent's Representative and Ms Jack

126 I have earlier referred to this issue to some extent. It was more fully described in my reasons in dismissing the interlocutory applications at [125]-[129]. Having again reviewed the transcript of this episode, I cannot see that the Commissioner failed to do anything which was required of her to prevent any untoward "body language" or coaching. Certainly, the appellant's counsel did not ask the Commissioner to do anything in this respect. The complaint cannot be upheld.

The Appellant was Prejudiced by Ms Carey not Giving Evidence

127 I have earlier set out the reasons of the Commissioner about this issue. In my opinion Ms Carey not giving evidence did not work an unfair disadvantage upon the appellant. Whilst he did not have the opportunity for counsel to cross-examine Ms Carey, neither did the respondent get the benefit of any evidence that Ms Cary could have given in favour of the termination of the appellant's employment. The primary participants in the review of the appellant's teaching performance and the PIP process were Mr Pilkington, Ms Stewart, Mrs Pilkington and Ms Jack. Each of these witnesses gave evidence and were available for cross-examination. In my opinion this complaint has not been established.

The Education Department were Given Four Months to Provide their Closing Written Submissions

128 This assertion is factually incorrect. The second and final day of the hearing was on 21 April 2006. The respondent filed its closing written submissions on 5 May 2006 and a document entitled "Response to Applicant's Closing Submission" on 12 May 2006. As I have set out earlier the appellant's closing written submissions were filed on 5 May 2006 and its final submissions on 15 May 2006. Accordingly the submissions of both parties were provided within the same period of time and there was no unfairness in this to the appellant. This complaint must be rejected.

Discrimination

129 In the appellant's amended grounds of appeal filed on 7 August 2009, point 1(e) was "Discrimination". The point was not elaborated upon and cannot be sustained.

There was a Conspiracy by the Staff at the College to Terminate the Appellant's Employment

130 This issue was raised at the hearing by the appellant. The Commissioner dealt with the issue and rejected it. She gave her reasons for doing so. The Commissioner accepted the evidence of the witnesses of the respondent. She decided that each gave their evidence honestly and to the best of their recollection. The Commissioner also commented that their evidence was supported by documents. In my opinion the Commissioner cannot be shown to have erred in deciding that there was no conspiracy. There was no evidence, either oral or documentary, which compelled the Commissioner to the contrary conclusion.

The State School Teachers' Union of Western Australia Worked Against the Appellant

131 This was mentioned in the submissions filed by the appellant on 20 August 2009. The appellant alleged that the union representative had not properly supported him and that a union officer had submitted forged documents against the appellant. With respect to both, the appellant complained that there were additional documents which he had, which the Full Bench had refused to consider. To the extent to which this complaint relates to the dismissal of the interlocutory application about considering additional documents, no more needs to be said about that. The issue has already been determined. Quite apart from that, it was no part of the appellant's case at the hearing that the union had worked against him. Indeed part of his case was that Mrs Pilkington had wrongly prevented the union from assisting him by not allowing sufficient time for him to meet with a union representative.

132 There was no evidence given at the hearing which would support the contention that the union had not properly assisted the appellant or had worked against him.

133 This complaint has no substance.

Complaint About Exhibit R1 310

134 This document was a typed review of a lesson of the appellant made by Mr Pilkington on 11 August 2004. The appellant said that to the extent that Mr Pilkington was critical of his lesson, it should have been borne in mind that the lesson presented was one taken from that of his Head of Department. The appellant did not however give evidence to this effect at the hearing. In his cross-examination, Mr Pilkington was asked whether he was aware that the appellant was teaching the lesson from materials provided by Ms Stewart (T93). Mr Pilkington answered that he was not and the issue was not taken any further. This answer did not establish that the lesson was prepared from materials supplied by Ms Stewart. In re-examination Mr Pilkington said that irrespective of the source of the information for the lesson, the method of presentation was inappropriate for the level of students that the appellant had in front of him and was not part of a "sequenced plan" but was "disengaged, it was a one off lesson" (T100). It appears there was no examination or cross-examination of Ms Stewart about the issue.

135 There was therefore no evidence that the material upon which the lesson was based was obtained from Ms Stewart. Additionally, as explained by Mr Pilkington, the difficulty with the lesson was not so much the content but the way in which it was conducted. This is reflected in exhibit R1 310.

136 The appellant also complained that in exhibit R1 310 Mr Pilkington said that the level of the lesson was "primary school", whereas on another occasion he had said that the appellant ought to teach at TAFE or University level. In my opinion the second comment does not logically undermine the first. The level of the lesson could be, and according to Mr Pilkington was, "primary school" even though Mr Pilkington may have also thought the appellant had the capacity to teach at TAFE or University level.

137 In my opinion the complaints made by the appellant about exhibit R1 310 and Mr Pilkington's evidence are not established.

The Commissioner did not properly take into account the Documentary Evidence

138 This complaint was elaborated upon at length by the appellant during the hearing of the appeal. In essence, the submission was that if the Commissioner had properly considered the documents contained within Exhibit R1 then she would have come to a different conclusion. That is, inadequate weight was placed upon the documents within the file.

139 The decision made by the Commissioner involved the making of an evaluative judgment as to whether the dismissal of the appellant was or was not fair. It was therefore a discretionary decision. As such, the decision is accorded significant deference by the Full Bench and should only be set aside in limited circumstances.

140 The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 as follows:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be

> reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

141 As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19]-[21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a "decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result'". Instead "the decision-maker is allowed some latitude as to the choice of the decision to be made". At [21] their Honours said that because "a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process". Their Honours then quoted part of the passage of *House v King* which I have quoted above.

142 Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with "caution and restraint". His Honour said this is "because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view". (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535).

143 These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although "error in the proper weight to be given to particular matters may justify reversal on appeal, … disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge". This is because, in considering an appeal against a discretionary decision it is "well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion", and that when "no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight". (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]).

144 To support this ground of complaint, the appellant directed the attention of the Full Bench to a number of documents. It has been necessary to review these documents to consider this ground of complaint. Having done so, I can say in summary that I do not think that the contents of the documents, considered separately or cumulatively, have the effect that the Commissioner erred in making her findings and decision. It was open to the Commissioner to accept the oral evidence of the witnesses for the respondent for the reasons she explained. She was also entitled to rely upon the documents she cited. The Commissioner not citing the additional documents referred to by the appellant, nor referring to their contents in her reasons, does not in my opinion have the effect that the decision was in error.

145 To properly consider this ground of complaint it is necessary to consider the type of documents which the appellant referred to the Full Bench.

146 The appellant referred the Full Bench to the document on the page after R1 408. The document was some handwritten notes by Ms Stewart dated 26 June 2004. The document does not appear to have its own number. One of the comments made in the document was Ms Stewart saying that her belief was that the appellant's difficulties originated from his lack of understanding about the educational constructs behind the new curriculum. She then said that she suspected the appellant found it difficult to build these understandings via the process of professional reading. She said the complexity of written materials was caused by the fact that English was the second language of the appellant. The appellant argued, in effect, that this document contradicted Ms Stewart's claims that she did not think there was an issue with the appellant's language. I have referred above to the summary of Ms Stewart's evidence made by the Commissioner in which she said that she did not raise the appellant's accent or level of English with anyone at the College and issues were more to do with the manner in which the appellant presented his classes and not his accent. In my opinion the contents of the document did not necessarily undermine the evidence given by Ms Stewart. Even if it did, it was to a minor issue in the context of the application as a whole. The decision of the respondent to terminate the appellant's employment due to his teaching performance was not based upon his lack of grasp of English but to his teaching performance overall.

147 The appellant also referred the Full Bench to a report by Dr Proud, consultant psychiatrist, at R1 568, dated 2 March 2005. In the report Dr Proud concluded that the appellant was fit to resume full-time work as a teacher. The appellant contrasted the contents of this document to the Commissioner's reasons at [23]. The Commissioner there referred to the appellant visiting a general practitioner who declared him unfit for work due to work related stress. This was in August 2004. The contents of Dr Proud's report are about a different time than that which the Commissioner was talking about at [23]. The report does not undermine what the Commissioner wrote. In addition, what the Commissioner there wrote was a summary of the evidence of the appellant. The appellant had said that he had seen Dr Crawford, his general practitioner, who certified him unfit for work from work related stress (T50). In any event, the Commissioner did not find that the appellant's dismissal was not unfair on the basis that he had been medically unfit for work. The opinion was based upon it being open to the respondent to conclude that he was not fit to be employed because of his teaching performance as a whole.

148 The appellant also complained about documents about medical appointments for him. These documents were at R1 260, 167, 161, 173 and 174. Whilst it is correct that the Commissioner did not refer to these documents in her reasons, this does not necessarily mean that she did not read the documents. In my opinion these documents do not contain any significant information which the Commissioner was obliged to refer to. Their contents did not undermine her findings or conclusion.

149 The appellant also referred to documents which he had written and submitted that if they had been read and properly understood by the Commissioner then she would not have decided the application against him. I do not accept this submission. These documents set out the opinions of the appellant about the matters discussed and his understanding of the facts. The fact that he had written the letters did not oblige the Commissioner to accept their contents, especially when they were contradicted by the oral evidence and documents of the witnesses of the respondent. It was open to the Commissioner to prefer the respondent's evidence. For example at R1 179-185 there was a letter from the appellant dated 7 December 2004 which was said to be in response to a letter by Ms Jack dated 23 October 2004. The letter covered issues such as the appellant's interaction with Ms Jack, the complaints by and about the student Lauren, interaction with the Principal about the appellant's understanding of English, the issue about the signing of school reports, observations of lessons of the appellant by Ms Stewart and Mrs Pilkington and other matters. This document was referred to by the Commissioner in her reasons at [131]. This was in the context of saying that from a review of the documentation generated by the appellant during his time at the College he had a reasonable grasp of English. Whilst the Commissioner did not descend to the detail of this document, in my opinion its contents do not establish, either alone or in combination with other documents, that the Commissioner erred in not accepting the appellant's evidence.

150 The appellant also referred to R1 195-196 which was a letter to the Director General from the appellant dated 19 October 2004. Again this document was referred to in the reasons of the Commissioner at [131]. In the letter the appellant sought to bring to the attention of the Director General facts which he said were omitted from his file. Essentially the letter was a series of complaints about Mr Pilkington, Mrs Pilkington, Ms Stewart and Ms Carey. The letter mainly contained opinions and not much by way of "facts". The contents of this document did not require the Commissioner to reach different findings and conclusions to those that she did.

151 Exhibit R1 225-227 was also referred to by the appellant. This was a letter by the appellant to Mr Pilkington. The letter involved complaints about Ms Stewart. It also complained about the conduct of Mr Pilkington. The letter also referred to complaints made against the appellant by three students and alleged that they had been "egged on" by Mrs Pilkington, Ms Stewart and Ms Carey. The letter asserted other staff were disgruntled and unhappy because of the appellant's salary. The letter also referred to the stress suffered by the appellant. This letter was also referred to in the Commissioner's reasons at [131]. Again the contents of the letter do not establish that the Commissioner erred.

152 The appellant also referred to a letter he wrote to Ms Jack dated 20 August 2004 at R1 291. It was a letter which welcomed Ms Jack to the College. It said however that Ms Stewart, Mrs Pilkington and Mr Pilkington had made his teaching position "very unpleasant". The letter said the appellant had been unfairly treated and judged with prejudice and therefore he did not have any confidence in "anyone from Geraldton". He asked to be advised about this. This letter did not establish that the appellant had been undermined by the personnel he mentioned – it is merely his assertion that this occurred. The assertion contained in this letter did not have to be accepted by the Commissioner.

153 Exhibit R1 309 was described as a self-evaluation by the appellant. It was dated both 13 August 2004 and 17 August 2004. The appellant said in this document that Ms Stewart had a "plan, to finish me after she knows my salary". This point was dealt with in the evidence of Ms Stewart as summarised by the Commissioner and set out earlier. Again the fact that the appellant made this assertion in the document did not prove the assertion was correct. The Commissioner was entitled to accept the evidence of Ms Stewart on the point.

154 The appellant referred also to a letter to Mr Pilkington which was received on 10 August 2004. The letter is of five pages. There is some misnumbering of the pages of the letter in R1 because it is only numbered pages R1 322-325. The appellant submitted that as the end of the letter was signed by Mr Pilkington, he agreed with its contents. This is not so however, as next to the signature of Mr Pilkington, he notes that the document has been "received". There is no comment about the accuracy of its contents. The letter referred to the student Lauren, the issue about the signing of the reports, interactions between the appellant and the Principal about complaints, complaints about the teaching methods of Ms Stewart and her comments about the appellant, comments about the difficulties of teaching particular students, issues about the appellant's understanding of English language and the general lack of support from the personnel of the school. This document was referred to by the Commissioner at [131] of her reasons in the context earlier described. Again the contents of the document did not have to be accepted by the Commissioner. It was, as I have said, open to her to prefer the evidence of the respondent on the issues contained in the letter.

155 The appellant referred the Full Bench to another document written by him which was his response to complaints made by another teacher, Mr Molina. This document was R1 271-279. The document was also referred to by the Commissioner in her reasons at [131]. The letter covered some of the interactions between the appellant and Mr Molina and also complains about the appellant's interaction with Ms Stewart. The letter also referred to the lack of support received by the appellant from the other mathematics department staff. The letter discussed the observations made of his lessons by Ms Stewart and Mrs Pilkington and his complaints to Mr Pilkington about them. He said that there was constant scrutiny on his English language not on his skills as a mathematics teacher. The letter also discussed the interaction with the parent that led to the appellant being unwell in August 2004. For the same reasons as set out earlier, the contents of this letter do not show that the Commissioner's reasons and conclusions were in error. The Commissioner did not base her decision upon the complaint made by Mr Molina. Therefore even if the Commissioner did not consider the appellant's response to that issue, it did not undermine her findings overall.

156 The final document in this category which the appellant referred to the Full Bench was typed notes by the appellant about an observation by Ms Stewart on 25 June 2004 (R1 414-425). The document contained a lengthy discussion about the appellant's interaction with Ms Stewart and the lesson which she had observed. The document was referred to in the reasons of the Commissioner at [131]. The same may be said of this document as to the others written by the appellant. That is, the document contained assertions made by the appellant. The Commissioner did not have to accept that the contents of the document were accurate.

157 The appellant referred the Full Bench to an apparent contradiction between the documents at R1 212 and R1 222. The latter document was a workers' compensation first medical certificate signed by Dr Crawford. The date of the examination was recorded as being on 3 September 2004. The document recorded the date of the "injury/disease" as being 30 August 2004. The document said the appellant was unfit for work from 3 September 2004 to 17 September 2004. It also said the next appointment for the appellant was on 17 September 2004. The document at R1 212 contained emails from Ms Jack to Mr Newman and Mr Baker of the Department of Education and Training and a reply from Mr Newman. They were dated 9 and 10 September 2004 respectively. The email from Ms Jack referred to the date of the appellant's "injury" being "20 August 2004". The email said that this was of "interest" and that the appellant "was on sick leave at this time". As I have said the date of the injury in the workers' compensation certificate was recorded as 30 August 2004. The appellant asserted that the date referred to in Ms Jack's email was a forgery. I do not accept this. Ms Jack was not cross-examined on this topic. It is more likely that she made a mistake in referring to 20 August 2004 rather than 30 August 2004. In any event the point that she made about the date, that the appellant was on sick leave at that time, was correct. It may be that the workers' compensation certificate inaccurately referred to 30 August 2004 as opposed to 31 August 2004. It is not necessary to determine this however as the documents were of no importance to the reasoning of the Commissioner.

158 The appellant also referred the Full Bench to documents about complaints from the parents of students. The documents at R1 294 and R1 295 were letters from the mother of Lauren to Mr Pilkington and the appellant. They were both dated 16 August 2004. They both referred to improvements which had been made by the appellant since a complaint had been made about him two weeks earlier. It was submitted that the Commissioner did not consider the contents of these documents as if she did she would not have made her decision. In my opinion this does not follow. These documents concern improvement by the appellant from the perspective of one parent over a period of two weeks. This does not undermine the opinions of the teaching staff at the College who thought the appellant's teaching performance was inadequate. Their opinions were supported by Ms Jack. The appellant also said that the complaints made about him by parents of students were received within a small timeframe. It was suggested that this was consistent with parents being urged to make complaints about the appellant. Again this does not logically follow. These documents and this submission does not establish any error made by the Commissioner.

159 The appellant also referred the Full Bench to a typed comment on a lesson of the appellant's by Ms Stewart, dated 5 August 2004, and the appellant's handwritten comments on this document (R1 332). Ms Stewart's notes were that the lesson occurred in block four on 5 August 2004. The comments by the appellant referred to him being in a meeting with Ms Franklin and that they were together when the third block had finished. The appellant submitted this supported his view that he had only been with Ms Franklin for 45 minutes and not the time period alleged by Mrs Pilkington. In my opinion, again, this is simply not so. The Commissioner's finding that the appellant was not prevented by Mrs Pilkington or others from being assisted by the union is not undermined by the document.

160 The appellant also referred the Full Bench to two references given to him by the Principal and Head of Mathematics at Katanning Senior High School when he taught there in second semester 2003 (R1 537-538). The appellant is correct in submitting that these were both positive references about him. The Commissioner mentioned them in her reasons at [5] in describing the appellant's evidence. She did not refer to them however in setting out her findings and conclusions. In my opinion whilst the references were positive they did not to any significant degree undermine the Commissioner's findings that it was open for the respondent to find that the appellant's teaching performance in 2004 at the College was substandard.

161 Exhibit R1 432 was a note about the performance improvement plan by Ms Stewart dated 21 June 2004. In this it said that a lesson plan was to be given to the individual attending the lesson on the day before the lesson. It was submitted in effect that this contradicted the evidence of Ms Stewart summarised at [74] of the Commissioner's reasons, which was that the appellant was required to submit lesson plans two days before each lesson. In my opinion this is a minor point. Even if Ms Stewart did contradict herself this did not provide any basis for the Commissioner not to accept her evidence generally. The point does not in any way undermine the findings or conclusions of the Commissioner.

162 Finally the appellant referred the Full Bench to a letter written by the student Holly about the non-signing of the reports issue. This was at R1 436-437. The Commissioner did not refer to this document in her reasons. This is understandable however as this issue did not form the basis for any conclusions that the appellant did not adequately perform as a teacher. Even if the Commissioner did not consider this document that does not undermine her decision.

163 On this complaint, the issue overall is whether, when the documents referred to by the appellant are considered collectively, they ought to have changed the decision made by the Commissioner. For the reasons I have set out, they do not have this quality. This ground of complaint cannot be established.

Conclusion

164 For the reasons I have set out therefore none of the complaints made by the appellant are sustained. Accordingly the appeal must be dismissed.

165 There is one final point which I would like to make. As I have set out, the Commissioner said the respondent would also have been entitled to dismiss the appellant as a probationary employee and because of his conduct on 31 August 2004. The respondent did not base its case on either of these two points. The appellant did not have the opportunity to respond to them. Accordingly they should not have been taken into account by the Commissioner without prior notice being given to the appellant, together with the opportunity to respond to them. These points did not effect the ultimate decision reached by the Commissioner however as they were clearly stated to be alternative bases for her decision. The Commissioner concluded that the appellant was not unfairly dismissed according to the tests set out in the *Undercliffe* case and the others I have mentioned. The Commissioner's decision, on that basis, has not been proved to be in error by the complaints made by the appellant.

166 As I have said, the appeal must be dismissed.

167 The publication of these reasons and the issuing of the order have been delayed by the Full Bench because the appellant has been overseas. We were advised by the appellant that he was to be overseas in Egypt until 8 November 2009. Accordingly we have not published the reasons and issued the order until now so that the appellant has a full opportunity, if he may wish to do so, to file a notice of appeal in the Industrial Appeal Court within the 21 days permitted by s90(2) of *the Act*.

BEECH CC:

168 I have had the advantage of reading in advance the reasons of the Acting President. I agree with them and have nothing to add.

SCOTT C:

169 I have had the benefit of reading the reasons for decision of the Acting President. I agree and have nothing to add.

2009 WAIRC 01181

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 10 NOVEMBER 2009
FILE NO/S	FBA 27 OF 2006
CITATION NO.	2009 WAIRC 01181

Decision	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Ms R Hartley (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 13 August 2009, and having heard Mr E Michael on his own behalf as appellant, and Ms R Hartley (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 10 November 2009, it is this day, 10 November 2009, ordered that:

1. The appeal is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 01149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 01149
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		SENIOR COMMISSIONER J H SMITH
HEARD	**:**	FRIDAY, 18 SEPTEMBER 2009
DELIVERED	**:**	MONDAY, 2 NOVEMBER 2009
FILE NO.	**:**	FBA 6 OF 2009
BETWEEN	**:**	SHIRE OF RAVENSTHORPE
		Appellant
		AND
		JOHN PATRICK GALEA
		Respondent

ON APPEAL FROM:

Jurisdiction:	Western Australian Industrial Relations Commission
Coram:	Commissioner JL Harrison
Citation:	2009 WAIRC 00455
File No:	U175 of 2008

CatchWords:

Industrial Law (WA) – Leave to appeal to the Full Bench – Appeal raises important questions of law and jurisdiction – Leave to appeal granted

Appeal against finding in relation to jurisdiction – Whether appellant is a trading corporation – Application of 'activities test' – Significance of statutory functions of local government – Character of trading activities carried out in the public interest – Importance of profit – Trading – Particular activities considered – Relevance of work of employees – Lack of evidence at first instance – Correction order issued; appeal otherwise dismissed

Legislation:

Bush Fires Act 1954 (WA): Part IV Division I

Cemeteries Act 1986 (WA); s5, s6; s53(i); ss54-55.

Constitution: s52(xx); s109

Constitution Act 1889 (WA): s52

Dividing Fences Act 1961 (WA): s24

Dog Act 1976 (WA): s9

Emergency Management Act 2005 (WA): s36

Fair Work Act 2009 (Cth): s26

Fire and Emergency Services Authority of Western Australia Act 1988 (WA): s36J

Health Act (WA): s26

Heritage of Western Australia Act 1990 (WA): s45

Industrial Relations Act 1979 (WA): s7; s26(1)(a); s26(1)(b); s29(1)(b)(i); s49

Judiciary Act 1903 (Cth): s78B

Litter Act 1979 (WA): Part V

Local Government Act 1995 (WA): s1.3(3), s2.1(1)(a), s2.3(1), s2.4(1), s2.5, s2.6(1), s2.6(3), s2.7, ss2.8-2.10, ss2.11-2.16, s2.17, s2.19, s2.28, ss3.1-3.68, s3.1, s3.2, s3.4, s3.5(1), (3) and (4), s3.10, s3.18, s3.21, s3.27, ss3.28-3.36, ss3.37-3.48, s3.59, ss4.1-4.99, ss5.1-5.125, s5.36(1), ss6.1-6.82, s6.2, s6.4(1), s6.7(2), s6.9, s6.14, s6.15, s6.16, s6.17(2), s6.17(3)

Main Roads Act 1930 (WA): s27A

Planning and Development Act 2005 (WA): s72

Workplace Relations Act 1996 (Cth)

Result:

Correction order issued, appeal otherwise dismissed

Representation:

Counsel:

Appellant:	Mr S White, as agent
Respondent:	Mr J Atkinson (of Counsel), by leave

Solicitors:

Appellant:	Not applicable
Respondent:	Haynes Robinson Barristers and Solicitors

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] (2008) 89 WAIG 243

Aboriginal Legal Service of Western Australia Inc v Lawrence (2007) 87 WAIG 856

Australian Workers' Union of Employees, Queensland v Etheridge Shire Council (2008) 171 FCR 102

Ballina Shire Council v Ringland (1994) 33 NSWLR 680

Bank of New South Wales v Commonwealth (1948) 76 CLR 1

Bell v Shire of Dalwallinu (2008) 88 WAIG 1867

Bysterveld v Shire of Cue (2007) 87 WAIG 2462

Clark v Commissioner of Taxation (2009) 258 ALR 623

Cole v Whitfield (1988) 165 CLR 360

Derbyshire County Council v Times Newspapers Ltd [1993] AC 534

E v Australia Red Cross Society (1991) 27 FCR 310

Educang Ltd v Queensland Industrial Relations Commission (2006) 154 IR 436

Fencott v Muller (1983) 152 CLR 570

Gerhardy v Brown (1985) 159 CLR 70

Glew v Shire of Greenough [2006] WASCA 260

Guest v Kimberley Land Council (2009) 89 WAIG 2063

Hardeman v Children's Medical Research Institute (2007) 166 IR 196

Hughes v Western Australian Cricket Association (Inc) (1986) 19 FCR 10

J S McMillan Pty Ltd v Commonwealth (1997) 77 FCR 337

Jazabas Pty Ltd v City of Botany Bay Council [2000] NSWSC 58

Mid Density Development Pty Ltd v Rockdale Municipal Council (1993) 39 FCR 579

Mid Density Development Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290

Murdoch University v Liquor Hospitality and Miscellaneous Union, Western Australian Branch (2005) 86 WAIG 247

New South Wales v Commonwealth (2006) 229 CLR 1

Pavlakis v Council of the City of Shoalhaven [2005] NSWSC 436

Pellow v Umoona Community Council [2006] AIRC 426

R v The Judges of the Federal Court of Australia; ex parte Western Australian National Football League (Inc) (1979) 143 CLR 190

Quickenden v O'Connor (2001) 109 FCR 245

Re Ku-ring-gai Co-operative Building Society (No, 12) Ltd (1978) 36 FLR 134

Ritchie v Mosman Municipal Council (2000) 107 LGERA 187

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 1873

SGS Australia Pty Ltd v Taylor (1993) 73 WAIG 1760

State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282

Victoria v Commonwealth (1996) 187 CLR 416

XYZ v The Commonwealth (2006) 227 CLR 532

Reasons for Decision

RITTER AP:

Introduction

1 This is an application for leave to appeal and an appeal if leave is granted against a decision made by the Commission on 17 July 2009. The application/appeal is made under s49 of the *Industrial Relations Act 1979* (WA) (*the Act*). (For ease of reference I will refer to the applicant/appellant as "the Shire").

The Decision

2 The order made by the Commission on 17 July 2009 was not contained in the appeal book. Instead there was a minute of proposed order dated 15 July 2009. A perusal of the records of the Commission has confirmed however that an order, in the terms of the minute, was made on 17 July 2009. Although it is this document which should have been contained in the appeal book, nothing turns upon that in this matter.

3 The orders made on 17 July 2009 were that the Commission:-

> "1. ORDERS THAT application U 175 of 2009 be and is hereby accepted out of time.
>
> 2. DECLARES THAT during the time the applicant was employed by the respondent, the respondent was not a trading corporation."

4 The "application" in order 1 was made under s29(1)(b)(i) of *the Act*, seeking a remedy for alleged unfair dismissal. The "respondent" in order 2 is the Shire.

5 The Shire does not seek to appeal against the first order made, but only the second. The effect of that order was that the Commission has jurisdiction to hear and decide the respondent's application. If the Shire is a trading corporation, the parties agreed that pursuant to the provisions of the former *Workplace Relations Act 1996* (Cth) and s109 of the *Constitution*, the Commission does not have that jurisdiction. (See *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* (2008) 89 WAIG 243 (*ALS*) at [14]). The outcome is the same if the *Fair Work Act 2009* (Cth) now applies to the present matter. (See s26). Accordingly it is unnecessary to decide that point.

Section 78B Notices

6 The application/appeal involves the interpretation of the Constitution. Accordingly, at the request of the Full Bench, the Shire issued notices pursuant to s78B of the *Judiciary Act 1903* (Cth) to the Attorneys General of the Commonwealth and each of the States (see *ALS* at [8], and in the Full Bench, *Aboriginal Legal Service of Western Australia Inc v Lawrence* (2007) 87 WAIG 856 at [10]). None of the Attorneys General has decided to intervene.

Leave to Appeal

7 The decision by the Commission at first instance, that the Shire was not a trading corporation, was a "finding" as defined in s7 of the *Act*. This is because the decision made by the Commission did not finally decide, determine or dispose of the respondent's application. As such, the Shire faces the hurdle of s49(2a) of *the Act* in seeking to appeal against the finding. Section 49(2a) provides that:

> "(2a) An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie."

8 In a schedule to the notice of appeal the Shire set out "public interest grounds" supporting the grant of leave under s49(2a) of *the Act*. Although there were nine numbered paragraphs in this section of the schedule, they may be summarised as arguing that the issue of whether or not local government bodies are trading corporations, and accordingly outside the jurisdiction of the Commission, is a matter of public importance for all local government bodies throughout the State and potential applicants against such bodies. Accordingly, guidance from the Full Bench as to the approach to take in deciding that issue is within the public interest.

9 The respondent opposed the application for leave, although this was more upon the ground that the appeal should not succeed rather than that the issue before the Full Bench was not one of public importance. The respondent's counsel conceded the latter.

10 The principles guiding the Full Bench in determining whether leave to appeal should be granted were discussed in my reasons in *Murdoch University v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2005) 86 WAIG 247 at [12]-[15] (Gregor SC and Smith C agreeing with those reasons).

11 In my opinion leave to appeal should be granted. This is because the appeal raises important questions of law and jurisdiction affecting the Commission. A decision of the Full Bench will be of assistance to other Commissioners who are required to determine whether a local government body is a trading corporation, as well as to local government bodies themselves and putative applicants throughout the State. It is, to paraphrase the words of the Full Bench in *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 1873 at 1879, quoted in *Murdoch University* at [13], a case where the appeal raises issues which because of their generality, are in the public interest to decide.

12 In my opinion an order should be made granting leave to appeal.

The Hearing at First Instance

13 A hearing before the Commission to determine both the trading corporation issue and whether the respondent should be granted an extension of time to file his application, was heard on 19 March 2009. At the hearing the respondent did not lead any evidence on the trading corporation issue. The Shire led evidence from Mr Ian Dickinson, who is the Supervisor of the Shire who had responsibility for the respondent and Mr Pascoe Durtanovich, the acting Chief Executive Officer of the Shire. It was only the evidence of the latter which was relevant to the trading corporation issue. Mr Durtanovich gave oral evidence and through him a number of documents were received as exhibits, including a witness statement and financial records of the Shire for the financial year 1 July 2007 to 30 June 2008. It was partly during this period that the respondent was employed by the Shire. The respondent was employed between May and November 2008 but later financial records were not available. At the completion of the hearing, directions were made to enable the Shire to file and serve an amended witness statement of Mr Durtanovich and the filing and service of closing written submissions. The Commissioner reserved her decision on that basis. An amended witness statement of Mr Durtanovich was duly filed. The reasons for decision of the Commissioner were published on 15 July 2009. As I have said earlier, the order appealed against was then made on 17 July 2009.

14 The evidence adduced by the Shire was within a narrow focus. It provided evidence about the income received by the Shire and sought to establish that a number of the activities which produced income for the Shire were "trading activities". It was argued that these activities produced approximately 25% of the income received by the Shire over the 2007-2008 financial year. It was therefore submitted that the trading activities of the Shire were significant and consequently the Commissioner should find that it was a "trading corporation".

15 In summary, this was not accepted by the Commissioner. In particular the Commissioner did not agree with the assessment that a number of the sources of income of the Shire were produced by trading activities. The Commissioner held that those activities which did involve trading were not a sufficiently significant part of the activities of the Shire overall to make it a trading corporation.

The Grounds of Appeal

16 The grounds of appeal, contained in a schedule to the notice of appeal, were unnecessarily prolix. They were set out over nine pages and read more like an outline of submissions than grounds of appeal. Nevertheless it is possible to discern those aspects of the reasons of the Commissioner which the Shire contends were in error. The respondent did not complain about the way in which the grounds of appeal were set out. In summary, the complaints of the Shire are as follows:

(a) The Commissioner incorrectly characterised activities of the Shire as not being trading activities.

(b) Accordingly the Commissioner was in error in deciding the trading activities of the Shire were peripheral and minor.

(c) The Commissioner erred in deciding there was a requirement to make a profit before an activity could be characterised as trading.

(d) The Commissioner wrongly decided that an activity conducted in the public interest was a gratuitous provision of a public welfare service and not a trading activity.

(e) The Commissioner erred in her assessment of the relevance of "commerciality to trading activity".

(f) The Commissioner erred in her assessment of the relevance of the *Local Government Act 1995* (WA) (*the LGA*) in deciding whether the shire was a trading corporation.

17 The grounds of appeal and also the written and oral submissions of the Shire addressed the activities of the Shire which were said to constitute trading.

The Reasons for Decision

18 In her reasons for decision the Commissioner summarised the evidence given by Mr Durtanovich. He said that the Shire is located 536 kilometres from Perth, covers 12,872 square kilometres and has approximately 2,300 residents. Mr Durtanovich said the Shire operates trading activities in addition to performing its statutory functions.

19 The Commissioner set out a table provided by Mr Durtanovich which contained the income produced by activities of the Shire which were asserted to be trading. The table set out by the Commissioner, which was in Appendix A to Mr Durtanovich's amended witness statement, was as follows:

Shire of Ravensthorpe Operating Accounts

		2006-2007	2007-2008
Ref#	**Name**	**Trading Income**	**Trading Income**
1	Sale of Council Publications	$546.00	$111.27
2	FESA - Bush Fires	$35,700.00	$38,000.00
3	FESA - Administration Charge	$4,000.00	$4,000.00
4	Fire Map Sales	$30.00	$474.55
5	Grant - Emergency Services Collocation		$1,600,000.00
6	Rent - Martin St, Ravensthorpe		$5,352.00
7	FESA - State Emergency Service	$11,200.00	$11,600.00
~~8~~	~~Crime Prevention Grant~~		
9	Business Refuse Charges	$17,708.24	$22,045.81

		2006-2007	2007-2008
Ref#	**Name**	**Trading Income**	**Trading Income**
10	Business Tip Charges	$11,113.32	$11,017.40
11	Building Sites Tip Charges	$15,008.53	$20,782.56
12	Mine Site Refuse Charges	$188,320.45	$116,671.09
13	Sale of Refuse Bins	$2,070.00	$534.73
14	Cemetery Charges	$499.54	$930.00
15	HalI Hire Charges	$3,617.01	$5,172.17
16	Swimming Pool Admission Charges	$7,934.91	$7,931.05
17	Ravensthorpe Entertainment Centre Charges	$9,065.00	$6,876.73
18	Ravensthorpe Sports Pavilion Hire Charges	$4,700.00	$1,952.50
19	Gym Memberships	$6,321.35	$6,734.06
20	Camping Fees	$7,822.00	$5,306.00
21	Landing Fees and Charges	$39,300.00	$32,715.00
22	Ravensthorpe Nickel Operation Contribution	$185,680.62	$194,621.06
23	Gate Registrations		$270.00
24	Hopetoun Caravan Park lease	$10,000.00	$21,200.00
25	Other Minor Revenue		$500.00
26	Tectonic Resources Lease	$6,545.00	$6,750.00
27	Standpipe Administration Charge	$864.50	$1,759.00
28	Airport Farmland Lease	$25,000.00	$25,750.00
~~29~~	~~Power Connection Morris Camp~~		
30	Private Works Revenue	$27,193.30	$80,618.91
31	Staff Housing Rent - Works		$9,525.73
32	Westpac Banking Corporation In-Store Commission	$55,814.83	$51,925.92
33	Department for Planning & Infrastructure Commission	$33,230.16	$37,965.37
34	Safe Custody Charges	$1,008.02	$854.87
35	Westpac Training		$592.20
36	Rate Search Fees	$15,454.55	
37	Profit on Sale of Asset	$1,119.63	
38	Reimbursement Fire Fighting Expenses	$28,720.30	
39	Rent - Medical House	$872.72	
40	Medical Practice Review	$9,090.91	
41	Tip Entry Fees	$435.54	
~~42~~	~~Sewerage Fees~~		
43	Hopetoun Recreational Facilities	$34,583.00	
44	Landcorp Street Tree Project	$87,385.18	
45	Subdivision Admin & Supervision	$40,449.99	
46	Western Power - Lease of Depot	$12,000.00	
47	Ravensthorpe Sewerage Charge	$42,032.47	$48,181.89
48	Ravensthorpe Sewerage in Lieu	$6,588.97	$8,919.35
49	Munglinup Sewerage Charge	$1,849.87	$1,942.60
~~50~~	~~Reimbursement Fire Fighting Expenses~~		
51	Ravensthorpe Sewerage Extensions	$70,072.20	$122,979.34
52	Hopetoun Effluent Cartage	$375,000.00	
53	Waste Effluent Dump Charge		$71,649.79
		$1,435,948.11	**$2,584,212.95**
		$6,118,024.00	**$10,538,817.00**
		23.47%	24.52%

20 Accordingly, as stated earlier, the position of the Shire was that 24.52% of its income was generated from trading activities in the 2007-2008 financial year. The relevant evidence by Mr Durtanovich about each of these activities was also summarised.

21 The Commissioner then summarised the submissions of both the Shire and the respondent. In doing so the Commissioner noted the reliance by the Shire on the decisions of a single Commissioner in *Bell v Shire of Dalwallinu* (2008) 88 WAIG 1867 and *Bysterveld v Shire of Cue* (2007) 87 WAIG 2462.

22 Under the heading "Findings and conclusions" the Commissioner set out her reasons leading to the conclusion that the Shire was not a trading corporation. At [73] the Commissioner said that she did not doubt the veracity of the evidence given by Mr Durtanovich, but did not accept his "characterisation of some of the income received by the [Shire] as being from trading activities". The Commissioner said she would base her findings on the income received by the Shire in the 2007-2008 financial year, as this was the only complete financial record available as at the date of the hearing.

23 The Commissioner then referred to and set out the relevant sections of the *Workplace Relations Act*.

24 At [77] the Commissioner said:

> "77 The issue to be determined when deciding if a corporation is a trading corporation is the character of the activities carried out by a corporation at the relevant time within the context of the purpose of the organisation and whether or not the corporation engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation for the purposes of the WR Act."

25 The Commissioner then quoted paragraphs [68]-[74] of the reasons of Steytler P (agreed with by Pullin J) in *ALS*.

26 The Commissioner next referred to the "corporate status" of the Shire under *the LGA*. Sections 1.3(3) and 3.1(1) of *the LGA* were referred to and quoted. I will later refer to these and other provisions of *the LGA*.

27 At [82] the Commissioner said the Shire's role "was to carry out its statutory functions in addition to conducting a range of what [Mr Durtanovich] described as 'trading activities'. On this basis I find that [the Shire's] main role is to provide a range of infrastructure and other services to the residents of the Shire for their benefit".

28 At [83] the Commissioner found that the services provided by the Shire were funded from income received from rates and service charges as well as, in the main, from grants.

29 The Commissioner then discussed each of the items contained in the table set out earlier and discussed the evidence about each item.

30 The Commissioner then considered whether the Shire engaged in substantial trading activities. At the commencement of this part of her reasons the Commissioner set out in tabular form, the income received and the percentage of the total income of the Shire for 2007-2008, of each item relied upon by the Shire as being a trading activity. The table contained in the reasons is as follows:

Ref#	**Name**	**2007-2008 Income**	**Percentage of total income for 2007/2008**
1	Sale of Council Publications	$111.27	0.001
2	FESA - Bush Fires	$38,000.00	0.360
3	FESA - Administration Charge	$4,000.00	0.038
4	Fire Map Sales	$474.55	0.004
5	Grant - Emergency Services Collocation	$1,600,000.00	15.182
6	Rent - Martin St, Ravensthorpe	$5,352.00	0.051
7	FESA - State Emergency Service	$11,600.00	0.110
~~8~~	~~Crime Prevention Grant~~		
9	Business Refuse Charges	$22,045.81	0.209
10	Business Tip Charges	$11,017.40	0.104
11	Building Sites Tip Charges	$20,782.56	0.197
12	Mine Site Refuse Charges	$116,671.09	1.107
13	Sale of Refuse Bins	$534.73	0.005
14	Cemetery Charges	$930.00	0.008
15	HalI Hire Charges	$5,172.17	0.049
16	Swimming Pool Admission Charges	$7,931.05	0.075
17	Ravensthorpe Entertainment Centre Charges	$6,876.73	0.065
18	Ravensthorpe Sports Pavilion Hire Charges	$1,952.50	0.018
19	Gym Memberships	$6,734.06	0.064
20	Camping Fees	$5,306.00	0.050
21	Landing Fees and Charges	$32,715.00	0.310
22	Ravensthorpe Nickel Operation Contribution	$194,621.06	1.847
23	Gate Registrations	$270.00	0.002
24	Hopetoun Caravan Park lease	$21,200.00	0.201
25	Other Minor Revenue	$500.00	0.005
26	Tectonic Resources Lease	$6,750.00	0.064
27	Standpipe Administration Charge	$1,759.00	0.017
28	Airport Farmland Lease	$25,750.00	0.244
~~29~~	~~Power Connection Morris Camp~~		
30	Private Works Revenue	$80,618.91	0.765
31	Staff Housing Rent - Works	$9,525.73	0.090
32	Westpac Banking Corporation In-Store Commission	$51,925.92	0.493
33	Department for Planning & Infrastructure Commission	$37,965.37	0.360
34	Safe Custody Charges	$854.87	0.008
35	Westpac Training	$592.20	0.006

Ref#	Name	2007-2008 Income	Percentage of total income for 2007/2008
36	Rate Search Fees		
37	Profit on Sale of Asset		
38	Reimbursement Fire Fighting Expenses		
39	Rent –Medical House		
40	Medical Practice Review		
41	Tip Entry Fees		
~~42~~	~~Sewerage Fees~~		
43	Hopetoun Recreational Facilities		
44	Landcorp Street Tree Project		
45	Subdivision Admin & Supervision		
46	Western Power – Lease of Depot		
47	Ravensthorpe Sewerage Charge	$48,181.89	0.457
48	Ravensthorpe Sewerage in Lieu	$8,919.35	0.085
49	Munglinup Sewerage Charge	$1,942.60	0.018
~~50~~	~~Reimbursement Fire Fighting Expenses~~		
51	Ravensthorpe Sewerage Extensions	$122,979.34	1.167
52	Hopetoun Effluent Cartage		
53	Waste Effluent Dump Charge	$71,649.79	0.680
	Respondent's total income for 2007/2008	**$10,538,817.00**	

31 The Commissioner then said that after reviewing the principles outlined by Steytler P in *ALS* and reviewing the nature of the funds received by the Shire, and when taking into account the activities of the Shire as a whole and the purpose and role of the Shire, the Shire was not a trading corporation "at the relevant time" ([107]).

32 In the next paragraph the Commissioner found that when considered collectively most of the activities claimed by the Shire to be trading activities were "conducted in the main for the public benefit" of the residents of the Shire and "did not have the requisite commercial character one would normally associate with the activities of a trading corporation". The Commissioner found that "most of these activities were inconsequential and incidental to the primary activities and functions of the [Shire]".

33 The Commissioner then made an assessment of each of the items contained in the table to decide whether they were trading activities. The Commissioner's conclusion was that only the income generated by items 30, 51 and 53 was from trading.

34 Accordingly, the Commissioner concluded that the Shire was not a trading corporation. The Commissioner then said that the substantive application would be listed for hearing on a date to be fixed. I understand that the hearing of the substantive application has been deferred pending the resolution of the present appeal.

35 The case presented by the Shire and the submissions it made at first instance were very narrow. The focus was upon the sources of income received by the Shire. The evidence and submissions of the Shire did not look at all of the activities of the Shire. Additionally, in my opinion, there was inadequate consideration of the status and role of the Shire as a local government body.

***Constitution* of Western Australia, the *Local Government Act* and other Legislation**

36 The Shire is part of the arm of government constituted by local government bodies.

37 Section 52 of the *Constitution Act 1889* (WA) provides as follows:

> "**52. Elected local governing bodies**
>
> (1) The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.
>
> (2) Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted."

38 As stated by Wheeler JA in *Glew v Shire of Greenough* [2006] WASCA 260 at [25]:

> "25 In Western Australia, s 52 of the State Constitution imposes a positive duty on the State government to maintain a system of local governing bodies."

39 The State of Western Australia presently complies with the obligation under s52 of the *Constitution Act*, by and through the enactment of *the LGA*.

40 Section 1.3 of *the LGA* provides as follows:

> "**1.3. Content and intent**
>
> (1) This Act provides for a system of local government by —
>
> (a) providing for the constitution of elected local governments in the State;
>
> (b) describing the functions of local governments;
>
> (c) providing for the conduct of elections and other polls; and
>
> (d) providing a framework for the administration and financial management of local governments and for the scrutiny of their affairs.
>
> (2) This Act is intended to result in —
>
> (a) better decision-making by local governments;
>
> (b) greater community participation in the decisions and affairs of local governments;
>
> (c) greater accountability of local governments to their communities; and
>
> (d) more efficient and effective local government.
>
> (3) In carrying out its functions a local government is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity."

41 Section 2.1(1)(a) of *the LGA* provides that the Governor, on the recommendation of the Minister, may make an order declaring an area of the State to be a district.

42 Section 2.3(1) of *the LGA* provides that such an order is to include an order naming the district.

43 Section 2.4(1) of *the LGA* provides that such an order is to include an order designating the district a city, town or shire. It can be inferred that these sections have been complied with for the Shire.

44 Local governments are created as bodies corporate. Section 2.5 of *the LGA* provides:

> "**2.5. Local governments created as bodies corporate**
>
> (1) When an area of the State becomes a district, a local government is established for the district.
>
> (2) The local government is a body corporate with perpetual succession and a common seal.
>
> (3) The local government has the legal capacity of a natural person.
>
> (4) The corporate name of the local government is the combination of the district's designation and name.
>
> Example: City of (*name of district*)
>
> (5) If the district's name incorporates its designation, the designation is not repeated in the corporate name of the local government.
>
> Example:
>
> district's name : Albany (Town)
>
> corporate name : Town of Albany
>
> (6) Proceedings may be taken by or against the local government in its corporate name."

45 Pursuant to s2.6(1) of *the LGA*, each local government is to have an elected council as its governing body. Section 2.6(3) provides that the offices on the council of the local government of a shire are those of president, deputy president and councillors.

46 Section 2.7 of *the LGA* sets out the role of the council as follows:

> **"2.7. The role of the council**
>
> (1) The council —
>
> (a) directs and controls the local government's affairs; and

(b) is responsible for the performance of the local government's functions.

(2) Without limiting subsection (1), the council is to —

(a) oversee the allocation of the local government's finances and resources; and

(b) determine the local government's policies."

47 Sections 2.8-2.10 set out the roles of mayors/deputy mayors, presidents/deputy presidents and councillors. The election of office bearers is prescribed in ss2.11-2.16 of *the LGA*.

48 Section 2.17 of *the LGA* sets out the membership and size of the council of a local government. Section 2.19 of *the LGA* provides for the qualifications for election to council. Terms of office and vacation of office are set out in s2.28 of *the LGA*.

49 Part 3 of *the LGA*, comprised by ss3.1-3.68, sets out the functions of local government. The general function of a local government is set out in s3.1 as follows:

"**3.1. General function**

(1) The general function of a local government is to provide for the good government of persons in its district.

(2) The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.

(3) A liberal approach is to be taken to the construction of the scope of the general function of a local government."

50 In my opinion this section is very important. It sets out the reason for existence of a local government and its overriding function. Section 3.2 of *the LGA* provides that the "scope of the general function of a local government in relation to its district is not limited by reason only that the Government of the State performs or may perform functions of a like nature".

51 Section 3.4 of *the LGA* provides:

"**3.4. Functions may be legislative or executive**

The general function of a local government includes legislative and executive functions."

52 The legislative functions of local governments are set out in Division 2 of Part 3 of *the LGA*, comprised by ss3.5-3.17. Section 3.5(1), (3) and (4) set out the general legislative power of local governments as follows:

"**3.5. Legislative power of local governments**

(1) A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.

…

(3) The power conferred on a local government by subsection (1) is in addition to any power to make local laws conferred on it by any other Act.

(4) Regulations may set out —

(a) matters about which, or purposes for which, local laws are not to be made; or

(b) kinds of local laws that are not to be made,

and a local government cannot make a local law about such a matter, or for such a purpose or of such a kind."

53 Section 3.10(1) of *the LGA* confirms that a local law made under *the LGA* can establish that contravention of a provision of the local law is an offence, and provide for the offence to be punishable on conviction by a penalty not exceeding a fine of $5000. Section 3.10(2)-(6) provides for other powers in relation to penalties and the payment of fines.

54 Sections 3.11-3.16 provide for procedures in relation to local laws.

55 The executive functions of local governments are set out in Division 3 of *the LGA* comprised by ss3.18-3.60.

56 The general performance of executive functions is set out in s3.18 of *the LGA* as follows:

> "**3.18. Performing executive functions**
>
> (1) A local government is to administer its local laws and may do all other things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.
>
> (2) In performing its executive functions, a local government may provide services and facilities.
>
> (3) A local government is to satisfy itself that services and facilities that it provides —
>
> (a) integrate and coordinate, so far as practicable, with any provided by the Commonwealth, the State or any public body;
>
> (b) do not duplicate, to an extent that the local government considers inappropriate, services or facilities provided by the Commonwealth, the State or any other body or person, whether public or private; and
>
> (c) are managed efficiently and effectively."

57 Section 3.21 of *the LGA* is about the duties of a local government when performing its executive functions. The section contains limitations, to the extent that is reasonable and practicable, upon the performance of executive functions by local government. They include the non-obstruction of the lawful use of land; minimisation of harm, inconvenience or damage; minimisation of danger to any person or property; not damaging buildings and other structures and not physically damaging land. Pursuant to s3.27 of *the LGA* a local government may do any of the things prescribed in Schedule 3.2, even though the land on which it is done is not local government property and the local government does not have consent to do it.

58 Sections 3.28-3.36 provide for powers of entry of local government bodies. Sections 3.37-3.48 provide for the impounding of abandoned vehicles and goods and the holding of them and disposal of sick or injured animals.

59 Section 3.59 of *the LGA* is about commercial enterprises by local governments. Section 3.59(1) defines a "trading undertaking" to include an activity carried on with a view to producing profit. Limitations are imposed upon a local government before it commences what are described and defined in s3.59(1) as a "major trading undertaking", "major land transaction" or entering into a "land transaction that is preparatory to entry into a major land transaction". Section 3.59(2) provides that before this occurs a local government is to prepare a business plan. The contents of the business plan are to be in accordance with the requirements of s3.59(3) of *the LGA*. Notification requirements are contained in s3.59(4) of *the LGA*. Whilst this section contemplates that local governments will trade and indeed may engage in a "major trading undertaking", it is noted that there are restrictions upon the latter. (I note that there was no evidence that the Shire had been involved in such an undertaking).

60 Part 4 of *the LGA* provides for the elections to the offices of a local government (ss4.1-4.99).

61 Part 5 of *the LGA*, constituted by ss5.1-5.125, is about the administration of a local government. It provides for the taking place of council meetings and committee meetings, local government employees, annual reports, disclosure of financial interests, access to information, the payment of expenses and allowances to those holding council offices and the conduct of certain officials.

62 Section 5.36(1) of *the LGA* provides that a local government is to employ a person to be its Chief Executive Officer and such "other persons as the council believes are necessary to enable the functions of the local government and the functions of the council to be performed". It is presumably pursuant to this subsection that the respondent was employed by the Shire.

63 Part 6 of *the LGA*, comprised by ss6.1-6.82, is about financial management. Pursuant to s6.2 a local government is to prepare an annual budget. Pursuant to s6.4(1) a local government is to prepare an annual financial report. Pursuant to s6.7(1) of *the LGA* all money and the value of all assets received or receivable by a local government are to be held and brought to account in its municipal fund. Section 6.7(2) provides that money held in the municipal fund may be applied towards the performance of the functions and the exercise of the powers conferred on the local government by *the LGA* or any other written law. In addition, s6.9 of *the LGA* requires a local government to hold a trust fund. Pursuant to s6.14 money held in a municipal fund or the trust fund of a local government, which is not required for any other purpose, may be invested in accordance with Part III of the *Trustees Act 1962* (WA).

64 Division 5 of Part 6 of *the LGA* is about the financing of local government activities. Sections 6.15 and 6.16 of *the LGA* are as follows:

> "**6.15. Local government's ability to receive revenue and income**
>
> (1) A local government may receive revenue or income —
>
> (a) from —
>
> (i) rates;
>
> (ii) service charges;

(iii) fees and charges;

(iv) borrowings;

(v) investments; or

(vi) any other source,

authorised by or under this Act or another written law; or

(b) from —

(i) dealings in property; or

(ii) grants or gifts.

(2) Nothing in subsection (1)(a) authorises the making by a local government of a local law providing for the receipt of revenue or income by the local government from a source not contemplated by or under this Act.

6.16. Imposition of fees and charges

(1) A local government may impose* and recover a fee or charge for any goods or service it provides or proposes to provide, other than a service for which a service charge is imposed.

** Absolute majority required.*

(2) A fee or charge may be imposed for the following —

(a) providing the use of, or allowing admission to, any property or facility wholly or partly owned, controlled, managed or maintained by the local government;

(b) supplying a service or carrying out work at the request of a person;

(c) subject to section 5.94, providing information from local government records;

(d) receiving an application for approval, granting an approval, making an inspection and issuing a licence, permit, authorisation or certificate;

(e) supplying goods;

(f) such other service as may be prescribed.

(3) Fees and charges are to be imposed when adopting the annual budget but may be —

(a) imposed* during a financial year; and

(b) amended* from time to time during a financial year.

** Absolute majority required*."

65 Section 6.17(1) of *the LGA* provides considerations which are to be taken into account in setting the amount of a fee or charge for a service or for goods. They include the cost to the local government of providing the service, the importance of the service or goods to the community, and the price at which the service or goods could be provided by an alternative provider. Section 6.17(3) of *the LGA* provides that other than for services which are set out, the basis for determining a fee or charge is not limited to the cost of providing the goods or service. The power to borrow and restrictions upon borrowing are provided for in Subdivision 3 of Division 5 of Part 6 of *the LGA*.

66 Division 6 of Part 6 of *the LGA* provides for rates and service charges. This includes the basis of rating, the recording of rating, the imposition of service charges, the payment of rates and service charges and their recovery. Subdivision 6 of Division 6 of Part 6 of *the LGA* provides that actions may be taken against land where rates or service charges remain unpaid.

67 Part 7 of *the LGA* provides for the auditing of the financial accounts of local governments. Part 8 provides for the scrutiny of the affairs of local governments, and Part 9 is about objections to and the review of decisions made by local governments, legal proceedings and other miscellaneous matters.

68 It can be seen from this review that the Shire, as a local government, is no ordinary corporation. As I have said a local government is part of an arm of government which must act for the benefit of its community. It is controlled by a council which is elected by the public and governs within its district. As such, it has a variety of legislative, executive and regulatory functions. The way these functions are carried out is, in turn, constrained by the provisions of *the LGA*.

69 Local governments also have numerous functions and powers under other legislation in force in Western Australia. This includes, for example, the *Planning and Development Act 2005* (WA) (under s72, the preparation and adoption of a local planning scheme); the *Bush Fires Act 1954* (WA) (under Part IV Division 1, controlling bush fires); the *Dog Act 1976* (WA) (under s9, the administration and enforcement of *the Act*), the *Dividing Fences Act 1961* (WA) (under s24, the prescription of a "sufficient fence"); the *Emergency Management Act 2005* (WA) (under s36, providing for emergency management); the *Fire and Emergency Services Authority of Western Australia Act 1998* (WA) (under s36J, the determination and assessment of an emergency services levy); the *Health Act 1911* (WA) (under s26, the carrying out of the provisions of the *Health Act*); the *Heritage of Western Australia Act 1990* (WA) (under s45, maintaining an inventory of buildings of cultural heritage significance); the *Litter Act 1979* (WA) (under Part V, the enforcement of the *Litter Act*), the *Main Roads Act 1930* (WA) (under s27, the responsibility for roads in the district) and the *Cemeteries Act 1986* (WA) (under s5, the control and management of cemeteries as vested by the Governor and under s54-s55, making local laws in respect thereof).

70 The role which local governments have under each of these Acts, including the regulatory, executive and service functions provided for, are all part of what a local government does or can do. They are part of a local government's activities as the governing body for its district.

Legal Analysis

71 The relevant authorities were comprehensively summarised by Steytler J in *ALS*. It is unnecessary to repeat that exercise. His Honour also distilled relevant principles from the cases which were set out at [68]. In *R v The Judges of the Federal Court of Australia; ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 (*Adamson*), Mason J at 233 said that the expression "trading corporation" is "a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation". This was, his Honour said, a "question of fact and degree" (234). His Honour also said that not every corporation which is engaged in trading activity is a trading corporation and that "the trading activity of a corporation may be so slight and so incidental to some other principal activity … that it could not be described as a trading corporation" (234). These observations were referred to with approval by three members of the High Court in *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 303-304. The relevant passages of the reasons of Mason J were also quoted with approval by Steytler P in *ALS* at [46]; (and see also [68]).

72 As set out by Steytler P at [69] of *ALS*, s51(xx) of the *Constitution* does not give the Commonwealth the power to legislate with respect to trading, or even to trading by corporations. The power to legislate is with respect to some, but not all, corporations, including those classified as trading corporations.

73 At [74], Steytler P concluded that what was done by the Aboriginal Legal Service did not have a "commercial character" and that in all but exceptional cases its services were provided free of charge and for altruistic purposes not shared by ordinary commercial enterprises. Accordingly, and for the other reasons stated by Steytler P, the Aboriginal Legal Service was not a trading corporation.

74 As stated by Pullin J at [82] of *ALS*, the "decision about whether a corporation is a trading corporation is a qualitative judgment which involves the balancing of many factors which, taken individually, may point either to or against the conclusion that the particular corporation is a trading corporation".

75 In *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10 Toohey J at 22-23 accepted a submission that to determine whether a corporation is a trading corporation involves "identifying the totality of the activities of the corporation, identifying those activities properly characterised as trading activities and then evaluating the extent of the trading activities against the totality of activities". Using this methodology, his Honour determined that the incorporated district clubs of the Western Australian Cricket Association were not trading corporations despite the fact that between 32% and 63% of their income was obtained by bar trading and other trading sales. His Honour concluded at 29 that the clubs' trading activities were not "so significant so as to impose on the clubs the character of a trading corporation". His Honour said that this type of revenue and the percentage of income derived from it was "relevant but not overly persuasive". His Honour said this did "not sufficiently account for the time spent by the clubs in activities that are not income producing viz the playing of cricket which is their primary function." His Honour said that none of the clubs carried on the game of cricket as a trade.

76 The question of whether a local government is a trading corporation has not been considered by the Industrial Appeal Court. There are however two decisions of single justices of the Federal Court of Australia which have considered this question. In both cases it was decided the local government was not a trading corporation for the purposes of the *Constitution*. These cases are *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102 and *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1993) 39 FCR 579. In *Etheridge Shire Council* the local government body was constituted under the *Local Government Act 1993* (Qld) and in *Rockdale Municipal Council* the local government body was constituted under the *Local Government Act 1919* (NSW).

77 In *Etheridge Shire Council*, Spender J reviewed the relevant authorities of the High Court, which were also discussed by Steytler P in *ALS*. At [42] Spender J said that it was important in the resolution of the case to recognise that the Etheridge Shire Council has jurisdiction under the *Local Government Act 1993* (Qld) "to make local laws for, and to otherwise ensure, the goodwill and government of its local government and geographical area …" At [44] his Honour referred to the other powers and responsibilities held by the Etheridge Shire Council including the making of local laws which create offences for the contravention of other local laws and fixing penalties for those offences. His Honour noted at [47] the dearth of authority upon whether a "municipal corporation" is or can be a trading corporation. His Honour referred to the decision of the High Court in *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533. His Honour said however that that decision was not on point because although the St George County Council had been established under the *Local*

Government Act 1919 (NSW) for "local government purposes", it "was empowered within its district to supply electricity and to supply and install electrical fittings and appliances, *and these were its only activities*" (emphasis in original). This is set out in, for example, the reasons of Barwick CJ at 539 and Gibbs J at 561. Stephen J at 567 said the St George County Council "has none of the regulatory or governmental functions associated with ordinary local government bodies".

78 In *Etheridge Shire Council* at [71]-[74] Spender J discussed the analysis by Toohey J of the district cricket clubs in *Hughes*. His Honour then said at [75]:

> "75 Such trading activity of the Etheridge Shire Council is quite insignificant in relation to the overall consideration of the activities of the Etheridge Shire Council, which, as a local government, exercises extensive legislative and executive functions in the local government area, and is its *raison d'être*."

79 His Honour then referred to the *Rockdale Municipal Council* decision and said there was no case in any superior court in which it had been accepted that a local government corporation, with the powers and responsibilities of the Etheridge Shire Council, was a constitutional corporation.

80 His Honour then went on to look more closely at the characteristics of the Etheridge Shire Council. His Honour noted:

(a) The power of the council to make by-laws.

(b) The objects of the *Local Government Act 1993* (Qld).

(c) The power of a local government to fix regulatory fees.

(d) The jurisdiction of a local government to make laws and its executive role.

(e) Section 25 of the *Local Government Act 1993* (Qld) which provides that a local government has jurisdiction to make local laws for, and otherwise ensure, the good rule and government of its territorial unit. (I note the similarity to s3.1 of *the LGA*).

(f) The general powers of a local government.

(g) The funding of activities of local governments by grants.

(h) The legislative provisions for the qualification and disqualification of membership of local government, obligations of councillors and the election for membership of local governments.

(i) The general operation of local governments under the *Local Government Act 1993* (Qld).

(j) The preparation of an annual report.

(k) The obligations upon local governments with respect to a "business activity".

(l) The control of roads by local government authorities.

81 At [129] his Honour said:

> "129 I have set out a review of the powers and activities of a local government at some length to indicate that a local government, including the Etheridge Shire Council, has extensive legislative and executive functions of a governmental kind in relation to the relevant local government area."

82 With respect, in my opinion the same applies to the Shire as constituted under *the LGA*.

83 Spender J then considered the activities of the Etheridge Shire Council which were argued to be trading. They included the operation of a visitor information centre and tourist facility, road works, "private works", hostel accommodation, operating a child care centre, office space rental, residential property rental, the sale of land, the hire of halls, the sale of water and the provision of services by the Shire to the Federal government. His Honour then reviewed the evidence about each of these items.

84 Relevantly, his Honour at [144] said:

> "144 Mr Herbert of counsel for the applicants in QUD 481 of 2006 drew attention to the record of the constitutional debates on 17 April 1897, at 793, where Mr Symon said, 'In the original Act corporations simply are mentioned. Why this difference?' To which Mr Barton, later an original judge of the High Court, said:
>
> > 'The reason of making the difference was this: It having been seen that the word 'corporations,' as it existed, covered municipal corporations, the term was changed to 'trade corporations.'"

85 This suggests that in using the expression "trading corporation", the framers of the *Constitution* did not intend that it would include "municipal corporations".

86 At [150] and [151], Spender J concluded:

> "150 I have set out in detail the evidence in relation to what is said to be the trading activities of the council.

> 151 All of them, in my opinion, including even the road works aspect of the activity of the council, after close analysis, entirely lack the essential quality of trade. Almost all of them run at a loss. They are all directed, in my view, to public benefit objectives within the shire. Their scale, even in monetary terms (putting to one side the non-monetary significance of the legislative and executive activity of the shire council), are so inconsequential and incidental to the primary activity and function of the council as to the deny to the council the characterisation of a 'trading corporation' or a 'financial corporation'."

87 His Honour also made observations about whether it could be intended by the framers of the *Constitution* that the Commonwealth could have legislative power over the local governments of a State. It is plain however that these observations were not central to the decision reached by Spender J and I do not find it necessary to consider them for the purposes of the present decision.

88 As I have said, in *Rockdale Municipal Council*, Davies J concluded that the council was not a trading corporation. His Honour's decision was reversed on appeal, but this issue was not addressed. (See *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290). After a review of the authorities, Davies J said that the issue was whether the trading activities of the *Rockdale Municipal Council* "formed a sufficiently significant proportion of its overall activities as to justify its description as a trading or financial corporation". (584) His Honour said that the Council was typical of "municipal councils in that it concerns itself with matters of local government". (584) His Honour then referred to and set out the revenue which was earned by the council. Primarily it was derived from rates, garbage levies and the rent from properties which it owned. Other fees for services such as libraries and the rubbish tip were also referred to.

89 His Honour decided that the provision of certain certificates under the *Local Government Act* 1919 (NSW) and the carrying out of a statutory function such as the provision of garbage services, were not trading activities. His Honour said that the "carrying out of a function of government in the interests of the community is not a trading activity". (585) His Honour also decided that although the council earned "substantial rents, its activity would not be characterised as a business". (585) His Honour concluded that he would not describe the Rockdale Municipal Council as a trading corporation. His Honour said that its "trading activities as a whole seem to me to be too insignificant in relation to the totality of Rockdale's activities to confer the requisite character". (585)

90 It is notable that *Rockdale Municipal Council* was cited with approval by Steytler P in *ALS* at [60] and [68]. At [60] his Honour said the observation by Davies J that the carrying out of a function of government, in the interests of the community, was not a trading activity, was important.

91 *Rockdale Municipal Council* has also been followed by the Supreme Court of New South Wales in the single judge decisions of *Jazabas Pty Ltd v Botany Bay Council* [2000] NSWSC 58 at [192]-[209], *Ritchie v Mosman Municipal Council* (2000) 107 LGERA 187 at [22] and *Pavlakis v Council of the City of Shoalhaven* [2005] NSWSC 436 at [108], [117]. The reasons in these decisions do not however, and with respect, take the analysis of the issue much further.

92 Steytler P at [62] of *ALS* also cited and quoted from *J S McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337 at 355. There, Emmett J contrasted the functions of government which are purely governmental or regulatory with those which involve the carrying on of business, such as the providing of services for remuneration, like any private trader may do.

93 In *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, the New South Wales Court of Appeal decided that, unlike other corporations, a local government body could not sue for defamation. Gleeson CJ at 689 quoted with approval the reasons of Lord Keith in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 547, including the following:

> "There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non trading. The most important of these features is that it is a governmental body".

94 Despite the different context, in my opinion this point has applicability to the present issue.

95 In the article "*The meaning of 'trading or financial corporations': Future directions*", Mr Nicholas Gouliaditis, (2008) 19 PLR 110, the author considers whether "municipal corporations" should be characterised as trading corporations. (I note however that the article was published before the decisions of *ALS* in the Industrial Appeal Court and *Etheridge Shire Council*).

96 At 119 Mr Gouliaditis said that a perceived problem with the activities test as it has been enunciated by the High Court is that it could apply to bodies that the drafters of the *Constitution* would not have expected to be trading corporations. An example given was "municipal corporations", by reference to the comments of Sir Edmund Barton during the Convention Debates. (This was quoted above in the reasons of Spender J in *Etheridge Shire Council*). Mr Gouliaditis considered a number of possibilities for the evolution of or change to the activities test. One alternative considered was the application of the activities test more stringently. It was noted at 127 that although the *State Superannuation Board* case decided that trading did not have to be the predominant and characteristic activity of a corporation to be characterised as a trading corporation, the case did not say that trading did not have to be a characteristic activity.

97 At 127 Mr Gouliaditis then said:

> "As Gibbs CJ noted in *Fencott v Muller*:
>
> > a corporation cannot take its character from activities which are uncharacteristic, even if those activities are not infrequently carried on. It may indeed be wrong to insist on finding activities that are 'primary' or 'predominant', but it is equally wrong to be satisfied with activities that are 'substantial', if the latter activities do not, in all the circumstances, show that the corporation has a character which the *Constitution* requires [*Fencott v Muller* (1983) 152 CLR 570 at 588].
>
> … it is noted that the majority of cases generally approach the activities test by comparing trading revenue to non-trading revenue. But whether trading is a sufficiently significant proportion of a corporation's activities to mark the corporation as a trading corporation does not depend solely on the proportion of income derived from its trading activities. Revenue data is only relevant in so far as it provides a reasonable indication of the relationship between trading activities and overall activities. For example, a body could earn 100% of its income from trading activities and still not be a trading corporation if that income-generating activity was only a small part of what the corporation did. It is accepted, however, that 'there are difficulties involved in comparing economic and non-economic activities (*Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10 at 23 (Toohey J))".

98 In the sentence prior to the passage quoted from the reasons of Gibbs CJ in *Fencott*, the Chief Justice said the character of a corporation "may be discovered by considering what it does and what it is intended to do". In my opinion the observations made by Mr Gouliaditis are pertinent. I do not however necessarily think that the courts should apply the activities test more stringently; but need to follow the process described by Mason J in *Adamson* and Toohey J in *Hughes*. Such an analysis will proceed in the way Steytler P reasoned in *ALS*; and produce the "qualitative assessment" referred to by Pullin J. The analysis should not just take into account the activities of a corporation which produce income to decide whether it should be characterised as a trading corporation. As stated by Toohey J in *Hughes* at 25: "A trading activity may represent a significant part of a [corporation's] income but be relatively insignificant in an overall consideration of the [corporation's] activities". For a local government, a consideration of its activities must have full regard to its statutory function.

Trading

99 As I have said a major plank of the appeal was the argument by the Shire that the Commissioner erred in deciding that a number of its income producing activities were not trading. I will shortly consider this submission. It is important to recognise however that each of the activities conducted by the Shire occurs because of its overriding functions and duties under *the LGA* and other state legislation. In particular, the activities of the Shire must be viewed within the paradigm of its general function under s3.1(1) of *the LGA* being to "provide for the good government of persons in its district".

100 In *ALS*, Steytler P at [68] set out relevant principles to be drawn from the High Court and other decisions he had earlier analysed. With respect to trading, the following points were made, omitting citations:

(a) Trading is not to be given any narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trading services.

(b) The making of a profit is not an essential prerequisite of trade, but it is a usual concomitant.

(c) The fact that trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as trade.

(d) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading.

101 Le Miere J, although dissenting in the outcome in *ALS*, relevantly said at [103]:

> "103 The commercial nature of an activity may be an element in deciding whether the activity is a trading activity. But in that context commercial refers to activities which earn revenue and are conducted in a business-like way rather than with a view to profit."

The Commissioner's Characterisation of the Activities of the Shire

102 The Shire did not contend that the Commissioner had erred in her summary of the evidence about each of the activities which were asserted to be trading. It was submitted that the Commissioner fell into error in the characterisation of those activities. Accordingly, regard may be had to the Commissioner's summary of the evidence in considering the argument of the Shire.

(a) Items 1 and 4 – Sale of Council Publications and Fire Maps

103 The publications sold by the Shire included Council minutes and agendas. The costs charged to the public for the publications covered the cost of printing them. A majority of the publications were also available, without charge, on the website of the Shire. The Commissioner found at [86] that the charges for the publications were levied on a cost recovery basis. At [110] the Commissioner found that the income from these activities, together with the supply of refuse bins, was minor and peripheral to the main functions of the respondent. They were services provided by the respondent to support the local community. The

funds from publications sold by the respondent were not generated on a commercial basis. I see no error in the Commissioner's conclusion that the revenue received from the sale of publications was not from trading. It was a community service to keep people informed and to provide information by way of the "fire maps". The activities were not conducted in a business like way in that they did not generate a profit. The lack of commerciality of the activities is also evident from the fact that the publications were available without charge from the website of the Shire.

(b) Items 2, 3 and 7 – Fire and Emergency Services

104 The total amount of these items for the 2007-2008 financial year was $53,600. Mr Durtanovich asserted that this revenue should be considered as trading income as it enabled the Shire to undertake a State Government responsibility that would not be carried out by the Shire if the payment was not made. More specifically, the payment listed at item 2 was from an emergency services levy allocated to the Shire on a needs basis for fire control. The income was used for purchasing items including fire units and protective clothing for brigade members. The payment at item 3 also came from the emergency services levy and the income was used to purchase items including office equipment, vehicles and protective clothing for the Shire's State Emergency Service.

105 At [87] the Commissioner said that the income paid to the Shire under item 3 was a commission paid for collecting the statutory emergency services levy imposed on the ratepayers of the Shire. At [110] the Commissioner said that this activity was provided by the respondent as a community service and was "incidental and peripheral" to the main activities of the Shire. Earlier in that paragraph the Commissioner said that many of the activities which the Shire relied upon as being trading were to "provide services for the benefit of the local community as one would expect of the activities of a Local Government entity given its charter under the LG Act". At [82] the Commissioner had said that the main role of the Shire was "to provide a range of infrastructure and other services to the residents of the Shire for their benefit".

106 I am not convinced that it is correct to characterise the collection of the levy as incidental and peripheral. In my opinion it is a component part of what the Shire does as the local governing body. In my opinion however the Commissioner was not in error in deciding that this income was not generated by trading activities. The applicable statutory regime, about the raising of the levy and the payment therefore by the State, under the *Fire and Emergency Services Act*, is set out in the reasons of Smith SC. This activity lacks a commercial character in that what was done was provided for by statute and involved a community service, funded by the State Government. That the funding enabled the Shire to undertake a State Government responsibility in my opinion supports the characterisation that the activity was not trading. The income received was in the nature of a grant by the State Government for performing important services for the benefit of the residents of the Shire and the community as a whole.

(c) Item 5 – Grant – Emergency Services Collocation

107 This was a grant to facilitate the construction and fit-out of a new building in Hopetoun for the housing of fire and emergency services. A building company was used to undertake much of the work and was chosen through a tender process. The Shire was reimbursed out of the grant for administration costs associated with the project. At [88] the Commissioner noted that details had been requested from the Shire about the amount it received from the grant in return for administering the project, but no information was forthcoming.

108 At [109] the Commissioner said that this income was not received as result of a trading activity as the money from the grant was mainly used to fund contractors to construct a community facility. The Commissioner said that she was, due to a lack of evidence, unable to determine the amount the Shire received to facilitate the construction of the building.

109 In my opinion the conclusion of the Commissioner was not in error. Steytler P in *ALS* at [74] indicated that engaging in a public welfare activity pursuant to an agreement with Government, under which there will be reimbursement for most of its costs, is not trading. There will be a lack of a "commercial aspect". In my opinion this applies to the present item. A grant was received from the Government to fund the building of something which was for the benefit of the community. The building was not to be used for any commercial purpose. Although the Commissioner could have obtained additional evidence from the Shire about the amount of the grant which was provided for administering the project, non receipt of this evidence does not in my opinion lead to the conclusion that the Commissioner erred in her characterisation of this item. The type of analysis by Steytler P that I have referred to still leads to the conclusion that the item was not a trading activity.

(d) Items 6 and 31 – Rent

110 This income was received from the leasing by the Shire of properties owned by it. The majority of the premises were rented to Shire employees at non commercial rates and the Shire paid for the upkeep of these properties. At [110] the Commissioner said there was no evidence the Shire made a profit from this activity and that lower than commercial rents were charged to employees to enable them to reside and work in the Shire.

111 In my opinion the Commissioner was not in error in not characterising this activity as trading. The activity was engaged in for the benefit of the community. It was plainly part of an employment package to attract employees to work for the Shire and which was for the benefit of the community. It was not a commercial arrangement. Indicia of this were the lack of charging of commercial rates and the purpose of the activity.

(e) Items 9, 10, 11 and 12 – Collection of Business Refuse and Business Tip Charges, Building Site Tip Charges and Mine Site Refuse Collection

112 These items did not include income from domestic refuse collection. These activities were optional services provided by the Shire to businesses. At [90], the Commissioner said that it was unclear if these services were provided on a cost recovery basis or if a profit was made. If this point was significant to the decision to be made by the Commissioner, additional evidence should have been ordered to be provided. At [110] the Commissioner accepted that the income received was for activities over and above those which the Shire normally provided. The Commissioner said there was however no evidence that the services were undertaken on a profit making or commercial basis.

113 I accept that evidence about whether these services were provided on a profit making basis is relevant. There was in my opinion however, contrary to the conclusion of the Commissioner, evidence that these services were carried on a commercial basis. The services provided were in addition to those provided to the general community and were provided to businesses in exchange for income. Although there was clearly a community benefit in providing these services, this did not itself mean that the activity was not one of trade.

(f) Item 13 – Sale of Refuse Bins

114 This income was received for the sale of additional refuse bins required by residents and businesses. The bins were not sold for a profit.

115 The Commissioner's finding on this activity was grouped with her finding about items 1 and 4 at [110]. The Commissioner said that the income received was minor and the activities were peripheral to the main functions of the Shire. They were services provided to support the local community and the refuse bins were sold at cost.

116 In my opinion these findings were not in error. The sale of the bins lacked a commercial character in that they were provided as a service for members of the community and were not sold to generate a profit. There was no business aspect to the sale of the bins.

(g) Item 14 – Cemetery Charges

117 These were fees for burials performed by employees of the Shire. The statutory scheme which allows the Shire to perform burials and charge for this under the *Cemeteries Act*, is set out in the reasons of Smith SC. Mr Durtanovich said the rates charged were commercial. At [92] the Commissioner said that it was unclear if the Shire made a profit from the provision of the service. Again, additional evidence could have been obtained if this was crucial to the decision made by the Commissioner. It is perhaps likely however that if the services were charged using commercial rates then a profit was made. The Commissioner found that this activity (and those constituted by items 15-20) was incidental and peripheral to the main activities carried on by the Shire and in the main were provided as services to the local community. The Commissioner also referred to the lack of evidence about the services being provided on a cost recovery or profit making basis.

118 In my opinion, if this service was charged for at commercial rates, including a profit, it did constitute trading. This is because although a service was being provided to members of the community, it was done in a business like way. In my opinion this was so even if, as explained by Smith SC, the entitlement to charge a fee and the recovery thereof are statute based. The same may be said about the supply of electricity by the St George County Council, but nevertheless that was held to be a trading activity by Barwick CJ and Stephen J, whose approach on the way to decide whether a corporation is a constitutional corporation was later followed in *Adamson*. I note however that the amount of the income generated for burial services in 2007-2008 was only $930. This suggests that this was not a significant activity of the Shire. Accordingly, any mischaracterisation of this item by the Commissioner is of limited significance overall.

(h) Items 15, 17 and 18 – Income Received from the Hire of Halls, the Ravensthorpe Entertainment Centre and the Sports Pavilion

119 This income was derived from the hire of buildings and facilities owned, operated and maintained by the Shire. The Commissioner said it was unclear if a profit was made from conducting the activities. There was also no evidence that commercial rates were charged. The Commissioner's conclusions on these activities was grouped with the cemetery charges item which I have earlier referred to.

120 These activities were clearly engaged in for the benefit of the local community. That is relevant to but not necessarily determinative of whether something is a trading activity. Whether the activity was engaged in by the charging of commercial rates and whether a profit was made are also relevant. In the absence of evidence about that, I am unable to decide whether the Commissioner erred in her characterisation. If the lack of this evidence was crucial to the Full Bench being able to decide whether the Commissioner erred in finding that the Shire was not a trading corporation, the appeal would need to be allowed and the matter remitted to the Commissioner to obtain additional evidence. This is because the Commissioner would have erred in making the finding she did, in the absence of obtaining the additional evidence. (See generally *Guest v Kimberley Land Council* [2009] WAIRC 00668; (2009) 89 WAIG 2063).

(i) Items 16 and 19 – Swimming Pool Admission Charges and Gymnasium Memberships

121 This income was obtained by charges to enter the Ravensthorpe swimming pool, owned and maintained by the Shire and for gym memberships for residents to use a gymnasium operated by the Shire. At [94] the Commissioner said that there was no evidence that the Shire made a profit. The Commissioner's finding on these items was grouped with her findings on items 14, 15, 17, 18 and 20. I have the same opinion about the Commissioner's finding on these items as those expressed in the previous paragraph.

(j) Items 20 and 23 – Camping Fees and Gate Registrations

122 Members of the public were charged fees to use camping facilities provided by the Shire. Gate registration charges were nominal fees collected for the right of land owners to put gates across public thoroughfares. At [95] the Commissioner said it was unclear if the camping fees covered the costs of maintaining the camping facilities. The Commissioner also said that there was no evidence of any service or good being provided in return for the putting of the gates across public thoroughfares. For this reason the Commissioner at [109] held that item 23 was not a trading activity. The Commissioner's conclusion on item 20 was included in the discussions and findings about items 14-19. To that extent therefore my observations about these items, set out earlier, apply.

123 With respect to the gate registrations, the evidence was that a nominal amount was charged. This suggests the lack of any commercial character to this activity. This is despite the fact that the money was paid by the farmers in exchange for the permission to erect the gates.

(k) Items 21 and 22 – Landing Fees and Charges and Ravensthorpe Nickel Operation Contribution

124 The evidence was that BHP Billiton's Ravensthorpe Nickel Operation contributed to the operating costs of the Ravensthorpe airport, which is run by the Shire. Landing fees were also charged to users of the airport. Some of the equipment used at the airport was paid for out of grant funding and capital works costs relevant to the airport were paid for by BHP.

125 At [109] the Commissioner said the funds paid to the Shire did not represent income from trading activities, as details were not provided about how the contribution made by BHP towards the cost of operating the airport was used and whether or not this contribution was paid in return for the provision of goods and/or services by the Shire. Again, if the lack of this evidence was significant, the Shire should have been ordered to provide it. The consideration and relevance of these items is complicated by the notorious fact that BHP has now closed its nickel mining operation in Ravensthorpe. Accordingly, the inference may be made that BHP no longer contributes towards the cost of operating the airport. Therefore, even if the income received from BHP was by way of trading, it is no longer relevant to an assessment of whether the Shire is a trading corporation.

126 With respect to item 21, the Commissioner at [110] said that although this income represented a significant amount in return for the provision of the service, it was only a small proportion of the costs of operating the airport. The Commissioner also said that the operation of the airport was not conducted on a commercial basis as some of the costs for establishing and operating the airport were met by grant funding and contributions from BHP. In my opinion the Commissioner was not in error in her finding with respect to grant funding. With respect to contributions from BHP, the lack of evidence to some extent makes the finding by the Commissioner problematic. As BHP has ceased its Ravensthorpe operations however this item is no longer relevant in determining whether the Shire is a trading corporation by reason of the activities it engages in.

(l) Item 24 – Hopetoun Caravan Park Lease

127 The caravan park is on Shire vested land and a commercial operator pays the Shire for the lease of the land. At [97] the Commissioner said it was unclear if the lease arrangement generated a profit for the respondent. At [110] the Commissioner found that although the income from the lease was not insignificant it was a minor and peripheral activity of the Shire.

128 Whilst I agree with the latter conclusion by the Commissioner, in my opinion the evidence suggested that the leasing of the land to the caravan park operator was a commercial activity. It was a rental received so that the operators could carry on a business. Insofar as the Commissioner based her findings upon a lack of evidence, the observations I have made earlier are relevant.

(m) Item 25 – Minor Revenue

129 The Shire did not provide any evidence as to how the amount of $500 was generated in the 2007-2008 financial year. At [109] the Commissioner said that she was unable to determine if the income received was as a result of trading. Given the very small amount of this income I cannot see any error in the Commissioner proceeding in that way.

(n) Items 26 and 28 – Lease of Land Owned by the Respondent

130 These were commercial leases for the use of land as farm land at the airport and for a campsite for the use of "Tectonic Resources" employees. At [110] the Commissioner said that although the income was not insubstantial it resulted from activities which are incidental and peripheral to the respondent's main activities.

131 In my opinion this reasoning is problematic. Whether or not the activities were incidental and peripheral to the main activities of the Shire was relevant to the characterisation of the Shire as being a trading corporation or otherwise. This did not mean however that these particular activities were not trading activities. In my opinion the evidence suggested that the leasing was of a commercial character and should have been found to be a trading activity.

(o) Item 27 – Standpipe Administration Charge

132 The Shire received this income for the sale of standpipe water from facilities maintained by the Shire. At [99] the Commissioner said it was unclear if the fees charged covered the costs of operating the standpipes. At [110] the Commissioner found the income received was minor and resulted from an activity which is incidental and peripheral to the respondent's main activities. It was also unclear if the activity was operated on a commercial basis.

133 This reasoning is problematic for the reasons earlier set out. On the evidence I accept that the Commissioner was unable to determine whether this activity was trading. If this possible trading was significant to the Commissioner's decision, then additional evidence should have been obtained. I note however that the amount of income received in 2007-2008 was only $1,759. Accordingly, even if this was a trading activity, it was one which did not generate much income.

(p) Item 31 – Staff Housing Rent

134 This income was generated by rent paid by Shire employees for Shire owned houses. The rents were not levied at a commercial rental rate. Mr Durtanovich estimated that the rent the employees paid was 50-60% less than market rates.

135 I have earlier referred to the Commissioner's finding about this item which in my opinion was not in error.

(q) Items 32 – 35 – Westpac Banking Commission, Department for Planning and Infrastructure Commissions, Safe Custody Charges and Westpac Training

136 The commissions received from Westpac were for the Shire running a bank agency on its behalf. A safe custody service was also provided for "Westpac Items". In addition the Shire was reimbursed by Westpac for training staff to work in the bank agency. The income noted at item 33 was for commissions for operating an agency for vehicle licensing on behalf of the Department for Planning and Infrastructure (DPI).

137 At [110] the Commissioner found that the banking and DPI services were engaged in by the Shire for the public benefit. It was also inferred by the Commissioner that these were not major activities as the services would be attended to by the employees of the Shire on an intermittent basis. The Commissioner said that income for providing safe custody was minor and was incidental and peripheral to the main activities of the Shire.

138 Again this reasoning is somewhat problematic for the reasons earlier expressed. In my opinion the operating of a banking service for Westpac in exchange for receiving commissions had the hallmarks of and was a trading activity. Although the activity was provided for the benefit of members of the community, the Shire received a commercial income for doing so. This would seem to also apply to the provision of safe custody. With respect to the training of employees, the description by Mr Durtanovich of a "reimburse[ment]", suggests that the amount received from Westpac simply covered the cost of training employees. On this basis the Shire did not make a profit, which is ordinarily a concomitant of trade. However, the activity of having employees trained was, I infer, necessary to obtain the commissions received by Westpac and accordingly part of that trading activity.

139 In my opinion the provision of services of vehicle licensing for DPI is more difficult to characterise. This was the provision of a Government service. It was engaged in by the Shire as an arm of Government. The Shire did however receive a commission from the State Government for providing the service. The service undoubtedly had a public element about it. It was a service which could only be provided by or with the authority of the DPI. For these reasons I incline to the view that it was not a trading activity. Even if it was a trading activity, I agree with the Commissioner that overall the work which was done to generate this income was incidental to the activities of the Shire.

(r) Items 36 – 46

140 The Commissioner did not consider these items because no income was generated by these activities for the 2007-2008 financial year. The appellant did not submit that this was in error. In my opinion, the income received for the 2007-2008 financial year provided the best evidence of the present amount of income from the activities which the Shire asserted were trading.

(s) Items 47 – 49 - Ravensthorpe and Munglinup Sewerage Charges

141 Residents who chose to connect to the sewerage system provided by the Shire were charged an annual rate for this service. At [103] the Commissioner said that no details were provided about whether the service was profit making. On this basis it seems, at [110], that the Commissioner concluded that it was unclear if the activity was operated on a commercial basis. Accordingly, it was not a trading activity.

142 As I have said earlier, determining the characterisation of the activity on the basis of a lack of evidence is somewhat problematic. However these fees were generated by the Shire operating a service for the benefit of members of the community. It was a governmental service. It was a service which only the Shire could provide. Accordingly, I am inclined to the view that it was not a trading activity.

143 I now turn to the three activities which the Commissioner found were trading activities.

(t) Item 30 – Private Works Revenue

144 This income was received for carting waste water for BHP and for constructing a gravel pit using the Shire's plant and equipment. At [100] the Commissioner said that these works were undertaken on the basis of a fee being charged over and above the cost of providing the service and that the Shire made a profit. On this basis the Commissioner found at [111] that the income received was as a result of trading activity. I agree with this finding.

(u) Item 51 – Ravensthorpe Sewerage Extension

145 This amount was paid to the Shire by the Department of Industry and Resources to upgrade the sewerage treatment plant. At [104] the Commissioner said the Shire had a license to operate the Ravensthorpe sewerage system. Some of the work involved in the project was done by contractors. The Commissioner said that it appeared on the evidence and documentation that the activity was conducted on a commercial basis. At [111] the Commissioner found that as the Shire received income on a commercial basis in return for the provision of the activity, it was a trading activity. I do not think this conclusion was in error.

(v) Item 53

146 This was an amount paid to the Shire by the Water Corporation for the cost of disposing of effluent at the Shire's licensed facility at Ravensthorpe. It was part of a contract which the Shire had with the Water Corporation to cart effluent from Hopetoun to Ravensthorpe. At [105] the Commissioner said it appeared the Shire conducted this activity on a commercial basis. For this reason the Commissioner found at [111] that this was a trading activity. Again I do not think this conclusion is erroneous.

Analysis

147 From my review of the items considered by the Commissioner it can be seen that I think there were errors in the characterisation of some items as not being trading. In addition, there are items where the Commissioner could or should have ordered that additional evidence be provided before a proper characterisation could be made. The issue on appeal is not however whether the Commissioner erred in her consideration of individual items. It is whether she erred in her characterisation of the Shire as not being a trading corporation. If I was of the opinion that the Commissioner had found the Shire was not a trading corporation when she could not properly do so in the absence of obtaining additional evidence, I would allow the appeal. In my opinion however this is not the present position.

148 Even if all of the items where the reasoning of the Commissioner is in error or problematic, were to be characterised as trading activities, it remains that the substantial majority of the income received by the Shire is not from trading activities. The

substantial majority of its income is, as a local government body, received by way of grants, rates, ordinary service charges and the like. This may be gleaned from the first table set out earlier, where the total revenue received by the Shire for 2007-2008 is in excess of $10.5 million and also exhibit R1, which shows the revenue of the Shire for 2007-2008.

149 Additionally, the trading activities are generally incidental to the activities of the Shire as a whole – functioning as a local government body for the "good government of persons in its district". A good example is the activity of the Shire running a Westpac Bank agency. This involves the intermittent time of some of the employees of the Shire. Also, the activity would, I infer, be engaged in, overwhelmingly, for the benefit of the residents of the Shire. It is not an activity which on its own, or together with other activities, makes the Shire a trading corporation.

150 Some of the activities of local government, which the Shire engages in, can be obtained from the Statement of Financial Performance for 2007-2008. (Exhibit R1). This shows that, amongst other things, the Shire was engaged in the collection of rates, administering the council, general administration, fire prevention, animal control, enhancing law and order, health services, aged care services, providing resource centres, sanitation, planning and development, supporting regional libraries, "other culture", protecting the environment, cleaning and maintenance, tourism and area promotion, building control, community development and public works. Most if not all of these activities do not involve trading.

151 As I have earlier stressed, the Shire is part of that arm of government constituted by local government. Pursuant to its *Constitution*, the State is obliged to maintain a system of local governing bodies. As set out earlier at length, local government bodies under *the LGA* and other State legislation have numerous legislative, regulatory, prosecutorial, executive and service providing functions. These activities do not involve trading, the running of a business or commerciality. The way in which it conducts its activities is also controlled by the provisions of *the LGA* which I have earlier discussed. In my opinion, the observations by Spender J in *Etheridge Shire Council* at [75] are applicable to the Shire. That is, the Shire "as a local government, exercises extensive legislative and executive functions in the local government area, and is its raison d'être". In my opinion the analysis which I have undertaken about the Shire does not resort to the "purpose" test rejected by the High Court. The focus has been upon function and not purpose. A bodies' function is descriptive of its actions and what it does. A function is the kind of action or activity which is proper to a person, body, or institution (Macquarie Dictionary, Online edition, 30 October 2009). By contrast, the purpose of a corporation is the object for which something is done, or its aim (Macquarie Dictionary, Online edition, 30 October 2009). The Shire, as a local government body, is distinguishable from other corporations. The function of the Shire, what it does, is set out in *the LGA* and other legislation I have referred to. Its function is to govern a local district. This, in my opinion, stamps the character of the Shire. The activities which it engages in which do or might constitute trading, do not change this. They are incidental to what the Shire does.

152 In my respectful opinion, the decisions of *Bell* and *Bysterveld* are of limited assistance. With respect, I do not think that in either there was a comprehensive review of the function, role and activities of the local governments, in accordance with *the LGA* and other legislation. They were also both decided before *ALS* by the Industrial Appeal Court and *Etheridge Shire Council*.

153 Also, in my opinion it is not necessary to, as Smith SC has suggested, try to obtain evidence about the number of employees of the Shire and characterise whether the employees do or do not work in the trading activities of the Shire. This was not considered necessary in *Etheridge Shire Council*, *Rockdale Shire Council* or *Hughes*. Such information would not include details about the work done by the elected officers of the council, who are not employees. The time taken in their work, as the controlling body of the council, is unlikely to be recorded. I accept that the number, and nature of the work, of employees of a corporation can be relevant to deciding if it is a trading corporation. In the present appeal however, even with this information, it would not change the fact that the activities which are or could be trading are incidental to the Shire's overall function and activities, as the local governing body.

154 As stated by Pullin J in *ALS* at [82], a qualitative judgment is necessary in deciding whether a corporation is a trading corporation. This usually does not just involve an assessment of whether the income received by the corporation is mainly from trading. The type of analysis which is required is, as I have set out above, that explained in the reasons of Mason J in *Adamson* and applied by Toohey J in *Hughes* and Steytler P in *ALS*. With respect to local governments however, the analysis must be undertaken with a close eye to their particular characteristics and functions under *the LGA* and other legislation.

155 After engaging in this analysis, in my opinion, the activities of the Shire which are trading are incidental and peripheral to its primary activities and functions as a local government body, with all that entails. Overall, the Shire does not exist for, function, or conduct activities which are of a commercial character.

156 For these reasons, in my opinion, the Commissioner was not in error in characterising the Shire as not being a trading corporation. The Shire's complaints about the Commissioner's reasoning, set out earlier, do not lead to this conclusion.

Orders

157 Ordinarily this conclusion would lead to the dismissal of the appeal. There is one aspect of the order made by the Commissioner however which I think is problematic. This is that the declaration was made that, during the time that the respondent was employed by the Shire, the Shire was not a trading corporation. This is problematic in that if the Shire was a trading corporation at the time when the Commission would otherwise be seized of the matter, it would not have jurisdiction to hear and determine it. This involves the unlikely prospect that the Shire or another corporate body could change its character from not being a trading corporation to being a trading corporation between the time when an applicant was employed by it and the time when the Commission would otherwise hear and determine an application. Nevertheless, in my opinion, the order of the Commission should be accurate. Accordingly, in my opinion, the appeal should be allowed to the extent that the second order made by the Commission is deleted and replaced by an order declaring that the Shire is not a trading corporation.

158 Accordingly, in my opinion, the following orders should be made:

1. Leave to appeal is granted.

2. The appeal is allowed, to the extent that order 2 made by the Commission on 17 July 2009 is deleted and replaced with the following:

   2. DECLARES THAT the respondent is not a trading corporation.

3. The appeal is otherwise dismissed.

159 In accordance with s35 of *the Act*, in my opinion, the above should be published as a minute of proposed order. If the parties wish to do so, they should make submissions about the terms of the order to be made within four days.

BEECH CC:

Introduction

160 The background to this matter is set out in the Reasons for Decision of his Honour the Acting President. I too would grant leave to appeal and dismiss the appeal.

161 On behalf of the Shire of Ravensthorpe it was submitted that there is uncertainty over the workplace relations jurisdiction for local government in WA following the Commonwealth's "Work Choices" amendments to the *Workplace Relations Act, 1996* ("WR Act") in March 2006. The submission is that the decisions of Smith SC in *Bysterveld v Shire of Cue* [2007] WAIRC 00941; (2007) 87 WAIG 2462, 165 IR 186 and in *Bell v Shire of Dalwallinu* [2008] WAIRC 01269; (2008) 88 WAIG 1867 have provided a "level of consistency" for local government in dealing with this uncertainty and that this consistency will be lost if the decision in this appeal is allowed to stand.

162 In response to this submission, it should be pointed out that those two decisions are first-instance decisions and they are not binding on this Full Bench. Further, it is not open to the Full Bench to decide this appeal on the basis of following those decisions to ensure a "level of consistency" for local government. This is because, as the Shire of Ravensthorpe itself recognises, since those two first-instance decisions, the Industrial Appeal Court in *Aboriginal Legal Service of Western Australia (Inc) v. Lawrence* [No. 2] [2008] WASCA 254; (2008) 89 WAIG 243 ("the *ALS* decision") has considered the principles to be applied in this jurisdiction when considering whether a corporation is a trading or financial corporation and that decision, and those principles, are binding upon this Commission unless the decision is able to be distinguished. I do not think it is able to be distinguished and there is no submission before us that it should be distinguished.

163 Therefore, it is primarily the principles arising out of the *ALS* decision which are to be applied in considering the facts of this matter and not those two first-instance decisions.

164 It should also be pointed out that it is not the function of this Full Bench to resolve the uncertainty over the workplace relations jurisdiction for local government in WA following the Commonwealth's "Work Choices" amendments to the WR Act. This is an appeal against the decision of the Commissioner at first instance that the Shire of Ravensthorpe is not a trading corporation and the issue before the Full Bench is to decide whether the Commissioner erred in reaching that conclusion for the reasons advanced by the Shire of Ravensthorpe in its grounds of appeal.

The Relevant Principles to be Applied

165 The Shire of Ravensthorpe's first ground of appeal is that the Commissioner incorrectly interpreted the nature of activity conducted by it by not applying the accepted principles contained within the *ALS* decision, resulting in an inaccurate assessment of the Shire of Ravensthorpe's trading activity and the significance of that activity to it.

166 This ground requires an identification of the principles contained within the *ALS* decision. It is important to note at the commencement that in the *ALS* decision, the issue whether the Aboriginal Legal Service of WA (Inc.) was or was not a trading corporation involved an examination of all of the circumstances and not just an examination of those activities which were said to be trading activities. At [16], Steytler P, with whom Pullin J agreed, stated under the heading "Is the appellant a trading corporation?":

> "That brings me to the question whether there was an error of the kind contended for. In order to answer that question, it is necessary to give some attention to the appellant's constitution, its activities, the nature of its funding arrangements and the contract entered into with the Department."

167 The "appellant" referred to was of course the Aboriginal Legal Service of WA (Inc.) but applying that statement to the circumstances of this case means that in order to consider whether "the Commission incorrectly interpreted the nature of activity conducted by the Shire of Ravensthorpe by not applying the accepted principles contained within the *ALS* decision" will require a consideration of all of the circumstances of the Shire of Ravensthorpe and not just the activities which it says constitute its trading activities. That is, attention needs to be given to its "constitution" in the sense of its structure and purpose under the *Local Government Act, 1995* (WA) (the LG Act), its activities and where relevant, its funding arrangements This is not intended to be an exhaustive list.

168 That is not to say that the Shire's legislative structure and purpose under the LG Act will be determinative. It cannot be determinative because the connection of a corporation with the government of a State does not take it outside s 51(xx) of the Constitution (per Steytler P in the *ALS* decision at [53]). Further, again as stated by Steytler P at [68](5) (citations omitted):

> "(5) The ends which a corporation seeks to serve by trading are irrelevant to its description. Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade'."

169 Nevertheless, the *ALS* decision at [16] is authority for the proposition that when examining whether the Shire is a trading corporation, some attention must be given to the Shire's legislative structure and purpose under the *LG Act*.

170 This was also the approach in *Australian Workers' Union of Employees, Queensland & Ors v. Etheridge Shire Council & Anor* (2008) 171 FCR 102; 250 ALR 485 (*Etheridge*). This decision is a recent case before the Federal Court concerning precisely the issue of whether a local government council is, or is not, a trading or a financial corporation and I consider it both helpful and relevant in the context of this appeal. In *Etheridge*, Spender J considered what is the proper test to apply and stated the question as being (at [85], ALR 501):

> "I therefore proceed to inquire whether the Etheridge Shire Council is a trading corporation or a financial corporation, by considering whether, on the evidence, 'the predominant and characteristic activity of the Etheridge Shire Council is trading, whether in goods or services', or whether 'the predominant and characteristic activity of the Etheridge Shire Council is in finance'."

171 Spender J noted that there is no High Court, and very little superior court, authority directly relevant to the question of whether a "municipal corporation" is, or can be, a financial or trading corporation within the meaning of the Constitution. His Honour stated at [42] that it is important in the resolution of the question whether the Etheridge Shire Council is a trading or financial corporation to recognise that under the relevant Queensland local government legislation the Etheridge Shire Council has jurisdiction to make local laws for, and to otherwise ensure, the goodwill and government of its local government and geographical area in Far North Queensland. Such local laws, upon commencement, have the force of law of the State of Queensland. His Honour stated at [86] that it is necessary to have regard not only to whether the predominant and characteristic activity of the Council is trading or finance, but also the extent of that activity and its relative significance in the affairs of the Etheridge Shire Council.

172 I consider the approach of Spender J in giving attention to the jurisdiction of the Etheridge Shire Council under the relevant Queensland local government legislation is consistent with the approach of the majority in the *ALS* decision in giving attention to all of the circumstances of the corporation and not just the activities which it says constitute its trading activities, and that approach is to be applied here.

173 Further support for this approach is to be seen in the test applied by Davies J in *Mid Density Development Pty Ltd v. Rockdale Municipal Council* (1992) 39 FCR 579 (*Rockdale*) at [19] (FCR 584) which itself was quoted by Steytler P in the *ALS* decision at [60]:

> "The issue is, therefore, whether Rockdale's trading activities or financial activities formed a sufficiently significant proportion of its overall activities as to justify its description as a trading or financial corporation. The adjectives 'significant' and 'substantial' were considered in the context of characterisation in *Deputy Commissioner of Taxation (Cth) v. Stewart* [1984] HCA 11; (1984) 154 CLR 385 at 390, 397 and 399-400. The activities must be of a sufficiently significant or substantial scale as to confer the character of 'trading' or 'financial' upon the corporation. The relationship between the activities relied upon and the overall activities of the corporation, and the extent of those activities in comparison to the extent of the corporation's activities overall are relevant."

174 As well as being referred to by Steytler P, *Rockdale* has also been referred to with apparent approval by the New South Wales Supreme Court in *Tom Pavlakis and Anor v. The Council of the City of Shoalhaven* [2005] NSWSC 436 (9 June 2005). I therefore attach some significance to this decision for the purposes of this matter. In my view, the statement of Davies J above that the relationship between the activities relied upon and the overall activities of the corporation, and the extent of those activities in comparison to the extent of the corporation's activities overall, is consistent with the approach of the majority in the *ALS* decision of giving attention to all of the circumstances of the corporation and not just the activities which it says constitute its trading activities. In my view, the expression "all of the circumstances of the corporation" means that evidence about the number of employees and officers of the corporation who are engaged in its activities or the extent of their engagement in or the time spent on its activities may be helpful in the task of characterising a corporation as a trading or financial corporation, although no single factor is likely on its own to be determinative.

175 The structure and function of the Shire of Ravensthorpe is to be found in the relevant provisions of the *LG Act* which are set out in the reasons for decision of his Honour the Acting President and I gratefully adopt them here (and see too Smith SC in *Bysterveld v. Shire of Cue* [2007] WAIRC 00941 at [34] – [40]; (2007) 87 WAIG 2462 at 2467). The activities of the Shire of Ravensthorpe, other than those which the Shire itself deemed as trading activities, were not the subject of direct evidence from Mr Durtanovich. However, the range of its overall activities may be measured in a financial sense from the various categories of expenditure in the Shire's statements of financial performance which became exhibits R1 and R2 (AB 98 - 113, 114 – 131).

176 The Commissioner at first instance recognised the relationship between the activities relied upon and the overall activities of the Shire. After noting s 1.3(3) and s 3.1(1) of the *LG Act*, the Commissioner noted Mr Durtanovich's evidence that the Shire of Ravensthorpe's role was to carry out its statutory functions in addition to conducting a range of what he described as "trading activities" and found that the Shire's main role was to provide a range of infrastructure and other services to the residents of the Shire for their benefit.

177 She observed (at AB 32) that the *LG Act* creates a duty on the Shire of Ravensthorpe to focus on the environment, social advancement and economic prosperity of community members residing within the Shire. The Commissioner noted this statutory obligation on the Shire of Ravensthorpe in carrying out its functions to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity, together with its general function to provide for the good government of persons in its district. In doing so, the Commissioner at first instance correctly followed the approach of the majority in the *ALS* decision and to the extent the Shire's grounds of appeal suggest otherwise they are not made out.

Assessing the Activities of the Shire

178 The grounds in paragraph 2 contain the submission that the Commissioner assessed a trading activity as peripheral and minor in nature on an individual basis as opposed to evaluating the trading activity collectively and that the Commissioner failed to recognise that various items were conducted as part of the one activity area, for example recreational services, refuse services or banking.

179 In my view, the ground that the Commissioner did not evaluate the trading activity collectively cannot be made out. After concluding at [107] that the Shire of Ravensthorpe was not a trading corporation at the relevant time for the purposes of the application before her, the Commissioner stated at [108]:

> "I find that when considered collectively the nature of most of the activities undertaken by the respondent which generated income in the 2007/2008 financial year which it claims were trading activities were conducted in the main for the public benefit of residents in the Shire and did not have the requisite commercial character one would normally associate with the activities of a trading corporation. I also find that most of these activities were inconsequential and incidental to the primary activities and functions of the respondent."

180 This reasoning shows that the Commissioner at first instance did consider the activities collectively. It is evident that she also considered them individually and I am not persuaded that there is merit in the submission of the Shire that various items should be considered as being part of the one activity area. In this context, Pullin J in the *ALS* decision at [82] stated that the decision about whether a corporation is a trading corporation is a qualitative judgment which involves the balancing of many factors which, taken individually, may point either to or against the conclusion that the particular corporation is a trading corporation. I find that it was entirely appropriate that the Commissioner at first instance evaluated activities individually, whether or not they might have been part of the one activity area, and also evaluated them collectively.

The Activities

181 The emphasis in the Shire's grounds, and the essence of its case at first instance, is aimed more at what it says is the incorrect characterisation of at least 38 activities listed variously in grounds 2.3, 3.2, 4.3 and 9. These have been examined by his Honour the Acting President and set out comprehensively by him. I respectfully agree with the conclusions he has reached in relation to each of those activities. In my view his Honour has correctly applied the relevant principles set down by Steytler P in the *ALS* decision at [68]. In this context, I am referring to the principle at [68](5) to which I referred earlier in my Reasons:

> "(5) The ends which a corporation seeks to serve by trading are irrelevant to its description. Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade'."

and to the principle at [68](7):

> "(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade."

182 In my respectful opinion, there is an inherent tension between, on the one hand the statement that the ends which a corporation seeks to serve by trading are irrelevant to its description and that the trading activities conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade', and on the other hand that regard must also be had to the intended purpose of the corporation. If the intended purpose of the Shire is local government in the interests of the community, how are its trading activities conducted in the public interest or for a public purpose to be characterised if the ends which the Shire seeks to serve by trading are irrelevant to its description?

183 A resolution of this tension for present purposes may be achieved by recognising that there is a qualification in principle (5): trading activities conducted in the public interest or for a public purpose will not <u>necessarily</u> exclude the categorisation of those activities as 'trade' (my emphasis). Further, notwithstanding the importance of the activities test in determining whether a corporation is a trading or financial corporation, principle (7) itself recognises that the current activities of a corporation (in this case the Shire) are not the only criterion for determining its characterisation.

184 Accordingly, although trading activities conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade', there remains scope in some circumstances for trading activities conducted in the public interest or for a public purpose to exclude that categorisation. I am inclined to the view that those circumstances do exist in this case, given that after quoting from *Rockdale* Steytler P at [60] stated:

> "Importantly, [Davies J] also said that the 'carrying out of a function of government in the interests of the community is not a trading activity'."

185 It is for these reasons that I agree with the conclusions his Honour the Acting President has reached in relation to each of the activities which the Shire emphasises in its appeal. I find it is not necessary in this case to resolve the differences in approach between the Acting President and Smith SC to activities, such as item 14 Cemetery Charges, because of my ultimate conclusion that the substantial majority of the income received by the Shire is not from trading activities, and that the activities of the Shire which are trading activities are not substantial and are peripheral to the Shire's activities as a whole under the *LG Act*. I do not consider the Shire of Ravensthorpe has made out its grounds of appeal. The Commissioner at first instance did not err.

186 For the above reasons, I would grant leave to appeal and dismiss the appeal. I agree with the publication of a minute in the terms referred to in the reasons of his Honour the Acting President, and with his reasons for that minute.

SMITH SC:

Leave to Appeal

187 I agree with the Acting President for the reasons he gives that an order should be made granting leave to appeal.

Onus

188 By operation of s 109 of the *Constitution* this Commission does not have jurisdiction to hear and determine claims for unfair dismissal where the employee in question is employed by a constitutional corporation. The Commission must have material before it from which it can be legitimate to draw a conclusion as to whether it has jurisdiction to hear and determine a claim. No question of jurisdiction can be conceded at first instance or conferred on a court or tribunal when it does not have it: *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760.

189 Whether the onus of proof arises and whether it lies on a party in a matter where an issue arises whether an employer is a constitutional corporation was recently considered by the Full Bench in *Guest v Kimberley Land Council* [2009] WAIRC 00668; (2009) WAIG 2063. Acting President Ritter (with whom Scott & Mayman CC agreed) held that the question of whether an aboriginal land corporation is a constitutional corporation did not involve an onus of proof but is a factual enquiry in which it is the first duty of a statutory court or tribunal to decide whether it has jurisdiction [71], [75 - 82]. As Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 said:

> "When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants. When the validity of a State law is attacked under s 109 of the Constitution and the scope of the Commonwealth law with which it is thought to be inconsistent depends on matters of fact (which I shall call the statutory facts) the function of a court is analogous to its function in determining the constitutional validity of a law whose validity depends on matters of fact (141 – 142)."

190 Where a company is a charitable body or a local government organisation, a real question arises whether the body in question can be characterised as a trading or financial corporation within the meaning of s 51(xx) of the *Constitution*. In matters before this Commission if an employer simply asserts that they are a trading corporation without being prepared to lead sufficient evidence of the facts on which a finding of the constitutional issue can be made, the Commission should direct that such evidence be put by the employer. Or where such knowledge is in the knowledge or control of the applicant, the applicant should be required to produce evidence. In most matters relevant evidence is more likely to be in the possession or control of the employer. It is not only appropriate for the Commission to make an order requiring an employer (and/or the applicant) to provide evidence of the employer's activities but also for the Commission, when considering those activities, to make enquiries of the parties if it is not satisfied that there is sufficient information before it to make a determination whether a corporate body is or is not a constitutional corporation. To use the words of Brennan J, in *Gerhardy v Brown* such a determination should not be left in the hands of the litigants. This approach to hearing and determining such a matter is in my view inherent in the warrant given to the Commission in s 26(1)(a) and s 26(1)(b) of the *Industrial Relations Act (1979)* (WA) (the *Act*) which requires the Commission in the exercise of its jurisdiction to 'act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms' and not to 'be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just'.

191 It is my view that the legal consequence that follows from the principle that no onus of proof arises where a court or tribunal is called upon to find constitutional facts, is the Full Bench in this matter is required to be positively satisfied that there was sufficient evidence before the Commission at first instance on which a finding can be made that the Commission has jurisdiction to hear and determine the respondent's claim.

Legal Principles – Trading

192 If the appellant is a 'trading corporation' by operation of the now repealed s 4, s 6 and s 16 of the *Workplace Relations Act 1996* (Cth) (the *WR Act*) the jurisdiction of the Commission to hear and determine these claims is excluded by s 16(1) of the *WR Act* by operation of s 109 of the *Constitution.* The principles to be applied were summarised by Steytler P (with which Pullin J agreed [80]), in *ALS* at [68] as follows:

> "(1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 - 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
>
> (2) However, trading must be a substantial and not merely a peripheral activity: Adamson (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].
>
> (3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Quickenden* [101].
>
> (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
>
> (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 - 306); *E* (343). Consequently, the fact that the trading activities are conducted is [sic] the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).
>
> (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisation as a 'trading corporation' is a question of fact and degree: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (584).
>
> (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; E (344); *Hardeman* [18].
>
> (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler; Hardeman* [26]."

193 In considering what activities can be said to constitute trading in *Bell v Shire of Dalwallinu* (2008) 88 WAIG 1867 and *Bysterveld v Shire of Cue* (2007) 87 WAIG 2462 I applied the principles enunciated by the Full Bench in *Aboriginal Legal Service of Western Australia v Lawrence* (2007) 87 WAIG 856. When the *ALS* decision was delivered by the Industrial Appeal Court although the majority of the Court said that 'trading' is not to be given a narrow construction they took a narrower view than the Full Bench of the type of activities that constitute 'trading' within the meaning of s 51 (xx) of the *Constitution* [68](3) (Steytler P), [79] (Pullin J). They followed Barwick CJ's view in *R v The Judges of the Federal Court of Australia; ex parte Western Australian National Football League (Inc) and West Perth Football Club* (1979) 143 CLR 190 (*Adamson*) (209) and found that the commercial nature of an activity is an element in deciding whether the activity is in trade or trading ([68], [74] (Steytler P), [82] (Pullin J)). The Full Bench in *ALS* had taken a different view. It determined that an activity could be considered trading without any requirement for commerciality providing there is an exchange of personal property for value [286](e). This view was not accepted by the Industrial Appeal Court. In light of the Industrial Appeal Court decision in *ALS* it is appropriate that my reasoning in *Bell* and *Bysterveld* as to how the activities of a local government corporation should be analysed must be reconsidered.

194 In *New South Wales v Commonwealth* (2006) 229 CLR 1 (*Work Choices*), the High Court upheld the constitutional validity of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), including its reliance on the corporations power in s 51(xx) of the *Constitution.* Chief Justice Gleeson, Gummow, Hayne, Heydon and Crennan JJ in a joint judgment said that any debate about what kinds of corporations fall within the constitutional expression 'trading or financial corporations formed within the limits of the Commonwealth' must await a case in which they properly arise [58]. They however noted [157] - [158] that the view of Barwick CJ in *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 that 'a corporation whose predominant and characteristic activity is trading whether in goods or services' (543) was accepted by the majority in *Adamson* where Mason J said that:

> "Essentially it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation (233)."

195 When considering whether Etheridge Shire Council was a constitutional corporation, Spender J in *The Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268; (2008) 250 ALR 485 analysed in detail what was said by each judge in *St George County Council* [48] - [66]. Justice Spender noted that the majority of the court in *Adamson* favoured the minority reasoning of Barwick CJ in *St George County Council* [67]. Justice Spender went on to consider the judgment of Toohey J in *Hughes* and observed:

> "The comment by the majority in the *Work Choices* case that the view of Barwick CJ 'did not then command the assent of the majority of the court' is to be understood as indicating that the 'activities test' propounded by Barwick CJ was later accepted by the High Court in *Adamson* as the applicable test, and is the proper test to apply.
>
> Mason J, in *Adamson*, said of a 'trading corporation' (at CLR 233; ALR 472):
>
> > Essentially, it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation.
>
> With respect, there is an element of circularity in this observation, but it is not inconsistent with the view of Barwick CJ in *St George County Council*, set out above: at [55].
>
> It is to be noted that Gibbs J in *St George County Council* said (at CLR 561; ALR 392):
>
> > The word 'trading' forms part of a composite expression and indicates the essential attribute of the kind of corporation to which it refers. It is common to describe corporations according to their nature …
>
> And later, in the same paragraph:
>
> > … the words 'trading corporations' … in their natural meaning, as well as in the context of the placitum, refer to corporations of a particular kind.
>
> Both Barwick CJ (at CLR 543; ALR 377-8) and Gibbs J (at CLR 561; ALR 392) thoroughly rejected the contention that a corporation which to any extent engages in trade is a trading corporation.
>
> I therefore proceed to inquire whether the Etheridge Shire Council is a trading corporation or a financial corporation, by considering whether, on the evidence, 'the predominant and characteristic activity of the Etheridge Shire Council is trading, whether in goods or services', or whether 'the predominant and characteristic activity of the Etheridge Shire Council is in finance'.
>
> In that inquiry, it is necessary to have regard not only to whether the predominant and characteristic activity of the council is trading or finance, but also, as Barwick CJ indicated in *St George County Council* (at CLR 543; ALR 377-8), the extent of that activity and its relative significance in the affairs of the Etheridge Shire Council [79] - [86]."

196 Justice Spender reviewed the powers and activities of the Council in the *Local Government Act 1993* (Qld) and concluded that a local government, including the Council, had 'extensive legislative and executive functions of a governmental kind in relation to the relevant local government area' [129]. His Honour then went on to analyse each activity said to be in trade. Whilst he did not apportion a percentage of these activities against total revenue, in respect of most items Spender J noted whether the item returned a profit and examined the scale of the trading activities when compared to the total revenue of the Council. The activities claimed to be trading activities included operation of a visitor centre; road works; hostel accommodation; childcare centre; hire of halls; renting office space and the sale of land and water. Many of the activities considered were similar to the activities claimed by the appellant in these matters to be trading activities.

197 Justice Spender held the Etheridge Shire Council was not a trading corporation on several grounds. Firstly he regarded all of the activities as entirely lacking the essential quality of trade. He noted:

> "Almost all of them run at a loss. They are all directed, in my view, to public benefit objectives within the shire. Their scale, even in monetary terms (putting to one side the non-monetary significance of the legislative and executive activity of the shire council), are so inconsequential and incidental to the primary activity and function of the council as to the [sic] deny to the council the characterisation of a 'trading corporation' or a 'financial corporation' [151]."

198 In this paragraph Spender J appears to have concluded the activities do not constitute trade on two grounds. Firstly, he expressed the view that the activities are run at a loss and are directed to the public benefit objectives of the Council.

Secondly, he concluded that the scale of the activities were inconsequential and incidental to the primary activity and function of the Council. It could be said that in making a finding that the activities were in fact not trading activities within the meaning of s 51(xx) of the *Constitution* Spender J gave too much weight to the fact that the activities claimed by the Council as trading were run at a loss and that the activities were directed to public benefit objectives. It could be said that his view is inconsistent with the finding made by Steytler P in *ALS* who pointed out in his summary of relevant principles that profit is not an essential prerequisite to trade, but a usual concomitant and that the fact that trading activities are conducted in the public interest or for a public purpose will not necessarily exclude categorising these activities as 'trade': [68](4) - (5); (see also the cases cited therein). Steytler P also said at [70] - [71] that the fact that the Aboriginal Legal Service was set up to perform public welfare services was not of itself, determinative. Justice Spender's view could also be said to be inconsistent with the conclusion reached by Barwick CJ in *St George County Council* who said that: 'the identification of the corporation which falls within the statutory definition will be made principally upon a consideration of its current activities' (543). Chief Justice Barwick also added in the next paragraph:

> "It seems to me that the reason why a corporation trades as its sole or predominant and characteristic activity is irrelevant to the description of the corporation for present purposes, that is to say, the ends which such a corporation seeks to serve by trading are irrelevant to its description. As I have indicated, the purpose of the grant of legislative power includes the control of the corporate activities of the corporation: it is not so concerned with the motives which prompt those activities, nor the ultimate ends which those activities hope to achieve. If, upon that consideration, the corporation can fairly be described by reason of those activities, their extent and relative significance in the affairs of the corporation as a 'trading corporation' it will, in my opinion, be nothing to the point that it is also a government or State or municipal corporation (543)."

199 As O'Callaghan SDP pointed out in *Pellow v Umoona Community Council Inc* [2006] AIRC 426 in relation to the Umoona Community Council [29]:

> "The fact that the Council is incorporated in accordance with its constitution to undertake activities directed at the public good does not automatically take it outside the scope of being a trading corporation. Rather, consistent with the authorities, it is the activities in which it is involved which will determine whether it is, or is not, a trading corporation."

200 It is well known that whilst local government authorities have a wide variety of powers under *the LGA* some engage in more trading activities than others and the degree to which they each engage in trading activities varies. It is notable that the extent of activities said to constitute trading in *Etheridge Shire Council* could have established a basis on which a finding could be properly made that the Etheridge Shire Council was not a constitutional corporation because the scale of the activities were as a whole insignificant, as to deny the Etheridge Shire Council the characterisation of a 'trading corporation' or a 'financial corporation' because of its trading activities were overall insignificant in relation to its overall activities [75]. For this reason whilst I have some difficulties with the reasoning applied by Spender J in *Etheridge Shire Council*, in [151] of his reasons, I do not disagree with the conclusion that he reached that the Etheridge Shire Council was not a trading corporation.

201 Justice Spender also put forward another ground (in the alternative), that the Etheridge Shire Council was not a trading corporation. His Honour said:

> "If contrary to my view, the Etheridge Shire Council was a trading corporation, the Commonwealth government would have the powers that I have set out above: at [21]. Such powers would annihilate any concept in the Constitution of a federal balance, and in a very significant way, permit the Commonwealth to nullify the right of the state to govern in its local government areas.
>
> I am of the view that all five judges in *St George County Council* would have determined that the Etheridge Shire Council is not a trading corporation [153] - [154].

202 Earlier in his decision Spender J had said:

> "If it is, the acceptance by the majority in the *Work Choices* case of the ambit of the power of the Commonwealth under s 51(xx) as described by Gaudron J in *Pacific Coal* would mean that the Commonwealth has power to regulate the activities, functions, relationships and the business of the Etheridge Shire Council; the creation of rights and privileges belonging to the Etheridge Shire Council; the imposition of obligations on it; and, in respect of those matters, the regulation of the conduct of those through whom it acts, its employees, and also the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

> In my opinion, it is inconceivable that the framers of the Constitution and the parliament which enacted it intended that the Commonwealth should have the powers described above (at [21]) in respect of a local government, which is a body politic of a state government, having legislative and executive functions [21] - [22]."

203 If this view is accepted then it is doubtful whether any local government corporation in Australia could be characterised as a constitutional corporation if each has had conferred on them (by operation of State law), the full spectrum of legislative and executive local government functions. This reasoning would not apply to local government organisations that are established solely to trade. The Council in *St George County Council* can be distinguished as the Council in that matter was formed for one purpose only and that was to buy and sell electricity.

204 In making these observations it appears that Spender J relied upon a 'intentionalism' approach to constitutional interpretation. The learned authors Hanks, Keyzer and Clarke in *Australian Constitutional Law Materials and Commentary* (7th Edition, 2004) explain that there are three approaches to constitutional interpretation:

- *textualism* (or literalism or legalism);
- *intentionalism* (or originalism or sometimes called legalism); and
- *progressivism* (or dynamism or organicism).

> The textualists emphasise the importance of referring to the text of the Constitution itself to deduce the meaning of a constitutional term: see, for example, *McGinty v. Western Australia* (1996) 186 CLR 140 at 235. Textualism is closely related to intentionalism. The intentionalist school calls for judges to decide questions of constitutional law according to the intentions of the framers: see, for example, the High Court's unanimous judgment in *Cole v. Whitfield* (1988) 165 CLR 360 [10.4.27C]. Finally there are those who ascribe to a progressive or dynamic interpretation of the text, according to which the Constitution ought to be interpreted in the light of changes in historical standards: see, for example, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 [11.3.2C] at 173-4 (Deane J).
>
> The textualist-intentionalist-progressivist divide is overlaid with a distinction between the claim that judges *declare* the law and the acknowledgement that they *make* the law. Hence, those adopting the declaratory approach tend to rely on a combination of textualism and intertionalism, and those who acknowledge that there is judicial laws-making are more likely to be progressivists [1.2.14]."

205 Whist it seems that all members of the High Court have from time to time considered each of the three approaches, in *Cole v Whitfield* (1988) 165 CLR 360 Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ (in relation to construing s 92 of the *Constitution*) unanimously stated in relation to the "intentionalism" approach that:

> Reference to the history … may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged (385).

206 Consequently any inquiry by a Court about what was meant by any words in question in the *Constitution* when the document was framed is a linguistic exercise where the original debates can be used to draw a conclusion about the meaning of words in question: *XYZ v. The Commonwealth* (2006) 227 CLR 532 [153] (Callinan & Heydon JJ).

207 It is notable that the scope of activities of local government in Western Australia could undertake at the time the *Constitution* was framed did not specifically contemplate the power to enter into commercial enterprises (see *The Municipal Institutions Act 1895 (59th Vic, No 10)).* Unlike the local government authorities in Queensland considered by Spender J in *Etheridge Shire Council* local government authorities in Western Australia for some time have been empowered under s 3.59 of *the LGA* to enter into 'major trading undertaking'. Trading undertakings are defined under s 3.59 as an activity carried on 'with a view to profit' and any other prescribed activities. Local government authorities in Western Australia are also empowered under s 3.59 to enter into major land transactions. To carry out these activities a local government authority must prepare a business plan, give Statewide public notice and consider any submissions made about the proposed undertaking or transaction before deciding to proceed. The minimum expenditure of a major trading undertaking is required to be more than $500,000 or 10% of the lowest operating expenditure within a specified period of time (reg 9 *Local Government Functions and General) Regulations 1996*). The minimum value of any major land transaction is $1,000,000 or 10 % of the operating expenditure incurred by the local government organisation from its municipal fund in the last completed financial year (reg 7 *Local Government (Functions and General) Regulations 1996*). There is no evidence that in this matter that the appellant has entered into any commercial undertaking as contemplated by s 3.59 of *the LGA.* If the appellant had just been

established and had barely established its activities then the fact that the appellant is authorised by law to engage in commercial enterprises is a matter that the Commission could consider as material in considering the character of the appellant: *Fencott v Muller* (1983) 152 CLR 570 (602) (Mason, Murphy, Brennan & Deane JJ). However once a corporation begins it activities, its character must be assessed by its current activities: *Adamson* (208) (Barwick CJ).

208 It is also notable in *St George County Council* Barwick CJ (whose view of trading Spender J applied) expressed a view the textualism approach to constitutional interpretation had no place in interpreting s 51(xx) of the *Constitution.* He said:

> "[T]he words to be construed being drawn from an organic instrument, the purpose of the vesting of the power in the Parliament must bear on the assignment of meaning to the cryptic expressions of the instrument.
>
> Of course, it must be recognized that words which were generally used with an artificial meaning in the period of the formation of the Constitution may in some circumstances need to be given that meaning now. But nothing of that kind, in my opinion, is present in this case. No doubt during and at the end of the nineteenth century, corporations were classified for various purposes and, on occasions, special rules made applicable to corporations in one category which were not applicable to corporations in another. Trading corporations were both known and referred to as such. But there does not appear to have been any generally accepted definition of a trading corporation. It was assumed, I think that such a corporation could be identified by its activities. If its nature was being sought, it was to be found in what it did. It seems to me that no assistance in the solution of the present problem is to be derived from the undoubted statement that, as at 1900, there were trading and non-trading corporations or that consequences were attached to such descriptions or classifications. But it is certain that the community of that day were aware of the influence which the activities of foreign and local trading and financial corporations could have on the Australian community and its affairs. The framers of the Constitution appear to have concluded that the power to control those activities should be included in the powers given to the Parliament concurrently with the residual powers of the several States. Thus, the question in this case should be approached bearing in mind the purpose of the grant of the power and without any special or technical meaning of the description 'trading corporation' derived from nineteenth century usage (541 - 542)."

209 When Spender J in *Etheridge Shire Council* stated that the corporations power should not be used to cover local government corporations who have conferred on them the full ambit of local government functions and powers he also relied upon a principle of statutory interpretation that seeks to maintain the 'federal balance' of constitutional power between the Commonwealth and the States. The High Court has in some matters read down the effect of Commonwealth legislation or found legislation invalid or inoperative in so far the legislation applies to the particular essential functions of the States because of a principle that recognises an implied limit on Commonwealth legislative power (see for example *Victoria v Commonwealth* (1996) 187 CLR 416). This limitation recognises the co-existence of State and Federal Governments as entities and is sometimes known as the *Melbourne Corporation* doctrine. In the *Work Choices* case Callinan J (who was in the minority) explained the basis of the doctrine. In his view the text, whole structure of the *Constitution* mandates the co-existence of the Commonwealth and the States. He said:

> "Let me make clear what I mean by the 'federal balance' before I continue. It is, essentially, a sharing of power, even of power which the Commonwealth can monopolise under a specific constitution grant if and when it chooses to do so, and can successfully invoke s 109 of the *Constitution*, and the exercise of different powers of varying importance by each of the Commonwealth and the States, but not so that, relevantly for present purposes, that essential functions and institutions of the States, for example, internal law and order, their judiciaries, and their Executives are obstructed, impeded, diminished, or curtailed [777]."

210 The *Melbourne Corporation* doctrine was very recently discussed and applied by the High Court in *Clarke v Commissioner of Taxation* [2009] HCA 33; (2009) 258 ALR 623 where French CJ explained:

> "The constitutional implication considered in *Austin* and its precursors means that the Commonwealth cannot, by the exercise of its legislative power, significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions (be they legislative, executive or judicial) or significantly impair, curtail or weaken the actual exercise of those power or functions. The *Constitution* assumes the existence of the States as 'independent entities'. This implies recognition of the importance of their status as components of the federation. The 'significance' of a Commonwealth law affecting the States' functions is not solely to be determined by reference to its practical effects on those functions. This is not a return to any generalised concept of inter-governmental immunity. It simply

> recognises that there may be some species of Commonwealth laws which would represent such an intrusion upon the functions or powers of the States as to be inconsistent with the constitutional assumption about their status as independent entities [32]."

211 Whether this doctrine could be applied to State legislation that establishes local governments is not a matter that it is open for this Commission to speculate about. However in the absence of any recent consideration by the High Court of the scope of the corporations power insofar as it applies to local government the opinion of Spender J on this point must in my respectful view be regarded with some caution.

212 Whether the High Court would find favour with an argument that the scope of the corporations power should be read down in s 51 (xx) or construed so that it does not apply to local government corporations that have a statutory duty to exercise legislative and administrative powers of government by operating under a State law is not clear (see the discussion by Nicholas Gouliaditis in *'The meaning of 'trading or financial corporations': Future directions'* (2008) 19 PLR 110). Nor is a matter that it is appropriate for this Commission to consider.

213 One of the important issues in this appeal is what weight, if any, could be given to whether the appellant carried on many of its activities without regard to making a profit and whether a conclusion could be drawn that to do so is to lack a necessary element of commerciality. When considering the element of commerciality Steytler P said in *ALS* that '[t]he making of a profit is not an essential prerequisite to trade, but it is a usual concomitant' [68](4). Justice Pullin Jalso stated that '[w]hether the operations or activities of a corporation produce a profit or are intended to produce a profit may not be determinative, but it will often be an important relevant factor' [82]. However Steytler P and Pullin J did not specifically analyse the requirements of 'commerciality' in *ALS*. It might be said that it was not necessary to do so in that matter as it was plain that no element of commerciality arose on the facts as the provision of services by the Aboriginal Legal Service was essentially free of charge. President Steytler (with whom Pullin J agreed), however, considered a number of authoritative decisions in which the element of commerciality was discussed.

214 One of the authorities considered by Steytler P in *ALS* was *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd* (1978) 36 FLR 134. In that matter the applicants were terminating building societies who raised funds from banks to loan to their members. It did so to provide public welfare housing. All funds were used by the members who were the ultimate borrowers and purchasers of homes. The applicants could not use the funds for their own advantage and they did not administrate a revolving fund. When the societies had run their course they were to be wound up. Bowen CJ, whose decision was in the minority held that the context in which the building societies carried on their business of providing loans to members and the restrictions on the way in which it could be done showed that lending of money to members, which was the principal activity of the building society, was not a trading activity (142). Bowen CJ made this finding by having regard to the principle of 'mutuality' in the law of taxation. He also observed that there was a degree of 'mutuality' on the part of the building societies and their members. He then went on to explain that:

> "The presence of that mutuality may be derived from a whole complex of factors, not solely the absence of profit. It excludes the commercial element which is a necessary part of 'trade or commerce'.
>
> Some guidance in discovering the presence of 'mutuality' is gained from a consideration of the application of the mutuality principle in taxation law. That principle is based upon the simple notion that a person cannot make a profit out of himself (*Bohemians Club v. Acting Federal Commissioner of Taxation* (1918) 24 CLR 334) (142)."

215 Both Brennan and Deane JJ found that the building societies were financial corporations within the meaning of s 51(xx) of the *Constitution*. Justice Deane expressed an opinion that they were not trading corporations but qualified his opinion by saying that he did not express a concluded view on that question (159). Justice Brennan found that it was not necessary to determine that issue (150). Justice Deane found that at the heart of the business of the building societies were commercial dealings in finance (160). His Honour said in relation to the commerciality aspect of dealings that can be regarded as trading:

> "The terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phases [sic] of development of trade, commerce and commercial communication, the terms are clearly of the widest import: see, generally, *W & A McArthur Ltd v State of Queensland* (1920) 28 CLR 530 at 546ff; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 284ff and 381ff. They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making. I have already expressed the conclusion that, notwithstanding the particular nature of the applicants and the particular character of their

> activities, their lending to their members are commercial or business dealings in finance. In my view, that lending is, for the purposes of s 47 of the Act, in trade or commerce (167)."

216 Justice Deane also said a corporate body can to be categorised as a financial corporation where it occasionally has dealings in finance (158). In the passage in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 referred to by Deane J, Dixon J made this point about the meaning of 'trade' in the context of s 51(i) of the *Constitution* where he said:

> "In s.51 (i.) they coupled the word 'trade' with the word 'commerce', which stood alone in the United States Constitution to define the subject matter of the power of Congress to regulate commerce with foreign nations and among the several States. Not content with the expression 'trade and commerce' for the purposes of s 92, they there added the word 'intercourse'.
>
> It has been said that "trade" strictly means the buying and selling of goods. That, however, is a specialized meaning of the word. The present primary meaning is much wider, covering as it does the pursuit of a calling or handicraft, and its history emphasizes rather use, regularity and course of conduct, than concern with commodities (381)."

Chief Justice Bowen in *Re Ku-ring-gai* had regard to this passage and said (139):

> "The terms 'trade' and 'commerce' are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements (*W. & A. McArthur Ltd. v. State of Queensland* (1920) 28 C.L.R. 530, at p. 547). The word 'trade' is used with its accepted English meaning: traffic by way of sale of exchange or commercial dealing *(Commissioners of Taxation v. Kirk* [1900] A.C. 588, at p. 592 per Lord Davey; *W. & A. McArthur Ltd v. State of Queensland* (1920) 28 C.L.R 530). The commercial character of trade was mentioned more recently by Lord Reid in *Ransom v. Higgs* [1974] 1 W.L.R. 1594. His Lordship there said: 'As an ordinary word in the English language trades has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services [FN2]'. Moreover, the word covers intangibles, such as banking transactions, as well as the movement of goods and persons, for historically its use has been founded upon the elements of use, regularity and course of conduct *(Bank of New South Wales v. Commonwealth* (1948) 76 C.L.R. 1, at p. 381)."

217 Another decision referred to by Steytler P in *ALS* was the decision of Davies J in *Mid Density Development v Rockdale Municipal Council* (1992) 39 FCR 579. In that matter Davies J decided that the issue by Rockdale Council of three certificates pursuant to s 149 of the *Environmental Planning and Assessment Act 1979* (NSW) was not in trade or commerce. He also decided that the council's trading and financial activities did not form a sufficiently significant proportion of its overall activities to justify its description as a 'trading' or 'financial corporation'. Davies J said:

> "Rockdale is typical of municipal councils in that it concerns itself with matters of local government. There is no evidence that it carries on trading activities under Pt XVII of the LGA. Most of its revenue is derived from rates, garbage levies and the rent from properties which it owns. I assume that fees may be charged at Rockdale's lending libraries or at its tip and the like. In the 1990 Annual Report, the following income was disclosed, inter alia:

Rates	$14,692,680
Garbage Levy	$3,357,847
Government Grants & Subsidies	$4,202,248
Contributions towards Works	$1,546,399
Rents	$374,286
Interest on Investments	$1,692,472
Fees, Charges & Sundry Income	$1,526,917

> Fees etc provided only 5 per cent of total income. Some fees would have been charged for trading activities. A report, 'The Year in Review', refers to, inter alia, 'increasing fees, for carnivals, circuses, planning, large picnics and organised sport'. Many of the fees, however, would have been derived from activities other than business or trading activities. For

> example, fees were charged and received for the grant of s 149 certificates. In addition to the prescribed fee, an urgency fee of $50 was charged if a certificate was sought within 24 hours. It was submitted by Mr R C McDougall QC, with whom Mr I M Jackman of counsel appeared for the applicant, that, as the imposition of a charge for an expedited certificate was discretionary, the provision of s 149 certificates was a trading activity. In my opinion, it is not a trading activity but the performance of a statutory duty in respect of which the EPA permitted the charging of fees: see *Lismore City Council v Stewart* (1989) 18 NSWLR 718.
>
> Mr McDougall further submitted that Rockdale engaged in trading because it contracted out its garbage collection service. However, it seems to me that this is not a trading activity. It is the nature of the activity so far as Rockdale is concerned that matters. From Rockdale's point of view, the carrying out of a statutory function, the provision of garbage services, is not a trading activity, whether Rockdale uses its own employees, subcontractors or a contractor to perform the whole or part of the works. The carrying out of a function of government in the interests of the community is not a trading activity.
>
> On the other hand, Rockdale earned some income from carrying out tasks within its municipal responsibility. The report, 'The Year in Review', records that 'Council undertook kerb and gutter reconstruction ... for the Roads and Traffic Authority ... which earned income for the Council'. Mr McDougall submitted that Rockdale carried on the business of leasing out property. However, notwithstanding that the Council earned substantial rents, its activity would not be categorised as a business. The letting of premises may be a business, but would not ordinarily be so described (584-585)."

218 Importantly Davies J said in this passage that charging fees in performance of a statutory duty was not trading. He also said that the carrying out of a function of government in the interests of the community is not a trading activity such as contracting out its garbage collection service. When I expressed an opinion in *Bysterveld* that I did not think this was correct [64], my view was predicated on the principle that commerciality was not an element to be considered. The majority of the Industrial Appeal Court in *Lawrence* has subsequently ruled that the approach (which I applied in *Bysterveld*) is wrong. This means that the principles applied and the findings made in respect of particular activities of local government authorities in *Bysterveld* and *Bell* can no longer be regarded as good law and should not be followed.

219 Following a discussion about the observations of Davies J in *Mid Density Developments*, Steytler P referred to another decision of the Federal Court, *J S McMillian Pty Ltd v Commonwealth* (1997) 77 FCR 337. The AGPS was the primary publishers, printers and distributors of government information. Part of the information it published was core parliamentary printing such as bills, legislation and passport production. Justice Emmett in *J S McMillian Pty Ltd* distinguished activities of the AGPS that could not be regarded as trading with those that could be regarded as trading. After citing *Mid Density* as an example Emmett J said:

> "Clearly, there is a distinction between those functions of a Government which are purely governmental or regulatory and those functions which entail the carrying on of business. However, that contention appears to confuse the two aspects of the Commonwealth's involvement in the package 3 services. Insofar as the Commonwealth, in the guise of the Department of the Senate, the Department of the House of Representatives and other departments, utilises the services provided or procured by AGPS, it does so in the carrying out of governmental functions. It could not be said that the Commonwealth in those guises is carrying on a business. It is acquiring the services systematically and regularly, but only for the purpose of governing.
>
> However, in its guise as AGPS, the Commonwealth is doing what any citizen or private trader might do, namely, providing those services for remuneration. That remuneration may or may not be a commercially adequate remuneration. Further, those services are being provided to the Commonwealth in its governmental guises. Nevertheless, I consider that the Commonwealth, in providing those services, is carrying on a business within the meaning of s 2A (355)."

220 In *'The meaning of "trading or financial corporations": Future directions'* the author said:

> Although Davies J in *Mid Density* made a general statement that '[t]he carrying out of a function of government in the interests of the community is not a trading activity', this was in the context of the provision of garbage services which the council was required by statute to provide and which was

> one of the services for which rates were paid. It is likely that providing services on this basis is not trading. But the statement made by Davies J can not be taken as holding that functions of government carried out in the interests of the community can never be trading activities. Many functions, such as the collection of garbage and maintenance of roads, can be carried out by government or by private companies or persons. They are not inalienably governmental functions. Government can provide services in the same way as a private provider, with freedom to set prices in competition with a private provider. Davies J was not dealing with this situation. The difficulty is to distinguish between the trading and non-trading forms of the services provided by local government and other statutory corporations. This can be problematic because governmental non-trading activities may sometimes superficially resemble trade. At one extreme, receipt of grants from the Commonwealth or State government for the provision of services is unlikely to involve trading. At the other extreme, provision of services which a corporation is statutorily authorised, but not required, to provide and which it chooses to provide at a cost of its choosing in competition with other providers is more likely to be a trading activity (128).

221 Another authority considered by Steytler P in *ALS* was *Quickenden v O'Connor* [2001] FCA 3003; (2001) 109 FCR 245, in which Black CJ, French and Carr JJ held that the University of Western Australia was a trading corporation because it engaged in substantial trading activities in which the provision of services within a statutory framework was discussed. President Steytler relevantly pointed out [64]-[65]:

> "[B]lack CJ and French J considered it questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act 1988* (Cth) (HEF Act) amounted to trading. They said, in this respect [50] - [52]:
>
> > The University also submitted that the fees charged by it for courses are fees for services notwithstanding that they are regulated by legislation and ministerial guidelines. So it was said that under the *Higher Education Funding Act* the regulation of fees is a condition of receiving Commonwealth grants and not a requirement imposed directly by law. The guidelines themselves, it is said, do not limit the University in such a way as to deny the fees the character of payment for services and facilities provided in the courses offered by the University. No limits are imposed on the number or content of the courses nor on their promotion or design, nor on ancillary matters such as accommodation and other student benefits which may attract potential students. Specifically, in respect of payments made by the Commonwealth to the University under the *Higher Education Funding Act* it is said that they should properly be characterised as revenue from trading activities. The argument is put thus. Some students pay HECS contributions directly to the University. That is, they pay a fee for services rendered to them. In 1995 fees paid in this way amounted to $8.849 million. HECS payments by the Commonwealth to the University in that year amounted to $17.318 million. Those payments, it was submitted, should also be characterised as revenue derived from trading.
> >
> > It is questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act* amounts to trading. The Act creates a liability for each student to the University in respect of each course of study undertaken in a semester. The amount is not fixed by the University but rather by the Minister under published guidelines. The concept of 'trading' is a broad one. It is doubtful, however, that it extends to the provision of services under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory. For present purposes, however, this aspect of the claimed trading activities can be disregarded. For it is plain that the other activities cited are trading activities and are a substantial, in the sense of non-trivial, element albeit not the predominant element of what the University does. The University was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.

> It may be added that the characterisation of a body corporate as a trading corporation is a matter of fact and degree. Dr Quickenden has been unable to point to any error in that assessment on the part of the learned primary judge. As to the status of the University as a financial corporation that too is established on the evidence. His Honour's reasons and findings in that respect also are not shown to have been in error.

Carr J disagreed with the majority as regards the provision of educational services under the HEF Act. He said [106]:

> Although it is not necessary for me to decide, in my view there were other aspects of the University's activities which could be characterised as trading. Judicial notice can, I think, be taken of the fact that these days universities compete for students. The competition may be more intense within a particular State, but it certainly extends overseas and probably extends interstate. The Higher Education Contribution Scheme, in essence, works as follows. Relevantly, if the University wishes to participate in the Scheme it is obliged to charge fees to the students for the provision of education. If a student elects to pay those fees to the University directly and immediately out of his or her own funds the student gets a discount of 25 per cent, with the Commonwealth paying the balance to the University. Otherwise the student borrows the amount of the fees from the Commonwealth (which the Commonwealth pays to the University on the student's behalf) and subsequently repays that loan when he or she earns certain levels of income. The evidence was that the University derived, in the year ended 31 December 1997, an amount of $29.5 million under the Higher Education Contribution Scheme. I would regard that as being a trading activity."

222 When Steytler P held in *ALS* that the commercial nature of an activity is an element in deciding whether the activity is in trade or trading his Honour also had regard to a recent decision of the New South Wales Industrial Court in *Hardeman v Children's Medical Research Institute* (2007) NSWIRComm 189; (2007) 166 IR 196. In a joint judgment Wright, Walton and Boland JJ held that the Institute was not a trading or financial corporation within the meaning of s 51(xx) of the *Constitution*. The Court stated that [18] (g):

> "'trading activities' generally connote the activities of a commercial nature involving, in essence, the exchange of goods or services for reward: see *Adamson* at 209 per Barwick CJ, *Hughes* at 19-20 and *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 139, 167. Trading activities are not, however, confined to dealings or communications within open markets or between strangers and are not limited to profitable activities: *Re Ku-ring-gai Cooperative* at 167 per Deane J."

The Court did not discuss the commercial nature of the trading activities except to say that in relation to a 'Jeans for Genes Auction' it was a charitable activity that lacked a commercial aspect [26]. The Court however analysed in some detail in what circumstances should financial activities be characterised as commercial for constitutional purposes and whether the Institute engaged in commercial dealings in finance within the meaning of s 51(xx) of the *Constitution* The Court asked and answered two questions:

> "First, are commercial dealings in finance an appropriate prerequisite to a finding that a corporation of the respondent's ilk is a financial corporation for constitutional purposes? Secondly, if so, in what circumstances should the financial activities be characterised as commercial for constitutional purposes?
>
> We consider that the first question should be answered in the affirmative for the reasons given under the next heading. When Deane J was resolving the question in *Re Ku-ring-gai* as to whether the Societies were financial corporations, he did so in a context in which the organisations had overall benevolent functions in the provision of low cost housing, but engaged in financial activities constituted by the borrowing from a bank at interest and lending to members at interest and the subsequent payments and receipt of money pursuant to obligations and rights resulting from those dealings. It was those financial dealings that ultimately led his Honour to the conclusion that, notwithstanding their altruistic motives, the organisations were financial corporations. However, as the extract from his Honour's judgment makes clear, that conclusion was not reached merely because the Societies engaged in some form of financial dealings. Rather, his Honour's reasoning makes clear that further qualifiers were necessary in order to be classified as a

constitutional corporation. The criterion which we consider his Honour settled upon in his reasoning, and by its application to the activities of the Societies, was that their financial dealing had a commercial or business flavour. His Honour stated (at 160):

> Notwithstanding the restricted scope and limited duration of their activities of their activities, each applicant in my view carries on a business. At the heart of that business are the commercial dealings in finance constituted by the relevant applicant's borrowing and lending of money and the subsequent payments and receipt of money pursuant to obligations and rights resulting from those dealings. Each applicant was formed to carry on a business. The activities of each applicant are confined to carrying it on. The business which each applicant carries on and which it was formed to carry on is a financial business. Each applicant, being formed to carry on a business of dealing in finance and in fact carrying on such a business, is, in my view, properly to be categorised as a financial corporation within the meaning of the phrase as used in s 51 (xx) of the Constitution...

That approach was, in our view, adopted by the High Court in *State Superannuation*. On close analysis the judgment of the Federal Court in *Quickenden* offers no different view.

We should pause to also state briefly (before later development) our view as to the requirements of 'commerciality' in answer to the second issue we have formulated. In our view, for an organisation to be engaged in commercial dealings in finance, the activities must do more than merely touch on finance. The activities must, of course, be a sufficiently significant proportion of the corporation's overall activities and they must involve transactions or dealings in the nature of business where the subject of the transactions is finance [64]-[67]."

223 The Court then went on to analyse what were the indicators of activity that could be characterised as 'commercial dealing in finance'. They said:

"In *Re Ku-ring-gai* it was apparent that the predominant benevolent motive underpinning the Societies' activities was outweighed by the commercial nature of the activities. It was the commercial element to the dealing in finance, the commercial dealing in finance, which characterised the Societies as financial corporations for the purposes of s 51(xx). Hence, the importance of the reference point.

The relevant commercial activities were the borrowing and lending of money and the subsequent payments and receipts of money pursuant to obligations and rights resulting from those dealings. Despite the commercial activities being severely curtailed because the loans were moderate interest loans, limited in amount, and that the activities of the loans served an important social function, commercial financial activity was present in the form of borrowing from the bank at interest and lending to members at interest and payments and receipt of money pursuant to obligations and rights resulting from those dealings. Thus, the financial dealings were transactions in the nature of business.

It was the integral nature of the financial activities to the Societies, the borrowing and lending, and payment of receipt of money by them, that established the commercial nature of the activities. The activities themselves were transactions in the nature of business because they were consistently carried on, being the corporation's primary activity.

Deane J stated (at 160):

> Whatever may have been the motivation of borrower or lender or of those involved in making or assisting in making the relevant funds available, the borrowing from the bank by each applicant was a secured borrowing at interest and was a commercial dealing in finance. Praiseworthy and altruistic though the motives of those associated with the promotion and management of the applicants may, to no small extent, be, the lending by the applicants to members upon security and at interest are, likewise, commercial dealings in finance. Neither the borrowing nor the lending can be seen in isolation from one another. Neither can they be seen as merely incidental or ancillary to some other and predominant activity. The lending to members is the

> raison d'etre of the applicants and both the purpose and the culmination of their operations. Their borrowing is so that they may lend.
>
> It is acknowledged that borrowing and lending constituted commercial dealing, however, this was so because interest and security were integral to the borrowing and lending engaged in by the Societies. The activities could not be carried on without the inherent commercial aspects of interest payment and lending upon security. The carrying on of the activities necessarily involved a commercial or business dealing. Commerciality was an ever-present aspect of the financial activities in which the Societies engaged, activities that were at the heart of the Societies' operations.
>
> By their recurring nature as the Societies' primary activities, coupled with their necessary commerciality, the activities of the Societies in *Re Ku-ring-gai* demonstrate that financial activities must do more than touch on finance [69] to [74]."

224 The principles that can be drawn from these cases are in my respectful opinion as follows:

(a) Trade is sale of exchange or commercial dealing marked by use, regularity and course of conduct: *Bank of New South Wales* (381) (Dixon J). 'Trade' is not an expression restricted to dealings at arms length in an open market. Trade includes commercial or business dealings which are commercial in character, are marked by a degree of altruism which are not compatible with a dominant objective of profit-making: *Re Ku-ring-gai* (167) (Deane J).

(b) There is a distinction between the functions of a government which are purely governmental and those which entail the carrying on a business. Both can entail the provision of services which are systematic and regulatory. However the provision of services that are systematic and regulatory constitutes the carrying on a business where the government does what any citizen or private trade might do, namely providing service for remuneration which may or may not be commercially adequate remuneration: *McMillian* (355) (Emmett J). This is because when the activity in question is a governmental function which can not be carried out by a private provider in competition with the government provider, the activity can not be characterised as trade, as the element of commerciality is not present.

(c) Trade or trading does not extend to the provision of services under a statutory obligation to provide the service and fix a fee: *Mid Density* (585) (Davies J); (see also *Quickenden* [50] - [52] where Black CJ & French J expressed this principle as a tentative view).

(d) For an organisation to be engaged in commercial dealings in finance and thus to be characterised as a financial corporation, the activities must do much more than merely touch on finance, they must be a significant proportion of an organisation's overall activities and they must involve transactions or dealings in the nature of business where the subject of the transaction is finance: *Hardeman* [67]. Activities identified as those that more than "touch on finance" are those that are consistently carried on: *Hardeman* [71], [94]. It is my view that the same principles that apply to examining whether an organisation engages in commercial dealings in finance should be applied to ascertain whether the activities of an organisation are trading activities (see *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 (303) (Mason, Murphy & Deane JJ)).

225 Whether a corporation is a trading corporation is ultimately a question of fact and degree which depends upon whether its current trading activities are substantial and not peripheral: *Adamson* (234) (Mason J) or form a sufficiently significant proportion of the corporation's overall activities: *Adamson* (233) (Mason J) (237) (Jacobs J concurring); applied in *ALS* [68] (6) (Steytler P) [80] (Pullin J concurring). In *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10 Toohey J adopted a 'three-stage test' proposed by counsel for the respondents. This test:

> "[I]nvolved identifying the totality of the activities of the corporation, identifying those activities properly characterised as trading activities and then evaluating the extent of the trading activities against the totality of activities (22 - 23)."

Application of Principles

226 To apply the test enunciated in *Hughes* the first task is to identify the totality of activities of the appellant. The evidence in these matters has concentrated on the activities the appellant says are trading activities and little if any evidence has been given about other activities. For the reasons set out below I am of the opinion it is not possible to identify the totality and extent of all of the activities of the appellant to assess whether the trading activities of the appellant form a significant proportion of the appellant's overall activities. However it is patently clear from the provisions of the *the LGA* and other legislation that the appellant engages in many legislative, regulatory and governmental functions that are not trading activities. Pursuant to s 3.1 of *the LGA* the general function of government is to provide good government of persons in the district and the scope of this function is to be construed in the context of its other functions under *the LGA* or any other written law. The appellant has legislative functions under div 2 of pt 3 of *the LGA* to make local laws including the creation of penalties and prescribing penalties. Under s 3.18 it is to perform executive functions including providing services and facilities that integrate and coordinate so far as practicable with any services and facilities provided by the Commonwealth,

the State or any public body. Other executive functions include controlling and managing land reserved under the *Land Administration Act 1997* (s 3.54 *the LGA*). Other principal provisions of *the LGA* that are of importance in this matter are set out in some detail in the reasons for decision of the Acting President.

227 The second task in the three step process is to identify what activities of an organisation can be characterised as trading activities. When regard is had to the principles referred to in [224](a) to [224](c) of these reasons, it can be said that in identifying the activities which can be characterised as trading activities of a local government organisation it would be clear in most matters that the following categories of activities could not be regarded as trading activities as these activities do not carry with them any of the characteristics or incidents of trade or trading:

(a) Legislative and executive functions of government which are purely governmental and are not activities that any private citizen or trader might do. An example of this would be processing of applications for building licences. Others include the provision of bush fire services under the *Bush Fires Act 1954* (WA), or the provision of water services under the *Water Boards Act 1904* (WA);

(b) The provision of services where the right to be paid a fee for carrying out the service is created by legislation. Such services may include vehicle licencing commissions paid by the Department of Transport pursuant to s 6B of the *Road Traffic Act 1974* (WA), and commissions paid by the Fire and Emergency Services Authority (FESA) for collection of the Fire and Emergency Services levy pursuant to s 36J of the *Fire and Emergency Services Authority of Western Australia Act 1998* (WA) (FESA Act)*;*

228 The third step is to evaluate the trading activities against the totality of activities. The respondent's counsel has made a submission that is critical of the approach of looking at percentage value of trading activities against total revenue. This approach has however been adopted when considering the trading activities of non-profit organisations in *Pellow v Umoona Community Council Inc* [2006] AIRC 426 and *Educang Ltd v Queensland Industrial Relations Commission* (2006) 154 IR 436. As Carr J pointed out in *Quickenden* it has not yet been decided whether trading is a substantial activity when measured in absolute dollar terms or whether substantiality is a relative term [101] (7). His Honour cited Murphy J in *Adamson* (239) as one judge who put forward the former view. Whilst Carr J applied the view of Murphy J, the majority judges in *Quickenden* did not (Black CJ & French J). They applied a qualitative approach and determined that the trading activities of the University of Western Australia were substantial in the sense of non-trivial [48]-[51]. Justice Wilcox in *E v Australia Red Cross Society* (1991) 27 FCR 310 examined not only the financial value of the trading activities of the Red Cross Society but had regard to the scale of those activities. In *Hardeman* the Court took a relative approach and assessed the actual activities by the performance and acts of the organisation [56]. They regarded the size of the organisation's financial investments and amount of income generated as only partly indicative of whether the organisation's financial activities were a sufficiently significant proportion of its overall activities [54].

229 An assessment of whether the trading activities of an organisation are substantial by only comparing the percentage of income received from trading activities to the income received from non-trading activities in many matters will not result in a proper assessment of whether the trading activities of an organisation form a sufficient proportion of its overall activities. However, I am of the opinion that it is relevant to ascertain the monetary value of trading activities as one factor that is to be examined. As Pullin J said in *ALS* a qualitative judgment involves the balancing of many factors [82]. It is also necessary to examine all of the activities (including all non-trading activities) of an organisation. As Toohey J recognised in *Hughes* there are difficulties involved in comparing economic and non-economic activities (23). That is why it is necessary to look at other factors which is part of the task of making a qualitative or relative assessment. The facts in *Hardeman* illustrate that the total percentage value of financial activities may be large but the efforts or activities of an organisation to generate the funds from trading activities may occupy little time of the total number of those engaged in work for the organisation in question. In *Hardeman* only three out of 161 members of staff engaged in identifiable trading activities on more than a part-time basis [23]. Yet the medical research organisation on one view generated 31.369 % of its income from investment activities in one year and 45.544 % of its revenue from its investment activities in another year [36].

230 In my opinion when applying the third step of the test in *Hughes* to an organisation such as a local government organisation it may be necessary to consider among other matters, the following matters:

(a) The number of persons employed by the local government organisation and the nature of work and their activities;

(b) The activities of the council itself;

(c) The number of persons whose work requires them to be engaged in work on trading activities and the extent of the work on or in relation to trading activities in proportion to their work on non-trading activities;

(d) Whether income is generated from work of persons or bodies contracted to work for the local government organisation and whether the work of the contractors is supervised or controlled to any degree by the local government organisation;

(e) The frequency and regularity of each category of trading and non-trading activity.

Did the Commission at first instance err

231 When regard is had to the authorities and the principles discussed in these reasons of decision in my respectful opinion is it is clear that there was insufficient evidentiary material before the Commission on which a proper finding could be made at first instance or on appeal about the nature, scope and extent of the whole activities of the appellant on which a conclusion can be drawn as to whether the appellant is a trading corporation and thus a constitutional corporation. To make such a finding a relative assessment of the nature, scope, extent and regularity of the trading activities must be made by having regard to the nature, scope, extent and regularity of the non-trading activities of the appellant.

232 The Commissioner at [107] of her reasons for decision stated that she took into account the principles outlined by Steytler P in *ALS* at [79]. She then reviewed the nature of the activities the appellant claims are trading activities and said that she took into account the activities as a whole and the purpose of the activities of the appellant. In my respectful opinion the Commissioner made a number of errors in fact and in law. Firstly she made an error of fact because there was insufficient evidence before the Commission on which a finding could be made about the activities of the appellant as a whole. The only activities which were the subject of evidence were activities the appellant claims are trading activities. It is apparent from the provisions of *the LGA* and from exhibit R1, titled 'Statement of Financial Performance' that the appellant engages in many activities that were not claimed to be trading activities. Some of the activities listed in exhibit R1, include law, order and public safety; animal control; ranger administration; planning and development; creation and maintenance of parks, gardens, beaches, boat ramps; regional library schemes; museums; protection of the environment; maintenance of streets, roads, lights signs and parking bays; rural services; tourism; building control; maintenance of saleyards; community development; other economic services and public works. Apart from a list of these items and credit and debit amounts for these items no evidence was given about the nature, scope and regularity of these activities. Nor was any evidence given about the number of employees of the appellant who are engaged in these activities or the extent of their engagement in or the time spent on activities of the appellant. As discussed below such evidence may be of particular importance in respect of activities that are claimed to be non-trading activities.

233 The Commissioner went on to say at [108] that when the activities the appellant claims are trading activities are considered collectively they were conducted in the main for the public benefit and did not have the requisite commercial character. She also found that most of these activities were inconsequential and incidental to the primary activities and functions of the appellant which she found at [82] to provide a range of infrastructure and other services to the residents in the shire. The findings made at [107] and [108] determined her findings at [109] – [111] whether particular activities were trading activities. She also gave great weight to the findings that she made (which she made in respect of most items) that there was no evidence that particular items generated a profit or it was unclear whether items generated a profit.

234 The appellant in written submissions (AB 90 of 145) stated that it is acknowledged that Items 1 to 5, 7 and 36 (Sale of Council Publications, FESA - Bush Fires, FESA - Administration Charge, Fire Map Sales, Grant – Emergency Services Collocation, FESA – State Emergency Service and Rate Search Fees) arise as a result of the statutory obligations of local government. If the principles set out in [224](a) – [224](c) and [227] of these reasons are applied to each of these activities it would be difficult to characterise these activities as trading. Although the Commissioner found each of these activities were not trading activities she made those findings on a different basis. She found that there was no evidence that these activities generated a profit or were conducted on a commercial basis. She also found that these items to be incidental or peripheral the appellant's main functions.

235 Whilst, I am of the opinion that the Commissioner did not give too much weight to whether there was evidence that particular activities generated a profit, I am of the view that she erred in law by wrongly having regard to or giving weight to the fact that most of the activities were carried out for the public benefit. The fact that an activity may not generate a profit is only one factor that can be taken into account. As Steytler P pointed out in *ALS* the making of a profit is not an essential prerequisite to trade and the fact that trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as trade [68] (4) and [68] (5). Although whether the activities produce a profit or are intended to produce a profit will be a relevant factor: *ALS* [82] (Pullin J). Whether each activity claimed to be a trading activity generated a profit or was intended to generate a profit and the extent of the profit or loss in the relevant window of time, is a matter that should have been the subject of evidence, as it is one relevant factor to be considered when determining whether activities are trading activities.

236 The specific purpose of each activity is irrelevant. Motive for carrying out activities does not matter: *E v Australian Red Cross Society* (343) (Wilcox J). For example in relation to Item 15 (Hall Hire Charges) it is immaterial that this activity is carried on for the benefit of the community. This principle was explained by Mason, Murphy and Deane JJ in *State Superannuation Board v Trade Practices Commission* where their Honours said:

> "[T]he judgments 'of the majority in *Adamson* make it' clear that, in having regard to the activities of a corporation for the purpose of ascertaining its trading character, the Court looks beyond its 'predominant and characteristic activity' (cf. p. 213 per Gibbs J.). Barwick C.J.(208) spoke of making a judgment 'after an overview' of all the corporation's current activities, the conclusion being open that it is a trading corporation once it is found that 'trading is a substantial and not a merely peripheral activity'. Mason J.(234) said that it 'is very much a question of fact and degree' having earlier stated (233) that the expression is essentially 'a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation.'
>
> Murphy J.(239) said 'As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation'. Indeed, it was essential to the majority's approach and to its rejection of *St. George* that a corporation whose trading activities take place so that it may carry on its primary or dominant undertaking, e.g., as a sporting club, may nevertheless be a trading corporation. The point is that the

> corporation engages in trading activities and these activities do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade. As the carrying on of that undertaking requires or involves engagement in trading activities, there is no difficulty in categorizing the corporation as a trading corporation when it engages in the activities.
>
> Indeed, we would go on to say that there is nothing in *Adamson* which lends support for the view that the fact that a corporation carries on independent trading activities on a significant scale will not result in its being properly categorized as a trading corporation if other more extensive non-trading activities properly warrant its being also categorized as a corporation of some other type (304)."

Item 15 (Hall Hire Charges) however may not be able to be characterised as a trading activity if the activity of hiring halls cannot be said to be conducted on a basis that is commercial in character. Whether it is so may depend upon whether the halls are hired for a peppercorn rent on an ad hoc basis or whether there is some assessment of the value of the service provided on a basis that could be expected if the halls were hired by a private enterprise.

237 I am also of the opinion that the Commissioner erred in characterising most of the activities claimed as trading activities as inconsequential and incidental to the primary activities and functions of the appellant. For example it is not correct to characterise the collection of the fire and emergency services levy (Items 2, 3 and 7) as incidental and inconsequential to the primary activities of the appellant. What the appellant does is collect the fire and emergency levy on behalf of FESA. They are obliged to do so by operation of a statute and are entitled to payment by operation of law. Pursuant to s 36W of the FESA Act the Minister responsible for the administration of the FESA Act determines the fee to be paid by FESA to the appellant. The appellant is able to receive fees by any source authorised by the Local Government Act on any other written law (s 6.15(1) *the LGA*). Under s 36J of the FESA Act, a local government authority is required to assess the amount of the levy on each person who owns leviable land in its local government district and service notice of the assessment on that person as part of the rate notice. A sum is paid to the local government authority for collection of the levy. The provision of the service by the appellant to collect the levy and the fee paid by FESA raise no incidents associated with the concept of 'trade' or 'trading'. Clearly the obligation to collect the levy and the right to payment of that service is created by statute.

238 Other activities regulated by statute that are claimed by the appellant as trading activities are Item 14 (Cemetery Charges) and Item 33 (Department for Planning and Infrastructure Commission). Mr Durtanovich gave evidence that the cemetery charges are set on a commercial basis. However that evidence is irrelevant. The right to obtain income from cemetery charges is also regulated by statute and cannot be characterised as trading as the service is purely regulatory and the right to payment for the service is created by statute and not by any negotiations, bargain or agreement that has the hallmarks or incidents of "trade". Under s 5 of the *Cemeteries Act 1986* (WA) the Governor may vest the care, control and management of a cemetery in a local government. Under s 6 of the *Cemeteries Act* once vested the appellant is empowered to exercise the conferred on Boards under the *Cemeteries Act.* Pursuant to s 53(i) of the *Cemeteries Act* the appellant is empowered to set a fee among others for digging a grave. All fees set under s 53 are payable to the appellant and recoverable as a debt in a court of competent jurisdiction. The fact that the fees are deemed payable by statute to be recoverable as a debt raises the inference that such fees can not be regarded as monies owing pursuant to a contract for services. The appellant also performs a State Government function of licensing of vehicles and licensing persons to drive. The performance of these functions is vested in the appellant pursuant to agreement with the Director General of the Department of Transport made under s 6B of the *Road Traffic Act.* Whilst it may be open under s 6B to the appellant to negotiate the commission it is paid to perform this function, there is no evidence that this has occurred. In any event this function has no element of commerciality so as to characterise this activity as in trade or trading as it is truly a regulatory governmental function.

239 However some activities the Commissioner did correctly characterise as incidental to activities that are not trading activities. Staff housing (Items 6 and 31) can be said to be incidental to employment of council staff in the same way as income from interest that is earned from funds received as rates and held in a bank account. Also the sale of refuse bins (Item 13) can be said to be incidental to the collection of refuse (an activity that is not trading).

240 It is also doubtful whether the funds received for the Emergency Services Collocation Grant (Item 5) whilst used to engage subcontractors to build a community centre can be regarded as a trading activity as there is no evidence on which a finding could be made that the purpose of the building is to engage in trade by letting parts of the building to others for reward on a basis that has an element of commerciality. The evidence of Mr Durtanovich is that the only monetary return for the appellant was that it was reimbursed for the administration costs of managing the construction project. Such an arrangement is unlikely to be regarded as a business like arrangement. Even if I am wrong in reaching this view given that this activity was one single project this is a matter that would have to be taken into account when determining whether the appellant's trading activities form a substantial portion of its entire activities. In addition in relation to the value of the item, the only amount that should be taken into account is the amount the appellant received as income for the administration of this contract.

241 Unless evidence can be produced that the activities relating to the collection of business refuse, business tip charges, building site tip charges and mine site refuse collection are activities that a private citizen or trader could carry out for reward, these activities could not be characterised as trading activities (Items 9, 10, 11 and 12).

242 On the evidence before the Commission it is clear that some items are trading activities. These would include income from the lease of the caravan park (Item 24), private works (Item 30), income received in relation to the running of the Westpac Bank agency (Items 32, 34 and 35). All of these items are functions that could be carried out by a private business. The

same could be said about the income received for the running of the airport (Items 21 and 22) and the associated commercial leases (Items 26 and 28) as those activities appear to have an element of commerciality. As discussed above the income received from the hire of halls, the Ravensthorpe Entertainment Centre, the Sports Pavilion, swimming pool admission charges, gymnasium memberships (Items 15, 16, 17, 18 and 19) could be characterised as trading activities if those activities are engaged in a way that a private individual could run such activities. Even if all of those activities can be said to be trading activities, the nature, extent, regularity and scope of these activities will be relevant as to whether the appellant can be said to be a trading corporation.

243 In my opinion further evidence of some activities is required to be put before the Commission to determine whether they are, in law, trading activities. It is not clear from the evidence provided to the Commission whether any of the activities relating to the collection and treatment of sewerage and effluent (Items 47, 48, 49, 51, 52 and 53) are legislative and executive functions which are purely regulatory and not activities that any private citizen or trader might do. If only nominal charges are made for Items 20 and 23 (Camping fees and Gate registrations) it would be difficult to conclude that these items were in trade.

Conclusion

244 As discussed in the Acting President's reasons for decision the grounds of appeal read like submissions rather than grounds. As I understand the crux of ground 1 of the appeal the appellant contends that when regard is had to the decision of the majority in *ALS* the Commissioner inaccurately assessed the appellant's activities and significance of the trading activities to it. For the reasons set out above I would uphold that ground of appeal and suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

245 Whilst I have reached the conclusion that the Commission at first instance erred, my findings in relation to each of the activities claimed by the appellant as trading activities are not significantly different to the conclusions reached by the Acting President. However, I am of the opinion that until further information is provided in respect of Items 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 23, 47, 48, 49, 51, 52 and 53 it cannot be said definitively whether these items are trading activities or not. An evaluation would have to be made as to whether these activities are carried on in a business like way and whether some of these activities are purely regulatory, governmental activities. Even if these activities are trading activities, a conclusion would not necessarily be able to be drawn as to whether the appellant is a trading corporation as the extent of these activities together with the other activities would have to be examined in a qualitative assessment. Even if all of the activities claimed by the appellant to be trading activities it does not mean that at law the appellant can be regarded as a trading corporation. As set out above the trading activities of the appellant should be evaluated against the total activities of the appellant. An activity is a collection of duties and functions which may be difficult to quantify. One useful exercise may be to ask whether the appellant's activities as a whole simply 'touch on trading' (to use the expression in *Hardeman).* Another question to ask would be whether the appellant has delegated particular activities to third parties and relied upon their expertise or have activities been conducted partly or wholly 'in house'. Time spent on activities may be a useful indicator. Whilst it may be helpful to have regard to the percentage value of the trading activities, other factors such as the number of employees and or the hours of work of full time equivalents positions engaged in trading activities and non trading activities may be of assistance. This could be of particular importance in relation to activities such as the maintenance and operation of the airport. Not only would it be relevant to ascertain how many of the appellant's employees are engaged in this work but also the percentage of their working hours that they spend on such work. The scale of the trading activities would be of importance, including the frequency of each activity. For example, if the appellant employs 50 people whose full time work each week can be quantified as 50 full time equivalents (FTE's) and the equivalent of only five or six FTE's are engaged in work on trading activities each week and the remainder of the hours of work of the remaining FTE's work solely on non-trading activities it is highly unlikely that the appellant could be characterised as trading corporation. At the other end of the scale if 25 FTE's of a total of 50 FTE's are engaged in full time work on trading activities each week, it is likely that the appellant could be characterised as a trading corporation. However, before such a conclusion could be drawn it would be appropriate to have regard to all factors that are relevant to a qualitative assessment.

2009 WAIRC 01176

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRE OF RAVENSTHORPE
	APPELLANT
	-v-
	JOHN PATRICK GALEA
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 9 NOVEMBER 2009
FILE NO/S	FBA 6 OF 2009
CITATION NO.	2009 WAIRC 01176

Result	Correction order issued, appeal otherwise dismissed
Representation	
Appellant	Mr S White, as agent
Respondent	Mr J Atkinson (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 18 September 2009, and having heard Mr S White, as agent, on behalf of the appellant, and Mr J Atkinson (of Counsel) by leave, on behalf of the respondent, it is this day, 9 November 2009, ordered that:

1. Leave to appeal is granted.
2. The appeal is allowed, to the extent that order 2 made by the Commission on 17 July 2009 is deleted and replaced with the following:

   2. DECLARES THAT the respondent is not a trading corporation.
3. The appeal is otherwise dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2009 WAIRC 01183

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WILLIAM CLEVERLEY BEATTS-RATTRAY
	APPLICANT
	-and-
	AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 10 NOVEMBER 2009
FILE NO/S	PRES 13 OF 2009
CITATION NO.	2009 WAIRC 01183

Decision	Directions order issued
Appearances	
Applicant	Mr D Schapper (of Counsel), by leave
Respondent	Ms P Byrne

Order

This matter having come on for a directions hearing before me on 10 November 2009, and having heard Mr D Schapper (of Counsel), by leave, on behalf of the applicant, and Ms P Byrne on behalf of the respondent, it is ordered that:—

1. The parties file and serve any affidavits by close of business on Friday, 13 November 2009;
2. The parties file and serve any submissions by close of business on Friday, 20 November 2009; and
3. The matter be set down for hearing for half a day on Thursday, 3 December 2009 at 10:30 am in Court 1 on the 18th Floor, 111 St Georges Terrace, Perth.

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2009 WAIRC 01106

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY A. DAVIS AM, RETURNING OFFICER OF THE STATE SCHOOL TEACHERS UNION OF WA
	APPLICANT
	-and-
	PATRICIA BYRNE
	FIRST RESPONDENT
	-and-
	MS S O'NEILL, DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	SECOND RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	THURSDAY, 15 OCTOBER 2009
FILE NO/S	PRES 11 OF 2009
CITATION NO.	2009 WAIRC 01106

Decision	Orders and directions
Appearances	
Applicant	Mr D Howlett (of Counsel), by leave
First Respondent	Mr A Dzieciol (of Counsel), by leave
Second Respondent	No appearance
State School Teachers' Union of W.A. (Inc)	Mr S Millman (of Counsel), by leave
Western Australian Electoral Commission	Ms C Lake (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 12 October 2009, and having heard Mr D Howlett (of Counsel), by leave, on behalf of the applicant, Mr A Dzieciol (of Counsel), by leave, on behalf of the first respondent, Mr S Millman (of Counsel), by leave, on behalf of the State School Teachers' Union of W.A. (Inc), Ms C Lake (of Counsel), by leave, on behalf of the Western Australian Electoral Commission and there being no appearance by or on behalf of the second respondent, it is this day, 15 October 2009, ordered that:

1. The application is amended so that the only respondent is the State School Teachers' Union of W.A. (Inc).
2. The proceedings against Ms Byrne and Ms O'Neill are discontinued.
3. The applicant have leave within seven days to file and serve an amended application in the form of the amended application filed on 29 September 2009, save and except for the deletion of Ms Byrne as the second respondent and consequential amendments.
4. The first respondent file and serve affidavits and written submissions in support of the application that Mr Howlett not be given leave to appear for the applicant by 23 October 2009.
5. The directions hearing be adjourned to 9:00am on Tuesday, 27 October 2009.

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

2009 WAIRC 01112

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY A. DAVIS AM, RETURNING OFFICER OF THE STATE SCHOOL TEACHERS UNION OF WA
	APPLICANT
	-and-
	PATRICIA BYRNE
	FIRST RESPONDENT
	-and-
	MS S O'NEILL, DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	SECOND RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	FRIDAY, 16 OCTOBER 2009
FILE NO.	PRES 11 OF 2009
CITATION NO.	2009 WAIRC 01112

Result	Orders and directions
Appearances	
Applicant	Mr D Howlett (of Counsel), by leave
First Respondent	Mr A Dzieciol (of Counsel), by leave
Second Respondent	No appearance
The State School Teachers' Union of W.A. (Incorporated)	Mr S Millman (of Counsel), by leave
Western Australian Electoral Commission	Ms C Lake (of Counsel), by leave

Correction Order

This matter having come on for a directions hearing before me on 12 October 2009, and having heard Mr D Howlett (of Counsel), by leave, on behalf of the applicant, Mr A Dzieciol (of Counsel), by leave, on behalf of the first respondent, Mr S Millman (of Counsel), by leave, on behalf of The State School Teachers' Union of W.A. (Incorporated), Ms C Lake (of Counsel), by leave, on behalf of the Western Australian Electoral Commission and there being no appearance by or on behalf of the second respondent, it is this day, 15 October 2009, ordered that:

1. The application is amended so that the only respondent is The State School Teachers' Union of W.A. (Incorporated).
2. The proceedings against Ms Byrne and Ms O'Neill are discontinued.
3. The applicant have leave within seven days to file and serve an amended application in the form of the amended application filed on 29 September 2009, save and except for the deletion of Ms Byrne as the second respondent and consequential amendments.
4. The first respondent file and serve affidavits and written submissions in support of the application that Mr Howlett not be given leave to appear for the applicant by 23 October 2009.
5. The directions hearing be adjourned to 9:00am on Tuesday, 27 October 2009.

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

2009 WAIRC 01141

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY A. DAVIS AM, RETURNING OFFICER OF THE STATE SCHOOL TEACHERS UNION OF WA
	APPLICANT
	-and-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	WEDNESDAY, 28 OCTOBER 2009
FILE NO	PRES 11 OF 2009
CITATION NO.	2009 WAIRC 01141

Decision	Orders and directions
Appearances	
Applicant	Mr D Howlett (of Counsel), by leave
Respondent	Mr S Millman (of Counsel), by leave
Western Australian Electoral Commission	Ms C Lake (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 27 October 2009, and having heard Mr D Howlett (of Counsel), by leave, on behalf of the applicant, Mr S Millman (of Counsel), by leave, on behalf of the respondent and Ms C Lake (of Counsel), by leave, on behalf of the Western Australian Electoral Commission, it is ordered that:—

1. The respondent by 4:00pm on Friday, 13 November 2009 file and serve on the applicant a document setting out:–
   (a) an outline of their facts and contentions; and
   (b) the particulars of the rules of the respondent as is asserted by them.
2. The application be adjourned to a directions hearing on 20 November 2009 at 9:30am.

(Sgd.) J H SMITH,
[L.S.] Acting President.

2009 WAIRC 01142

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT MCJANNETT
	APPLICANT
	-and-
	KEVIN REYNOLDS, SECRETARY - THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS
	FIRST RESPONDENT
	IAN BOTTERILL RETURNING OFFICER WA ELECTORAL COMMISSION
	SECOND RESPONDENT
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	INTERVENER
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	FRIDAY, 30 OCTOBER 2009
FILE NO/S	PRES 5 OF 2009
CITATION NO.	2009 WAIRC 01142

Decision	Orders and directions
Appearances	
Applicant	In person
First Respondent	No appearance
Second Respondent	No appearance
Intervener	Mr R Kenzie QC, by leave, and with him Mr T Dixon (of Counsel), by leave

Order

WHEREAS the intervener's application for the summary dismissal of the proceedings was heard on 23 October 2009; and

WHEREAS the applicant has requested leave to file additional written submissions about the documents tabled by the intervener at the hearing; and

WHEREAS the intervener does not object to such submissions being made, but seeks the opportunity to reply to the submissions;

NOW THEREFORE it is this day, 30 October 2009, ordered that:

1. The applicant is to file and serve additional written submissions on the documents tabled by the intervener at the hearing, on or before 4:00pm on 6 November 2009.
2. The intervener may file and serve written submissions in reply, by 4:00pm on 13 November 2009.

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

2009 WAIRC 01108

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2009 WAIRC 01108
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
HEARD	**:**	TUESDAY, 18 AUGUST 2009, WEDNESDAY, 30 SEPTEMBER 2009, THURSDAY, 1 OCTOBER 2009
DELIVERED	**:**	THURSDAY, 1 OCTOBER 2009
FILE NO.	**:**	PRES 7 OF 2009
BETWEEN	**:**	THE REGISTRAR
		Applicant
		AND
		MR PHIL WOODCOCK
		THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIAN BRANCH
		Respondent

CatchWords:

Industrial Law (WA) – Application under s66 of the *Industrial Relations Act 1979* (WA) – Respondent failed to have elections in accordance with the Union rules – Appointment of interim executive by consent

Legislation:

Industrial Relations Act 1979 (WA): s66

Result:

Interim Executive Appointed

Representation:

Counsel:

Applicant:	Mr R Andretich (of Counsel), by leave
Respondent:	Mr J Nolan (of Counsel), by leave
First Proposed Intervener:	Mr J Nolan (of Counsel), by leave
Second Proposed Intervener:	Mr P Momber (of Counsel), by leave

Solicitors:

Applicant:	State Solicitor's Office
Respondent:	Not applicable
First Proposed Intervener:	Not applicable
Second Proposed Intervener:	Peter Momber Barristers & Solicitors

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Reasons for Decision

(Delivered Extempore and edited from the Transcript)

RITTER AP:

1 The substantive application before me is pursuant to s66 of the *Industrial Relations Act 1979* (WA) (*the Act*). It is an application brought by the Registrar in relation to the respondent Union. Primarily the application seeks the regularisation of the Union. This is because the Union has not been conducting itself in accordance with the rules and in particular has not, within the time provided by the rules, had elections for membership of the governing bodies of the Union as described in the rules. These bodies are the branch council and the branch executive. Pursuant to directions made at the past but one directions hearing, both the Registrar and the respondent have filed detailed submissions setting out the background to the present situation as well as industrial disputes which are presently ongoing and which involve the Union.

2 It is not necessary to summarise the detail of the background which has been provided. It is sufficient to say for present purposes that there have been difficulties which have arisen because of the intermingling of the WA branch of the Australian Rail, Tram and Bus Industry Union (the Federal Union) and the respondent Union in this matter. This has led to, amongst other things, difficulties with identifying membership, and the governing bodies of the respondent being comprised by the same persons as the governing bodies of the WA branch of the Federal Union, when the respondent has not applied for or obtained a s71 certificate and no separate election has been held for offices in the respondent. There are also difficulties involving assets and other financial matters.

3 The Registrar's interest is in seeking the regularisation of the respondent so that it can move forward and become again a properly functioning organisation registered under *the Act*. To this end the first concern of the Registrar is that there is no properly constituted executive of the respondent and therefore there is, at the very least very arguably, no body which can properly represent the Union and make valid decisions for and on behalf of the Union.

4 Broadly, those submissions are not cavilled with by the Union. At the last directions hearing it was proposed by the Registrar and agreed to by the respondent that there should be appointed by me an interim executive which could validly make decisions on behalf of the Union. At the last directions hearing Mr Momber appeared and informed me that he represented some 155 rail car drivers of the 250 rail car drivers who were eligible to be members of the Union, and also a large number of transit guards, approximately 250, who also were eligible to be members of the Union. At that stage Mr Momber sought leave to intervene on behalf of these parties, but for reasons which I will mention shortly, there was no need to press that application at this stage.

5 In addition, Mr Nolan in his written submissions and also yesterday, referred to an application by the Federal Union to intervene in these proceedings. Again at this stage it is not necessary to press that application. At the last directions hearing the Registrar and the respondent, together with those whom Mr Momber represents, all agreed that an interim executive should be appointed. There was at that time some disagreement as to who should be the members of that interim executive. Accordingly, the directions hearing was adjourned until this afternoon so that the parties could have the opportunity to discuss the matter and see whether there could be some agreement as to the membership of the interim executive.

6 At the commencement of the hearing today, Mr Nolan informed me that agreement had been reached as to the membership, and accordingly, there was amendment to the minute of proposed orders that he had previously provided, to increase the membership by two people. I was informed by the Registrar and Mr Momber that there was no disagreement with them as to the membership of the committee. I think it very sensible that the parties have been able to agree on the membership of the committee so that issue did not distract either the Commission, or the Union, from attempting to get the Union's house in order.

7 For these reasons I will make the orders later set out. In doing so it is important to note matters which were contained within the minute when it was provided to me and which were elaborated upon by Mr Nolan. The importance of these points is that they set out, from the submissions which have been provided by the Union, matters which need to be attended to, to get the Union's house in order. The points are that it is expected, before the directions hearing on 3 March 2010, that the interim executive committee will take all necessary steps to:

(1) Regularise the Union's membership; that is, determine which persons should have been admitted to the Union, and to arrange for admission in accordance with the rules.

(2) Obtain advice regarding the adoption of suitably amended rules and adopt such rules in consultation with the Registrar.

(3) Obtain advice regarding the possible adoption of rules as will be necessary to bring into conformity the eligibility rule of the respondent and Federal Union.

(4) Obtain advice regarding the adoption of a s71 certificate and/or advice as to the election of an executive committee.

8 For those reasons I will make the orders that I earlier indicated. These are:

1. An Interim Branch Executive of the Respondent is established, constituted as follows –

Full Time Official

1. Phillip Woodcock (Branch Secretary)

Branch President

2. Michael Chance

Branch Vice-President

3. John Miller

Metropolitan Sub-Branch President

4. James Drury

Metropolitan Sub-Branch Secretary

5. Ian King

Perth Sub-Branch President

6. Helen Martin

Perth Sub-Branch Secretary

7. Jason Hopperton

Member

8. Craig Dearth

Member

9. James Reed

2. Until further order, the Interim Branch Executive shall exercise all of the powers, functions and duties of the Branch Council and Branch Executive of the Respondent under the rules.

3. The matter return to the Acting President for a report back and further orders (if necessary) on 3 March 2010.

4. There be liberty to apply on seven days notice.

2009 WAIRC 01165

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION – PRESIDENT

BETWEEN:	THE REGISTRAR
	Applicant
AND:	MR PHIL WOODCOCK
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNIOIN OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	Respondent
CORAM:	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE:	THURSDAY, 1 OCTOBER 2009 (CORRIGENDUM THURSDAY, 5 NOVEMBER 2009)
FILE NO:	PRES 7 OF 2009
CITATION NO.:	2009 WAIRC 01165
PLACE:	**PERTH**

CORRIGENDUM

1. In the name of the respondent in the heading of the reasons for decision published on 16 October 2009 the word "WESTERN'" is deleted and the word "WEST" is inserted.

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

Dated: Thursday, 5 November 2009

2009 WAIRC 01137

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE REGISTRAR

APPLICANT

-and-

MR PHIL WOODCOCK

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

RESPONDENT

CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	TUESDAY, 27 OCTOBER 2009
FILE NO/S	PRES 7 OF 2009
CITATION NO.	2009 WAIRC 01137

Decision	Application adjourned
Appearances	
Applicant	Mr R Andretich (of Counsel), by leave
Respondent	Mr J Nolan (of Counsel), by leave
Proposed Interveners	Mr P Momber (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 27 October 2009, and having heard Mr R Andretich (of Counsel), by leave, on behalf of the applicant, Mr J Nolan (of Counsel), by leave, on behalf of the respondent, and Mr P Momber (of Counsel), by leave, on behalf of proposed interveners, it is this day, 27 October 2009, ordered that the directions hearing be adjourned to 3:00pm on 4 November 2009.

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

2009 WAIRC 01167

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE REGISTRAR

APPLICANT

-v-

MR PHIL WOODCOCK

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

RESPONDENT

CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	THURSDAY, 5 NOVEMBER 2009
FILE NO.	PRES 7 OF 2009
CITATION NO.	2009 WAIRC 01167

Result	Order
Representation	
Applicant	Mr R Andretich (of Counsel), by leave
Mr Phil Woodcock	Mr J Nolan (of Counsel), by leave
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Mr P Momber (of Counsel), purportedly, by leave

Correction Order

WHEREAS the order of the Acting President which issued on 18 August 2009 incorrectly names the respondent in the heading of the order as, in part, The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch; and

WHEREAS the order of the Acting President which issued on 30 September 2009 incorrectly names the respondent in the heading of the order as, in part, The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch; and

WHEREAS the order of the Acting President which issued on 1 October 2009 incorrectly names the respondent in the heading of the order as, in part, The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch; and

WHEREAS the order of the Acting President which issued on 27 October 2009 incorrectly names the respondent in the heading of the order as, in part, The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch;

NOW THEREFORE it is this day, 5 November 2009, ordered that the word 'Western' is deleted from the name of the respondent in the heading of these orders and the word 'West' is inserted in its place.

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

2009 WAIRC 01161

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR
	APPLICANT
	-v-
	MR PHIL WOODCOCK
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	THURSDAY, 5 NOVEMBER
FILE NO/S	PRES 7 OF 2009
CITATION NO.	2009 WAIRC 01161

Result	Order
Representation	
Applicant	Mr R Andretich (of Counsel), by leave
Mr Phil Woodcock	Mr J Nolan (of Counsel), by leave
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Mr P Momber (of Counsel), purportedly, by leave

Order

This matter having come on for a directions hearing before me on 4 November 2009, and having heard Mr R Andretich (of Counsel), by leave, on behalf of the applicant, Mr J Nolan (of Counsel), by leave, on behalf of Mr Woodcock and Mr P Momber (of Counsel), by leave, purporting to appear on behalf of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch, it is this day, 5 October 2009, ordered that the directions hearing be adjourned to 13 November 2009 at 9:15 am.

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

AWARDS/AGREEMENTS—Variation of—

2009 WAIRC 01134

THE FRUIT GROWING AND FRUIT PACKING INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	J.V. GIUMELLI AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 26 OCTOBER 2009
FILE NO/S	APPL 124 OF 2008
CITATION NO.	2009 WAIRC 01134

Result	Award varied
Representation	
Applicant	Mr M Zoetbrood
Respondent	Mr P Brunner (of counsel) on behalf of the W.A. Fruit Growers Association

Order

HAVING heard Mr M Zoetbrood on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and Mr P Brunner on behalf of the W.A. Fruit Growers Association, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act, 1979*, hereby orders:

THAT the *Fruit Growing and Fruit Packing Industry Award (No R 17 of 1979)* be varied in accordance with the following Schedule and that such variation shall have effect on and from 23 October 2009.

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

SCHEDULE

1. Clause 3. - Scope: Delete this clause and insert the following in lieu thereof:

This award shall apply to all workers employed in the classifications contained in Clause 24. - Wages engaged in the Fruit Growing and Fruit Packing Industry, including the preparation of land, cultivation, planting, care, picking, handling, treating, packing and dispatching of all fresh fruits including tomatoes on or from gardens, farms, orchards and in packing sheds.

2. Schedule C. – Service List: Delete this schedule and insert the following in lieu thereof:

WA Fruit Growers Association

MP 96 Market City

280 Bannister Road

Canning Vale WA 6155

WA Chamber of Commerce and Industry

180 Hay Street

East Perth WA 6004

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers

Level 4, 25 Barrack St

Perth WA 6000

C. Birmingham

"Caraholly"

Caraholly Road

Dwellingup WA 6213

A. Correia
Kenweyth Plantation
Carnarvon WA 6701
J.V. Giumelli
660 Canning Road
Carmel WA 6076
N.K. & P.G. Gubler
Lot 8 South West Highway
Mullalyup WA 6252
Mr Harvey Giblett
Newton Brothers
P.O. Box 190
Manjimup WA 6258
Mr Shane Kay
Lot 40 Great Northern Highway
Bindoon WA 6502

2009 WAIRC 01140

LANDSCAPE GARDENING INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	AAA GARDENERS AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 27 OCTOBER 2009
FILE NO/S	APPL 447 OF 2003
CITATION NO.	2009 WAIRC 01140

Result	Award varied
Representation	
Applicant	Mr M Zoetbrood
Respondents	Mr D Jones on behalf of the Chamber of Commerce and Industry Western Australia

Order

WHEREAS this is an application to vary Clause 16. – Public Holidays and Annual leave of the *Landscape Gardening Industry Award (No R 18 of 1978)* ("the Award"); and

WHEREAS a hearing was held with respect to this application on 23 October 2009; and

WHEREAS on 23 October 2009 the Commission issued a Minute of Proposed Order with respect to this application; and

WHEREAS on 27 October 2009 the Commission conducted a Speaking to the Minute of Proposed Order; and

WHEREAS at this hearing and after having discussions with Mr D Jones of the Chamber of Commerce and Industry Western Australia the applicant proposed an amendment to the Minute of Proposed Order to clarify the intention of the variation it was seeking with respect to paragraph (b) of subclause (2) of Clause 16. – Public Holidays and Annual leave of the Award; and

WHEREAS Mr D Jones on behalf of the Chamber of Commerce and Industry Western Australia agreed with the applicant's proposed amendment to the Minute of Proposed Order; and

WHEREAS after hearing from the parties and having considered their submissions the Commission advised the parties that paragraph (b) of subclause (2) of Clause 16. – Public Holidays and Annual leave would be amended in the terms being sought by the applicant as the amendment clarified the applicant's intentions with respect to the award variation being sought by the applicant;

NOW having heard Mr M Zoetbrood on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and Mr D Jones on behalf of the Chamber of Commerce and Industry Western Australia, the Commission, pursuant to the powers conferred under the *Industrial Relations Act, 1979*, hereby orders:

THAT the *Landscape Gardening Industry Award (No R 18 of 1978)* be varied in accordance with the following Schedule and that such variation shall have effect on and from 23 October 2009.

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

SCHEDULE

1. Clause 16 – Public Holidays and Annual Leave:

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

(2) (a) On any public holiday not prescribed as a holiday under this award the employer's establishment or place of business may be closed, in which case an employee need not present himself or herself for duty and payment may be deducted, but if work be done ordinary rates of pay shall apply.

(b) Any employee, other than a casual employee, who in any area of the State is not required to work on a day solely because that day is a public holiday in that area, is entitled to be paid the ordinary wages that would have been paid if he or she had worked that day.

B Immediately following subclause (9) of this clause insert a new subclause (10) as per the following and renumber the existing subclause (10) as (11):

(10) (a) Where an employer and an employee have not agreed when the employee is to take his or her annual leave, subject to paragraph (b) of this subclause, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than 12 months before that time.

(b) The employee is to give the employer at least two weeks' notice of the period during which the employee intends to take his or her leave.

2009 WAIRC 01135

LANDSCAPE GARDENING INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	AAA GARDENERS AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 26 OCTOBER 2009
FILE NO/S	APPL 1023 OF 2004
CITATION NO.	2009 WAIRC 01135

Result	Award varied
Representation	
Applicant	Mr M Zoetbrood
Respondent	No appearances

Order

HAVING heard Mr M Zoetbrood on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and there being no appearances on behalf of the respondents, the Commission, pursuant to the powers conferred under *the Industrial Relations Act, 1979*, hereby orders:

THAT the *Landscape Gardening Industry Award (No R 18 of 1978)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 23 October 2009.

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

SCHEDULE

1. Clause 13. – Meal Break: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) (a) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work shall be supplied with a meal by the employer or paid $12.50 for a meal.

(b) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer, unless the employer has notified the employee concerned on the previous day or earlier that such second or subsequent meals will also be required, shall provide such meals or pay an amount of $8.75 for each such second or subsequent meal.

(c) No such payments need be made to employees living in the same locality as their place of employment who can reasonably return home for such meals.

2. Clause 19. – Vehicle Allowance: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

RATES OF ALLOWANCE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS

Area and Details	Engine Displacement (in cubic centimetres)	
Distance Travelled during a Year on Official Business	Over 1600 cc c/km	1600 cc & Under c/km
Metropolitan Area:		
First 8,000 kilometres	62.6	51.5
Over 8,000 kilometres	40.8	33.9
South West Land Division:		
First 8,000 kilometres	65.4	53.8
Over 8,000 kilometres	42.3	35.2
North of 23.5 degrees South Latitude:		
First 8,000 kilometres	74.2	61.7
Over 8,000 kilometres	46.8	39.4
Rest of the State:		
First 8,000 kilometres	68.1	55.2
Over 8,000 kilometres	44.1	36.6

3. Clause 25. – Wages: Delete subclause (4) of this clause and insert the following in lieu thereof:

(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	25.47
(b)	If placed in charge of more than ten and not more than twenty other employees	39.08
(c)	If placed in charge of more than twenty other employees	50.27

2009 WAIRC 01136

LANDSCAPE GARDENING INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

APPLICANT

-v-

ANTHONY CONTRACTING AND OTHERS

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE MONDAY, 26 OCTOBER 2009

FILE NO/S APPL 106 OF 2008

CITATION NO. 2009 WAIRC 01136

Result	Award varied
Representation	
Applicant	Mr M Zoetbrood
Respondent	Mr D Jones on behalf of the Chamber of Commerce and Industry Western Australia

Order

HAVING heard Mr M Zoetbrood on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and Mr D Jones on behalf of the Chamber of Commerce and Industry Western Australia, the Commission, pursuant to the powers conferred under the *Industrial Relations Act, 1979*, hereby orders:

1. THAT the *Landscape Gardening Industry Award (No R 18 of 1978)* be varied in accordance with the following Schedule and that such variation shall have effect on and from 23 October 2009.

2. THAT liberty to apply is granted to the Chamber of Commerce and Industry Western Australia with respect to amending Clause 3. – Area and Scope of the *Landscape Gardening Industry Award (No R 18 of 1978)* to insert the words "other than constitutional corporations".

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

SCHEDULE

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

This Award shall have effect throughout the State of Western Australia and shall apply to all employees employed in the landscape gardening industry who are employed in any of the classifications contained in Clause 25. - Wages of this Award.

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

Arcadia Creative Garden Solutions

27 Williamson Avenue

BELMONT WA 6450

Contemporary Landscapes

PO Box 1528

WANGARA WA 6065

Cultivart Landscape Design

PO Box 2050

CLAREMONT WA 6010

Dream Gardens

2-6 Dobra Road

BIBRA LAKE WA 6153

Great Outdoors Landscaping

PO Box 2125

MANDURAH WA 6210

Greener Landscaping

33 Donaldson Street

QUEENS PARK WA 6107

Landscraft Construction

26 Wolsley Road

EAST FREMANTLE WA 6158

Marsdens Landscaping

19 Bertram Street

MADDINGTON WA 6109

Myada

35 Frances Road

BUNBURY WA 6230

Martin Cuthbert Landscapes
17 John XXIII Avenue
MOUNT CLAREMONT WA 6010
Naturescape
106 Napier Street
COTTESLOE WA 6011
Precision Landscape Construction
PO Box 869
MORLEY WA 6943
Revell Lawns and Landscapes
PO Box 481
MORLEY PRIVATE BOXES WA 6943
Street Image
BUTLER WA 6036
True Blue Landscapes
LANDSDALE WA 6065
Valleybrook Contracting
8 Brookside Avenue
KELMSCOTT WA 6111

3. Schedule A. – Named Parties to the Award: Delete this schedule and insert the following in lieu thereof:

UNION PARTY
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
Level 4, 25 Barrack St
PERTH WA 6000

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2009 WAIRC 01163

FRUIT GROWING AND FRUIT PACKING INDUSTRY AWARD - THE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	MC ARMSTRONG AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 5 NOVEMBER 2009
FILE NO/S	APPLA 901 OF 2002
CITATION NO.	2009 WAIRC 01163

Result	Discontinued
Representation	
Applicant	Mr M Zoetbrood
Respondent	Mr P Brunner (of counsel) on behalf of the W.A. Fruit Growers Association

Order

WHEREAS this is an application to vary the *Fruit Growing and Fruit Packing Industry Award* ("the Award"); and

WHEREAS this application resulted from an order that issued on 10 March 2005 which divided application Appl 901 of 2002 into two parts being application Appl 901 of 2002 and ApplA 901 of 2002; and

WHEREAS application Appl 901 of 2002 was finalised by an order that issued on 10 March 2005; and

WHEREAS the Commission contacted the applicant on numerous occasions about the status of this application; and

WHEREAS on 21 July 2006, 20 September 2006 and 2 November 2006 the Commission convened conciliation conferences; and

WHEREAS following the conference held on 2 November 2006 the applicant was to lodge a further application to vary the Award which was to be joined to this application; and

WHEREAS the Commission contacted the applicant on a number of occasions about its undertaking to lodge a further application to vary the Award and the application was lodged on 29 October 2008; and

WHEREAS on 31 July 2009 the Commission contacted the applicant about listing the matter for hearing; and

WHEREAS on 28 August 2009 the applicant informed the Commission that the applicant was having further discussions with a representative of the W.A. Fruit Growers Association with respect to the matter; and

WHEREAS on 23 September 2009 the applicant advised the Commission that it did not wish to proceed with the matter; and

WHEREAS on 12 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS the W.A. Fruit Growers Association consents to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2009 WAIRC 01109

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK BUTLER
	APPLICANT
	-v-
	KUMHO TYRES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 16 OCTOBER 2009
FILE NO/S	B 163 OF 2009
CITATION NO.	2009 WAIRC 01109
Result	Discontinued

Order

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

WHEREAS the Commission set down a conference on 14 October 2009 for the purpose of conciliating between the parties; and

WHEREAS on 12 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 12 October 2009 the respondent consented to the matter being discontinued; and

WHEREAS on 13 October 2009 the conference was vacated;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01110

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK BUTLER
	APPLICANT
	-v-
	KUMHO TYRES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 16 OCTOBER 2009
FILE NO/S	U 163 OF 2009
CITATION NO.	2009 WAIRC 01110

Result Discontinued

Order

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

WHEREAS the Commission set down a conference on 14 October 2009 for the purpose of conciliating between the parties; and

WHEREAS on 12 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 12 October 2009 the respondent consented to the matter being discontinued; and

WHEREAS on 13 October 2009 the conference was vacated;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01121

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEMAR CARNEIRO
	APPLICANT
	-v-
	THE CHENEY FAMILY TRUST T/A BULLCREEK MILK SUPPLY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 20 OCTOBER 2009
FILE NO	U 162 OF 2009
CITATION NO.	2009 WAIRC 01121

Result Application discontinued

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 7 October 2009 at the conclusion of which the matter was adjourned; and

WHEREAS the applicant advised the Commission on 9 October 2009 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.

2005 WAIRC 01946

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WARREN BRUCE CHRISTMASS
	APPLICANT
	-v-
	ACE REMOVALISTS PTY LTD ACN 074 187 438 ABN 30 074 187 438
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 1 JULY 2005
FILE NO/S	APPL 597 OF 2005
CITATION NO.	2005 WAIRC 01946

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Mr W Christmass on his 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 orders –

THAT until further order the herein application be and is hereby stayed.

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

2009 WAIRC 01103

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAMERON COX
	APPLICANT
	-v-
	GREG THOMAS PLUMBING & GAS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	THURSDAY, 1 OCTOBER 2009
DELIVERED	WEDNESDAY, 14 OCTOBER 2009
FILE NO.	U 128 OF 2009
CITATION NO.	2009 WAIRC 01103

CatchWords	Unfair dismissal – Gross misconduct – Seeking alternative employment – No valid reason for termination – Industrial Relations Act 1979 (WA) s.29(1)(b)(i)
Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr C Cox
Respondent	Mrs J Thomas

Reasons for Decision

1 Mr Cameron Cox claims that he was dismissed unfairly on 18 June 2009 from his position as a Manager with the respondent's business because:

> "I was working for another job (in my own time), my boss (Greg Thomas) found out from another party. He then told me that I should leave immediately, take my things and not come back.
>
> I feel I was unfairly dismissed as I had done nothing wrong and he had no reason to dismiss me. I consider his actions to be spiteful and vexatious. I was not given any notice nor paid in lieu of notice. I was summarily dismissed."

2 Mr Cox commenced his employment on 20 March 2009. Mr Cox's evidence is that on 18 June 2009 about 2pm Mr Thomas approached him in the office and said that he had heard Mr Cox was looking for another job. Mr Cox says, "I told him that I had, gave him the reasons why and was told to pack up my things and go because he didn't want anybody working for him that was looking for another job". Mr Cox left almost immediately and spoke with Mr Thomas in the following weeks as to why he was not paid any severance or notice. He says that Mr Thomas indicated that he did not think any payment was due.

3 He started in a new job the following Thursday and in that position is paid $16,000 per annum less in salary than he would have received from the respondent. He obtained the new job from looking in the newspaper and on the internet over the weekend following his dismissal. Mr Cox managed the business for Mr and Mrs Thomas for about 6 or 7 weeks while they were away overseas in Europe. They returned at the end of May 2009. He says the relationship between the owners and he was not as good after they returned from holidays as before. He says there were a few areas where they thought he had not done a good enough job, but that he had done his best.

4 The respondent in their Notice of Answer and Counterproposal state that Mr Cox was dismissed for gross misconduct. They state further that:

> "Mr Cameron Cox was employed by us in a full-time capacity as Maintenance Co-ordinator / Estimator within our plumbing business on a 3 month Probation period. Termination occurred within this period, namely Thursday 18th June 2009. Reasons for termination include, but are not limited to, the following:
>
> 1 Theft of fuel via business fuel cards.
>
> 2. Theft from petty cash to the sum of $100.00. Eventually reimbursed to employer, only after discrepancy queried.
>
> 3. Misconduct due to unauthorised use of employer's work vehicles, tools, fuel and on-board materials of said vehicles with intent of personal gain.
>
> 4. Inability to deal with allocated workload efficiently and within a reasonable timeframe.
>
> 5. The viewing of pornographic websites during work hours on work computer.
>
> 6. The display of pornographic reading material at the workplace.
>
> 7. Excessive use of work computer for personal matters. Holiday research, internet banking, searching for other employment.
>
> Verbal warnings were provided to Cameron Cox by Juliette Thomas (partner) on Tuesday 8th June 2009 and Friday 11th June 2009 regarding several of the above matters."

5 Mr Thomas gave evidence that, "we weren't ever disappointed in the way he was running our business while we were away. I believe he did run it in the best of his ability". On his return Mr Thomas discovered that Mr Cox was looking for another job and he says that, "I believe the problem that I have with Cameron is that he'd misled me in many areas of my business, and honesty was one of them, and trust". He was asked to clarify this statement and he said that Mr Cox, "didn't honestly account for everything that he did financially within the business". Mr Thomas then went on to explain some of these problems.

6 As for the dismissal Mr Thomas says that he said to Mr Cox, "Were you looking for another position". Mr Cox admitted he was and said that he was because he was seeking more money. Mr Thomas then said, "Well, you might as well leave because you'll be no good to me now". Mr Thomas under cross-examination said that looking for another job was sufficient reason for dismissal. Mr Thomas was then asked directly by the Commission whether the reason he dismissed Mr Cox was because he was looking for another job and he replied, "yes". He went on to say that he would have eventually dismissed him due to the problems mentioned in the Notice of Answer and Counterproposal. Some of these matters were put to Mr Cox prior to his dismissal by mostly Mrs Thomas.

7 Mrs Thomas also gave evidence about the problems she had encountered with Mr Cox. Mr Cox denies that any of these matters were serious or treated as serious concerns. I do not need to recite all the evidence as it is clear from the evidence of Mr Thomas alone that the reason why Mr Cox was dismissed was because he was looking for another job. This is not an act of gross misconduct and did not warrant Mr Thomas dismissing summarily Mr Cox (see *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 @ 287; *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). I therefore find that Mr Cox was dismissed unfairly on 18 June 2009.

8 He does not seek reinstatement as he has another job, was previously looking for another job and the relationship has broken down. I find that reinstatement is impracticable. He was without employment for 3 working days. This is the direct loss he suffered and he suffers also a component of ongoing loss in that his new salary is $16,000 per annum less than his old salary. However, he by his own admission did not intend to stay with the respondent. He was looking for work elsewhere. In that sense I would limit the period of ongoing loss to 4 weeks that being a sufficient time for Mr Cox to have assumed new employment.

9 Therefore the loss includes 3 days at a salary of $70,000 per annum, ie $807.69, and 20 days at a salary of $16,000 per annum, ie $1,230.77. The total loss is therefore $2,038.46 gross less any taxation payable to the Commissioner for Taxation. This money is to be paid to Mr Cox by the respondent within 7 days from the date of the order.

2009 WAIRC 01131

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAMERON COX
	APPLICANT
	-v-
	GREG THOMAS PLUMBING & GAS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 22 OCTOBER 2009
FILE NO.	U 128 OF 2009
CITATION NO.	2009 WAIRC 01131

Catchwords	Unfair dismissal - Gross misconduct - Seeking alternative employment - No valid reason for termination - Compensation to be ordered - Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr C Cox
Respondent	Mrs J Thomas

Supplementary Reasons for Decision

1 A letter dated 14 October was sent to the parties, with a Minute of Proposed Order, to ascertain whether a Speaking to the Minutes was required. The parties were required to reply by 21 October 2009. One response was received. The applicant emailed the Commission on 20 October 2009 and stated:

> *"… I received the minute of proposed order in relation to my claim.*
>
> *It was my understanding that if I was to be successful in my claim that I would receive payment for the weeks notice (or weeks severance) that I was entitled to.*
>
> *Point 3 & 8 are incorrect as I said all along that I found a new job within a couple of days by my employment didnt begin until the following Monday (29th).*
>
> *Please contact me if you have any questions."*

2 In my Reasons for Decision at paragraph 9 I calculated that the applicant's loss included 3 days at a salary of $70,000 per annum, ie $807.69, plus some ongoing loss. The applicant's evidence is in effect that he lost 3 days of paid work as he started a new job the following week. The relevant evidence is as follows:

> "All right. Since that date of your dismissal have you been looking for work and have you got work?---I do have a job at the moment, yes.
>
> All right. And your job at the moment, when did you start?---The following week after my dismissal.
>
> What, the Monday?---No, it was the Thursday, I believe, the following Thursday.
>
> So you left one job on the Friday and started the Thursday of the next week, did you?---Yes.
>
> Right. And in that job are you still there?---I am, yes. (4T)

3 His evidence is clearly that he started a new job on the Thursday following his dismissal. However, in my question I put to him that he left the job on a Friday. He in fact left the respondent's premises on Thursday, 18 June 2009. Therefore, in actual fact the applicant lost 4 days of wages, instead of 3 days, as he was dismissed the Thursday, and started new employment the following Thursday. The 4 days comes to a loss of $1,076.92 instead of $807.69 (being 3 days) and the total loss is therefore $ 2,307.69.

4 Mr Cox expresses a concern also that he was not paid one week of notice. That is so, however, the above calculation of his loss takes account of his total period of loss. If he had been paid notice then the law is that payment would have had to be deducted from the calculation of loss as a payment previously received from the respondent.

2009 WAIRC 01132

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAMERON COX
	APPLICANT
	-v-
	GREG THOMAS PLUMBING & GAS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 22 OCTOBER 2009
FILE NO	U 128 OF 2009
CITATION NO.	2009 WAIRC 01132

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr C Cox
Respondent	Mrs J Thomas

Order

HAVING heard Mr C Cox on his own behalf and Mrs J Thomas on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby:

DECLARES that the applicant, Cameron Cox, was dismissed unfairly by the respondent on the 18th day of June 2009;

DECLARES that reinstatement is impracticable;

ORDERS that the said respondent do hereby pay, as and by way of compensation the amount of $2,307.69 gross less any taxation payable to the Commissioner of Taxation, to Cameron Cox, within 7 days of the date of this Order.

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

2009 WAIRC 01129

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL KEITH FORBES
	APPLICANT
	-v-
	SODEXO - REMOTE SITES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 21 OCTOBER 2009
FILE NO/S	B 171 OF 2009
CITATION NO.	2009 WAIRC 01129

Result	Discontinued

Order

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

WHEREAS on 2 October 2009 the respondent lodged a Notice of Answer and Counter-proposal with respect to the matter; and

WHEREAS on 12 October 2009 the Commission wrote to the applicant by way of e-mail to ask whether the matter had been resolved given the respondent's answer to his claim; and

WHEREAS on 13 October 2009 the applicant advised the Commission that the matter had been resolved; and

WHEREAS on 19 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 19 October 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 00031

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATALIE JEAN HODSON
	APPLICANT
	-v-
	SHOPPENHANGERS PTY LTD T/AS C RESTAURANT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 29 JANUARY 2009
FILE NO/S	B 152 OF 2008
CITATION NO.	2009 WAIRC 00031

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	In person
Respondent	Mr T Carmady of counsel

Order

Having heard Ms Hodson on her own behalf and Mr T Carmady of counsel on behalf of the respondent the Commission, pursuant to powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2009 WAIRC 01120

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADAM LEIDREITER
	APPLICANT
	-v-
	POSEIDON SCIENTIFIC INSTRUMENTS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 20 OCTOBER 2009
FILE NO/S	U 145 OF 2009
CITATION NO.	2009 WAIRC 01120

Result	Discontinued
Representation	
Applicant	Mr A Leidreiter on his own behalf
Respondent	Mr D Jones (as agent)

Order

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

WHEREAS on 24 September 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on 15 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 15 October 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01125

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL A LE ROUX
	APPLICANT
	-v-
	CITY OF GOSNELLS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 20 OCTOBER 2009
FILE NO	U 136 OF 2009
CITATION NO.	2009 WAIRC 01125

Result	Application discontinued

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 2 September 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 9 October 2009 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.

2009 WAIRC 01139

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS KELLIE DYSON
	APPLICANT
	-v-
	JULIA AND ROB PERGOLITI, CUPIDS DELIGHT
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 27 OCTOBER 2009
FILE NO/S	B 132 OF 2008
CITATION NO.	2009 WAIRC 01139

Result Dismissed

Order

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

WHEREAS on 2 December 2008 the Commission convened a conference for the purpose of conciliating between the parties and a partial settlement of the issues in dispute was reached; and

WHEREAS following the conference the respondent was given time to get advice about the remaining outstanding issue; and

WHEREAS on 22 January 2009 the Commission convened a conference for the purpose of conciliating between the parties and following this conference the matter was adjourned to give the respondent time to obtain further advice about the outstanding issue; and

WHEREAS on 6 February 2009 the respondent advised the Commission that it was not prepared to make any further payments to the applicant; and

WHEREAS on 20 February 2009 the applicant requested time to consider what she wished to do with the matter and was asked to advise the Commission of her intentions by 6 March 2009 however this did not occur; and

WHEREAS on 13 March 2009 the Commission wrote to the applicant by e-mail requesting she advise her intentions in respect to this application by no later than the close of business on 16 March 2009 however this did not occur; and

WHEREAS on 8 May 2009 the Commission telephoned the applicant and was informed that the applicant did not wish to proceed any further with this application and a Notice of Withdrawal or Discontinuance form was forwarded to the applicant by e-mail; and

WHEREAS as the Notice of Withdrawal or Discontinuance form was not lodged, on 5 June 2009 the Commission contacted the applicant by telephone and the applicant stated that she had not received the form sent on 8 May 2009 and a further copy of the form was sent to the applicant by post that day; and

WHEREAS as the Notice of Withdrawal or Discontinuance form was not returned to the Commission, on 31 July 2009 the Commission wrote to the applicant to advise that if she did not contact the Commission or lodge the Notice of Withdrawal or Discontinuance form by the close of business on 14 August 2009 the matter would be listed for a show cause hearing as to why the matter should not be dismissed; and

WHEREAS on 27 August 2009 the Commission's letter sent on 31 July 2009 was returned undelivered and the Commission again contacted the applicant that day by telephone and at the applicant's request a further Notice of Withdrawal or Discontinuance form was sent by way of email; and

WHEREAS as the applicant did not contact the Commission or lodge the Notice of Withdrawal or Discontinuance after this date, the matter was listed for a show cause hearing on 27 October 2009 and the applicant was advised that non-attendance by the applicant at these proceedings would result in an order being issued dismissing the application for want of prosecution; 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* and given the circumstances of this case, hereby orders:

THAT this application be, and is hereby dismissed.

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

2009 WAIRC 00390

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LUKE NEAGLE

APPLICANT

-v-

ROSCOS RE-CAR

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE THURSDAY, 18 JUNE 2009

FILE NO/S U 79 OF 2009

CITATION NO. 2009 WAIRC 00390

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	Mr A J Prentice of counsel

Order

WHEREAS on 22 April 2009 the applicant commenced proceedings pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") alleging that on or about 27 March 2009 his employment was terminated in circumstances that were harsh, oppressive or unfair;

AND WHEREAS the respondent by notice of answer and counter-proposal filed on 29 April 2009 denied the applicant's claim;

AND WHEREAS the Commission listed the matter for a conciliation conference under s 32 of the Act on 17 June 2009 with notices of the conciliation conference being sent by facsimile and email to the parties at their addresses for service on the Commission's record;

AND WHEREAS the s 32 conciliation conference was convened on 17 June 2009 at which conference the respondent appeared with its solicitor but there was no appearance by the applicant or an agent or a solicitor on his behalf;

AND WHEREAS the Commission received no advice prior to the conciliation conference as to why the conference should not proceed or that the applicant was unable to attend for any good cause;

AND WHEREAS being satisfied that the applicant had been duly notified of the proceedings the Commission pursuant to s 27(1)(d) of the Act proceeded to hear the matter with the respondent's solicitor making an application that the application be dismissed for want of prosecution;

AND WHEREAS the Commission was satisfied that the applicant had failed to appear at the conciliation conference after being duly notified of the proceedings and had failed to inform the Commission of any reason why he was unable to attend or otherwise why the conciliation conference should not proceed on the listed date;

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

THAT the application be and is hereby dismissed for want of prosecution.

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

2009 WAIRC 01124

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATHEW PALMER
	APPLICANT
	-v-
	RCR TOMLINSON LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 20 OCTOBER 2009
FILE NO/S	U 176 OF 2009
CITATION NO.	2009 WAIRC 01124

Result	Discontinued

Order

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

WHEREAS on 9 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in relation to the application; and

WHEREAS on 14 October 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01119

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFFERY ALAN PIPER
	APPLICANT
	-v-
	JILLIAN DENISE BLACKLOCK-REED
	TRADING AS: REDS BABAKIN BUSES
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 20 OCTOBER 2009
FILE NO	U 149 OF 2009
CITATION NO.	2009 WAIRC 01119

Result Application discontinued

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 10 September 2009 at the conclusion of which the matter was unresolved; and

WHEREAS the applicant advised the Commission on 9 October 2009 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.

2009 WAIRC 01138

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHERIEKAH RAMIREZ
	APPLICANT
	-v-
	IVAN KHOO, MIDLANDER PTY LTD, T/AS - HARVEY NORMAN COMPUTER SUPERSTORE MIDLAND
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 27 OCTOBER 2009
FILE NO/S	U 131 OF 2008
CITATION NO.	2009 WAIRC 01138

Result Dismissed

Order

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

WHEREAS the Commission listed a conference on 5 December 2008 for the purpose of conciliating between the parties; and

WHEREAS on 21 November 2008 the respondent's representative advised the Commission that the applicant had also lodged an application in the Australian Industrial Relations Commission ("the AIRC"); and

WHEREAS on 26 November 2008 the Commission contacted the applicant who confirmed that she had lodged an application in the AIRC which had been listed for conciliation on 8 December 2008;

WHEREAS on 27 November 2008 the Commission wrote to the parties to advise that the conference had been vacated; and

FURTHER the applicant was to advise the Commission of her intentions with respect to this application by no later than the close of business on 15 December 2008; and

WHEREAS on 5 February 2009 the applicant advised the Commission that the matter had been settled in the AIRC however the settlement had not yet been finalised; and

WHEREAS the Commission contacted the applicant on a number of occasions about the status of her AIRC application and on 28 May 2009 the applicant advised the Commission that the settlement of the matter had been finalised and that she would not be proceeding with this matter; and

WHEREAS on 28 May 2009 the Commission requested that the applicant lodge a Notice of Withdrawal or Discontinuance form with respect to this application and a copy of the form was provide to the applicant by way of e-mail; and

WHEREAS as a Notice of Withdrawal or Discontinuance had not been lodged, on 5 June 2009 the Commission left a telephone message for the applicant to contact the Commission however there was no response; and

WHEREAS on 31 July 2009 the Commission wrote to the applicant to advise that if she did not contact the Commission or lodge the Notice of Withdrawal or Discontinuance by the close of business on 14 August 2009 the matter would be listed for a show cause hearing as to why the matter should not be dismissed; and

WHEREAS as the applicant did not contact the Commission or lodge the Notice of Withdrawal or Discontinuance by the due date the matter was listed for a show cause hearing on 27 October 2009 and the applicant was advised that non-attendance by her at these proceedings would result in an order being issued dismissing the application for want of prosecution; 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 this application be, and is hereby dismissed.

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

2009 WAIRC 01114

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DENISE E ROBINSON
	APPLICANT
	-v-
	COOPERATIVE BULK HANDLING LIMITED
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 19 OCTOBER 2009
FILE NO	U 125 OF 2009
CITATION NO.	2009 WAIRC 01114

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	No appearance
Respondent	Mr A Cameron as agent

Order

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

WHEREAS the Commission listed the matter for hearing on 16 October 2009; and

WHEREAS the respondent provided a certificate of incorporation certifying that the Co-operative Bulk Handling Limited has been incorporated as a limited company; and

WHEREAS the respondent is engaged primarily in the handling and export of grain; and

WHEREAS the Commission finds that the respondent is a trading corporation;

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 jurisdiction.

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

2009 WAIRC 01168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLES HENRY ROSENTHAL
	APPLICANT
	-v-
	JOHN PALERMO
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 5 NOVEMBER 2009
FILE NO/S	U 10 OF 2009, B 101 OF 2009
CITATION NO.	2009 WAIRC 01168

Result	Order Issued
Representation	
Applicant	Ms R Cosentino (of counsel)
Respondent	In Person and Mr T Palermo (as agent)

Order

WHEREAS this is an application by which the applicant claims that he has been unfairly dismissed from his employment with the respondent; and

WHEREAS on Thursday, the 23rd day of April 2009 the Commission issued Orders dealing with the Notice of Answer and Counter Proposal and matters of production and discovery; and

WHEREAS on Monday, the 11th day of May 2009 the Commission varied the Order of the 23rd day of April 2009; and

WHEREAS the matter proceeded to hearing on Monday, the 31st day of August 2009, Tuesday, the 1st day of September 2009, Wednesday, the 2nd day of September 2009, Tuesday, the 20th day of October 2009 and Wednesday, the 21st day of October 2009; and

WHEREAS the Commission expressed concern as to the pace at which the hearing was proceeding and discussed with the parties during the hearing of the 20th and 21st of October 2009 mechanisms for focusing the parties' attention on the issues in dispute between them and for specifying and limiting the times for the conduct of the hearing; and

WHEREAS the Commission noted that in accordance with the Orders previously issued by the Commission, the respondent filed and served a document dated the 8th day of June 2009 which provided some further and better particulars of the respondent's reasons for dismissal however, other matters continued to arise during the course of the hearing and it was difficult to determine whether they were matters upon which the respondent relies for its decision to terminate the employment and are thus relevant to the proceedings; and

WHEREAS the applicant sought a direction that the respondent file and serve further and better particulars of:

1. The applicant's alleged misconduct; and
2. The applicant's performance issues;

upon which it relies, in its decision to dismiss him; and

WHEREAS the respondent agreed to provide further and better particulars of those matters; and

WHEREAS the Commission sought from the respondent a timeframe in which he would be able to provide those further and better particulars of those matters and the respondent indicated that it would be approximately 60 days, that is by the 15th day of December 2009 due to his other business commitments; and

WHEREAS the Commission heard from the parties as to the appropriate timeframe for the filing and serving of such a document and the Commission has taken account of:

1. The timeframes provided for within the *Industrial Relations Act 1979* and the *Industrial Relations Commission Regulations 2005* for the filing and serving of claims and of Notices of Answer and Counter Proposal;

2. The fact that the respondent had previously filed and served some further and better particulars;

3. The hearing of the matter having proceeded for five days and that the respondent had been cross-examining the applicant, with some interruptions, over a number of days; and

4. The respondent's business commitments; and

WHEREAS the Commission is of the view that an appropriate period for the respondent to file and serve further and better particulars is a period of 28 days from Wednesday, the 21st day of October 2009 and that an order shall issue accordingly; and

WHEREAS by email dated the 20th day of October 2009 following the conclusion of the hearing of that day the applicant raised the issue of the Commission issuing directions limiting the period for presentation of the parties' respective cases pursuant to s 27(1)(ha) to ensure that the matter is conducted in a manner envisaged by s 26(1)(a); and

WHEREAS during the course of the hearing on 21st day of October 2009 the Commission heard from the applicant in elaboration on that matter and the respondent provided to the Commission a document expressing the respondent's view and further responded to the applicant's application; and

WHEREAS the Commission is of the view that in the circumstances of the manner in which the hearing of this matter has proceeded to date that it would be appropriate to determine the periods that are reasonably necessary for the fair and adequate presentation of the parties' respective cases and to require that the cases be presented within the respective periods; and

WHEREAS the Commission will require the parties to:

1. identify the names of their respective witnesses and how long they anticipate the examination of each such witness will take;

2. upon advice as to the names of the other party's witnesses and how long that party anticipates examination-in-chief will take, how long cross-examination will take; and

3. indicate the amount of time which will be required for the presentation of closing submissions or whether closing submissions ought to be made in writing and if so, the period to be allowed between the final day of hearing and the filing of closing submissions.

NOW THEREFORE, having heard Ms R Cosentino of counsel on behalf of the applicant and Mr T Palermo and Mr J Palermo, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that:

1. The Respondent file and serve further and better particulars of facts and issues of:

   (a) the applicant's alleged misconduct; and

   (b) the applicant's performance issues,

   upon which it relies as reasons for the termination of the applicant's employment no later than 28 days from Thursday, 5 November 2009;

2. The parties shall file and serve a list of the names of their witnesses and an estimate of the time necessary for examination in chief of each of those witnesses no later than 28 days from Thursday, 5 November 2009;

3. No later than 7 days after receipt of the other party's list of witnesses referred to in Order 2 above, each party shall file and serve a notice of the estimated length of time for the cross-examination of each of the other party's witnesses;

4. Reference to witnesses in Orders 2 and 3 above includes estimates of the time necessary to conclude the examination in chief of Victor John Matthews and the cross-examination of Charles Henry Rosenthal; and

5. The parties advise the Commission no later than 28 days from Thursday, 5 November 2009;

   (a) an estimate of the length of time their closing submissions will take; and

   (b) whether they would prefer to make closing submissions in writing; and

   (c) if closing submissions are to be made in writing, the period to be allowed between the final day of hearing and the filing of closing submissions.

6. The parties advise the Commission of their unavailable dates for the resumption of the hearing in February and March 2010.

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

2009 WAIRC 01143

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CARLO SCIORSCI
	APPLICANT
	-v-
	DAVID AQUILIA
	DAVILIA MEN'S HAIRSTYLISTS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 2 NOVEMBER 2009
FILE NO	U 143 OF 2009
CITATION NO.	2009 WAIRC 01143

Result	Application discontinued
Representation	
Applicant	Mr C Sciorsci
Respondent	Mr K Trainer (as agent)

Order

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

AND WHEREAS on 8 September 2009 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS on 19 October 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01102

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN WOODWARD
	APPLICANT
	-v-
	RENAE ALFORD & JOHN COLLINS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	THURSDAY, 24 SEPTEMBER 2009
DELIVERED	WEDNESDAY, 14 OCTOBER 2009
FILE NO.	U 131 OF 2009
CITATION NO.	2009 WAIRC 01102

CatchWords	Unfair dismissal - Probationary Employment - Industrial Relations Act 1979, s.29(1)(b)(i)
Result	Dismissal unfair; compensation awarded
Representation	
Applicant	Ms K Woodward
Respondent	No appearance

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). The applicant, Ms Karen Woodward, commenced work at the respondent's dental practice as a Dental Receptionist on 22 April 2009. She worked 38 hours a week, at the rate of $24.50 per hour, and was under probation at the time of her dismissal. She was dismissed on 22 June 2009. She says in her application:

> "1. I was told my employer was "not happy with the reception desk" though he "could not see how it was being run"
>
> 2. My employers agreed to variation of hours on Friday, 15 May 2009, then said that it did not suit them and I was terminated immediately partly for that reason.
>
> 3. Sited as a reason were payment problems that were never previously raised.
>
> I feel I was unfairly dismissed as my employer gave me the above (3) as reasons with no verbal/written warnings. He could not quantify any of the reasons nor did he have any suggestions how to improve anything. I was not given the opportunity to respond I did not feel his reasons were valid."

2 Ms Woodward does not seek reinstatement, but seeks the following, "I consider financial compensation to be appropriate. I have suffered mental anguish and a confidence set back as a result of my job being terminated so suddenly and so unexpectedly."

3 The application is within time. The initial stamp of the Commission shows that the application was first received on 17 July 2009 and hence is within the 28 day limit from the time of dismissal.

4 The respondent in their Notice of Answer and Counterproposal responded to the claim as follows:

> "She was by her own admission on a 3 mth. probationary period, therefore her work was constantly monitored and critiqued. As she failed to grasp the basic fundamentals of the business she was, after 7 weeks, which included 2 weeks holiday, terminated with all entitlements plus 2 weeks added pay. She is entitled to nothing and I consider this an affront."

5 My Associate attempted to list the matter for a conciliation conference. She spoke with the respondent on 14 August 2009 who advised that they did not want the matter to go to conference, the matter could go straight to hearing and they would ring again on Monday with available dates. My Associate again spoke with the respondent on 26 August 2009. Mr Collins stated that the applicant was on a provisional contract and referred to her as manipulating the system. He indicated that he would not attend any hearing.

6 My Associate wrote to both parties on 26 August 2009 and sought, in writing, unavailable dates for the months of September and October 2009, to be provided by 2 September 2009. The parties were advised that, "If the Commission has not received a reply by 4 pm Wednesday, 2 September 2009, the matter will be set down at the Commission's earliest convenience." The applicant responded with dates on 31 August 2009. The respondent responded on 28 August 2009 in the following terms:

> "Karen Woodward first came to our practice for three weeks of paid training, one on one with the receptionist whom she would be replacing. The training involved intensive supervision, provision of practice protocols and our current receptionist on hand at all times to guide and explain as Karen performed all tasks required. She was given a contract to sign which stated working terms and conditions. The contract was signed by employee and employer.
>
> The contract clearly stated that a trial period of employment would commence at the end of the training. The trial period was for three months commencing on the 11th May 2009.
>
> At the commencement of employment Karen stated she had already arranged holidays for two one week periods, one week apart. The first week off was approximately one week after starting employment. We agreed to this and worked around it, although it did make the running of the business difficult as we were left short staffed.
>
> During the trial period we encountered many problems with Karen's performance which were all brought to her attention immediately. We initially thought it would just take her more time to adapt and practice the skills she had learnt in training. We found it very difficult to accurately assess how Karen was going initially due to the fact she was off on holidays a week after she started, back for a week and then off for just over another week. Our head nurse, who is very experienced in reception, was constantly being called on to sort out problems with accounts and queries at the reception. This meant she was drawn away from her position in chair side assisting. The problems she was dealing with were simple, straight forward procedures that had been explained many times and were in fact fairly repetitive.
>
> Karen found it difficult to grasp dental terminology and misunderstood our protocol manual which meant she made mistakes with patient bookings on many occasions, even after detailed explanations were given. She booked many patients in for examinations and told them it would be free of charge as she had misunderstood the protocol manual. We then had to see these patients and forgo charging them.
>
> The computer programme we use encountered problems and so we called our IT support company who sent a technician out to investigate. He stated that the problem *was* caused by the receptionist (Karen) not following the correct procedures. He told us even when he was watching and instructing her on the correct procedures she told him she found it easier to do it the way she had been.
>
> Karen did not seem able to grasp basic tasks such as keeping track of which patients were seeing the dentist or the hygienist, or indeed which patients had just seen the dentist and required accounts to be finalised and follow up appointments made.

> After several complaints from patients and other staff members, we felt we had no option for our business but to terminate Karen's employment.
>
> We constantly gave Karen feedback on her performance, brought matters to her attention that we were dissatisfied with and as a trial period indicates, she was constantly monitored by me and my senior staff members who helped her. In the interests of our business we felt the situation was not going to improve, so after six weeks of employment (two weeks of which were holidays) we terminated her employment. We paid all outstanding holiday pay plus two additional weeks pay.
>
> We are extremely disappointed that Karen feels that we have not treated her fairly. We gave her extensive training and assistance at all times when employment had started. We even adapted the working hours to suit her better which was not ideal for our business.
>
> We feel we have done everything to try to make things work, however in the end we have to run a business that relies on competent staff. We feel we have already wasted a lot of money on lost revenue from incorrect patient bookings, training and computer technician's fees. We want to put our case forward, however we cannot lose more revenue by attending a hearing.
>
> Yours sincerely,
>
> John Collins (BDS)"

7 The notice of hearing was sent to the parties on 3 September 2009. Mr Collins telephoned my Associate on the morning of the hearing and asked about his rights of appeal. It is clear from the above that the respondent chose not to be present at hearing and hence the matter was heard in their absence.

8 Ms Woodward gave evidence that she was paid one week of notice on termination and then another week after some correspondence in which she challenged her initial payment. She is now employed at Envision Medical Imaging and commenced this employment on 13 July 2009 and is paid at the rate of $22.79 per hour for a 38 hour week.

9 As for her dismissal Ms Woodward's evidence is:

> "I was sitting at my reception desk and John Collins called me through to the kitchen at the back of the office. He asked me would I come through. And so I went through and he told me that he wasn't very happy with the way the reception is being run, he said even though he couldn't see what was happening out the front. And he also mentioned that the ... that I wasn't there at the end of the day when he still had patients, that I was going at 4.15 which is the time that was agreed to because he did ask me to reduce my hours. And he was ... he also said that there were also payment ... problems with payments. That would be all he said.
>
> ….
>
> -Well, he told me then that ... well he told me that and then he said that he was letting me go." (T3)

10 She said that she was totally shocked and asked him whether he wanted her to leave immediately or at the end of the day. Mr Collins told her that she could leave then and she did. As for why she considered her dismissal to be unfair Ms Woodward says:

> "I had no idea that they weren't happy with the way I was doing the job. They never actually came out and told me that they were dissatisfied with my work or that they'd been any ... I'm just looking at this letter given to me of 28 August, that there had been any complaints from patients or from other staff members about me, I had no idea until I read this letter. I felt everything was going along pretty well. Apart from maybe a few problems but I mean if I had problems I'd go and ask somebody about it. But generally in the normal running of the day I felt it was coping fine. And I was really shocked when he said that to me."

11 Ms Woodward was asked to respond to the claims by Mr Collins in his letter of 28 August 2009. She says that, "nobody actually came up and said to me that they were dissatisfied about anything at all". She was never told that she was making too many mistakes with patient bookings. She says that twice she told patients that procedures would be free of charge until she realised that she had misinterpreted some information on the protocol and corrected the matter straight away. She says that as she was just learning the job so she had to ask patients their names. She does not think her employer liked that very much as it was not sufficiently personal. She says that she was never given feedback on her performance.

12 Her working hours were agreed before she started employment, then on 15 May 2009 she was advised that she was working too many hours. Her hours were reduced to 38 hours per week and she agreed to this and was paid an extra 50 cents per hour. She tendered her contract of employment in evidence, some post-termination letters and a payslip for her final pay.

13 Ms Woodward says that she felt that she had sufficient initial training, however, afterwards she had to ask the head nurse about matters she did not understand and she found it hard to understand her because of her accent. Mr Collins did not know what was going on at the front desk and he based his decision to terminate upon information given to him by the head nurse. Ms Woodward says that she is seeking financial compensation from the application as she was out of work for three weeks and she had a setback in confidence from her dismissal.

14 There is nothing in the evidence of Ms Woodward which I consider to be untruthful or implausible. I accept her evidence which is to the effect that she was not warned or counselled about her performance and that her dismissal then came as a shock to her. It is important that Ms Woodward was on probationary employment at the time of her dismissal. In *Charles William Westheafer v Marriage Guidance Council of WA* 65 WAIG 2311 Fielding C stated:

> "The concept of probationary employment is well known and well understood in employment law. It is that an employer by engaging someone on probation throughout the period of probation retains a right to see whether he wants the employee or not in his employment as if the employee was still at the first interview. Hence there is no obligation on the

> employer to even objectively consider whether or not he should re-engage an employee at the end of the probationary period. The principles associated with probationary employment are now so well established that it is sufficient to refer in passing to in *re* Alchin and South Newcastle Leagues Club Limited (1977) AR (NSW) 236, a case with many features in common with this one and also to the New South Wales Teachers Federation and the Education Commission of New South Wages (NSW Industrial Commission Application No. 969 of 1984; 13 September 1984), where it was pointed out that probationary employment is but a step in the selection process and should be distinguished from permanent employment [see too: *Ex parte* Wurth case (supra)]."

I adopt this reasoning.

15 Nevertheless, whilst Ms Woodward was under probationary employment at the time of her dismissal and whilst an employee is considered to be on trial whilst on probation, an employee is nevertheless entitled to be trained and counselled to ensure that he/she can seek to meet the standards required at that workplace. On Ms Woodward's evidence this did not happen. If I apply the principles espoused in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 of a fair go all round then I must find on the evidence before me that Ms Woodward was dismissed unfairly. In *Undercliffe*, Brinsden J said @ page 386:

> "The jurisdiction has been variously stated: in re Loty and Holloway v. Australian Workers' Union (1971) A.R. 95 at 99 Sheldon J. said that even though in the dismissal be it summary or on notice, the employer has not exceeded his common law and/or award rights, the Court was entitled to enquire as to whether the employee had received "less than a fair deal". He also approved what had been said in an earlier case whether there had been "a fair go all round".
>
> ……
>
> As His Honour points out the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

16 I find that reinstatement is not practicable. Ms Woodward was on probationary employment and she has since found other employment. Ms Woodward was dismissed on 22 June 2009. She obtained other employment on 13 July 2009, but for less pay than she had received previously. Her probationary employment was due to finish on 21 July 2009. There were 14 working days between Ms Woodward's dismissal and the commencement of her new employment. During this period she was paid 10 days by way of notice payment. This payment should be deducted from her loss. Her loss is therefore 4 days plus any ongoing loss (to the end of the probationary period) she incurred due to the lesser rate of pay in her current job. The calculation is therefore $24.50 by 38 by 4 divided by 5. This gives a total of $744.80 gross. Her probation period would have concluded on 21 July 2009. Therefore between 13 July to 21 July 2009 she suffered a per hourly loss of the difference between her previous rate of pay, ie $24.50, and her new rate of pay, ie $22.79. That is a difference of $1.71 per hour for the period of 7 working days. The calculation is therefore $1.71 by 38 hours by 7 divided by 5 (to achieve a weekly hour comparison). This gives a total of $155.56 gross. The total loss is therefore $744.80 plus $155.56 which equals $900.36 gross less any taxation payable to the Commissioner for Taxation. This amount is to be paid by the respondent to the applicant within 7 days from the date of the order.

2009 WAIRC 01130

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN WOODWARD
	APPLICANT
	-v-
	RENAE ALFORD & JOHN COLLINS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 22 OCTOBER 2009
FILE NO	U 131 OF 2009
CITATION NO.	2009 WAIRC 01130

Result	Dismissal unfair; compensation awarded
Representation	
Applicant	Ms K Woodward
Respondent	No appearance

Order

HAVING heard Ms K Woodward 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:

DECLARES that the applicant, Karen Woodward, was dismissed unfairly by the respondent on the 22nd day of June 2009;

DECLARES that reinstatement is impracticable;

ORDERS that the said respondent do hereby pay, as and by way of compensation the amount of $900.36 gross less any taxation payable to the Commissioner for Taxation, to Karen Woodward within 7 days of the date of this Order.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Charlie Terbeeke	Apex Minerals	U 155/2009	Chief Commissioner A R Beech	Discontinued
Ogud Didumo Ogud	Ian Ainger Centrix Cleaning Maintenance Service	U 165/2009	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters referred—

2009 WAIRC 01128

DISPUTE REGARDING FIRST AID ALLOWANCE FOR UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

EXECUTIVE DIRECTOR PILBARA TAFE

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE WEDNESDAY, 21 OCTOBER 2009

FILE NO/S CR 72 OF 2006

CITATION NO. 2009 WAIRC 01128

Result Discontinued

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS the Commission listed the matter for hearing and determination on 18 and 19 April 2007; and

WHEREAS on 12 March 2007 the applicant sought an adjournment of the hearing and on 19 March 2007 the respondent consented to the hearing being adjourned; and

WHEREAS on 23 March 2007 the Commission adjourned the matter sine die; and

WHEREAS the Commission contacted the applicant on a number of occasions about whether it was ready to proceed with the matter; and

WHEREAS on 28 March 2008 the applicant requested the matter proceed; and

WHEREAS on 9 May 2008 the Commission convened a conference for the purpose of dealing with programming issues in relation to the hearing of the matter; and

WHEREAS at the conclusion of that conference the applicant undertook to lodge an award interpretation application, which was to be joined to this application; and

WHEREAS the Commission contacted the applicant on a number of occasions about its undertaking to lodge an award interpretation application; and

WHEREAS on 16 July 2008 the applicant advised the Commission that the application would be lodged in the next few days however, this did not occur; and

WHEREAS on 19 August 2008 the Commission wrote to the applicant requesting advice be provided to the Commission by no later than the close of business on Monday 25 August 2008 about when an award interpretation application would be lodged however this did not occur; and

WHEREAS on 10 September 2008 the Commission convened a status conference; and

WHEREAS following the conference the applicant undertook to lodge an application for an award interpretation by no later than the close of business on Monday 15 September 2008; and

WHEREAS on 12 September 2008 the applicant lodged an application for an interpretation of the relevant award (Appl 76 of 2008) and the matters in dispute the subject of this application were dealt with via Appl 76 of 2008; and

WHEREAS a decision in Appl 76 of 2008 issued on 19 May 2009; and

WHEREAS the Commission contacted the applicant on a number of occasions about discontinuing this application; and

WHEREAS on 8 October 2009 the applicant sought leave to discontinue the matter; and

WHEREAS on 21 October 2009 the respondent consented to the matter being discontinued;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Executive Director Pilbara TAFE	Commissioner J L Harrison	C 72/2006	8/09/2006 3/10/2006 21/12/2006	Dispute regarding first aid allowance for union member	Referred
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	A.L. Carver, G.M. Carver, J.G. Carver & N.R. Langan (A Partnership - ABN 25 690 124 349) Trading as Cuddles Child Care Centre Maddington, A.L. Carver, G.M. Carver, J.G. Carver & N.R. Langan (A Partner	Commissioner J L Harrison	C 16/2009	5/06/2009	Dispute re dismissal of union members	Concluded
The Civil Service Association of Western Australia Incorporated	The Director General for Department of Housing	Acting Senior Commissioner P E Scott	PSAC 17/2009	N/A	Dispute re Relocation of Union Member	Discontinued
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	The Chief Executive Officer of the City Bayswater	Commissioner J L Harrison	C 31/2009	5/10/2009 9/10/2009	Dispute in relation to termination of union member	Discontinued
Western Australian Police Union of Workers	Commissioner of Police	Acting Senior Commissioner P E Scott	PSAC 22/2009	N/A	Dispute in relation to entitlements of Union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2009 WAIRC 01123

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN JAMES RANN
	APPLICANT
	-v-
	MCMASTER TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 20 OCTOBER 2009
FILE NO	B 105 OF 2009
CITATION NO.	2009 WAIRC 01123

Result	Order made to substitute the Respondent
Representation	
Applicant	Mr S J Rann
Respondent	Mrs T McMaster

Order

HAVING heard Mr S J Rann on his own behalf and Mrs T McMaster on behalf of the respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT the name of the respondent be deleted and substitute instead the name, McMaster Transport Pty Ltd.

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

2009 WAIRC 01122

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN JAMES RANN
	APPLICANT
	-v-
	MCMASTER TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 20 OCTOBER 2009
FILE NO	U 105 OF 2009
CITATION NO.	2009 WAIRC 01122

Result	Order made to substitute the Respondent
Representation	
Applicant	Mr S J Rann
Respondent	Mrs T McMaster

Order

HAVING heard Mr S J Rann on his own behalf and Mrs T McMaster on behalf of the respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT the name of the respondent be deleted and substitute instead the name, McMaster Transport Pty Ltd.

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

2009 WAIRC 01133

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANN MARIE PIPER
	APPLICANT
	-v-
	GEOFFREY HAROLD AND NOLA JOY WESTLEY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 23 OCTOBER 2009
FILE NO/S	U 150 OF 2009
CITATION NO.	2009 WAIRC 01133

Result	Order made to substitute the Respondent
Representation	
Applicant	Mr J. A. Piper
Respondent	Mr I. S. Dhu

Order

HAVING heard Mr J. A. Piper on behalf of the applicant and Mr I. S. Dhu on behalf of the respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the name of the respondent be deleted and substitute instead the name GH & NI Westley.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
SWALSC Collective Agreement 2009 AG 36/2009	21/10/2009	Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch	South West Aboriginal Land & Sea Council	Acting Senior Commissioner P E Scott	Agreement registered

NOTICES—Appointments—

2009 WAIRC 01158

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 SM Mayman to be an additional Public Service Arbitrator for a period of one year from the 10th day of November, 2009.

Dated the 2nd day of November, 2009.

CHIEF COMMISSIONER A.R. BEECH

2009 WAIRC 01159

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 S Wood to be an additional Public Service Arbitrator for a period of one year from the 10th day of November, 2009

Dated the 2nd day of November, 2009.

CHIEF COMMISSIONER A.R. BEECH

PUBLIC SERVICE APPEAL BOARD—

2009 WAIRC 01107

APPEAL AGAINST THE DECISION NOT TO CONFIRM PERMANENT APPOINTMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BAHEEG JAMES ISKANDER
	APPELLANT
	-v-
	THE DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER J H SMITH - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR N WALDECK - BOARD MEMBER
DATE	THURSDAY, 15 OCTOBER 2009
FILE NO	PSAB 22 OF 2008
CITATION NO.	2009 WAIRC 01107

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr E Rea and Mr D Hughes (as agents)

Order

WHEREAS this is an appeal to the Public Service Appeal Board (the Board) pursuant to s 80I of the *Industrial Relations Act 1979*;

AND WHEREAS on 31 March 2009, the appellant sent a memorandum by facsimile to the Board advising that a settlement had been reached on 11 March 2009 and that he wished to discontinue these proceedings;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:—

THAT this appeal be, and is hereby discontinued.

(Sgd.) J H SMITH,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 36/2009	Request for mediation	Commissioner JL Harrison	10/09/2009	Consent
APPL 70/2009	Request for mediation	Chief Commissioner AR Beech	22/10/2009	Withdrawn

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 2/2009	David John Lunn	Child & Adolescence Health Service	Scott C	Upheld	20/10/2009

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2009 WAIRC 01150

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES ANDREW LILEY AND ANOTHER

APPLICANTS

-v-

HITACHI PLANT TECHNOLOGIES LTD

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE TUESDAY, 3 NOVEMBER 2009

FILE NO/S OSHT 22 OF 2009, OSHT 28 OF 2009

CITATION NO. 2009 WAIRC 01150

Result Applications discontinued

Representation

Applicant Mr S Millman (of counsel) for Andrew Liley

Mr T Kucera (of counsel) for Tom Blackledge

Respondent Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS applications were filed pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 22 October 2009 the applicants filed Notices of Discontinuance in respect of OSHT 22 of 2009 and OSHT 28 of 2009 advising each applicant was no longer in dispute;

AND WHEREAS the Occupational Safety and Health Tribunal (the Tribunal) heard from the parties on whether the applications ought be discontinued at a preliminary hearing on 26 October 2009;

AND WHEREAS at the preliminary hearing, counsel for the applicants submitted the applications should be discontinued as the parties were no longer in dispute;

AND WHEREAS the respondents submitted to discontinue the applications in accordance with reg 16 of the *Industrial Relations Commission Regulations 2005* would be ultra vires s 51I(1) of the *Occupational Safety and Health Act 1984;*

AND WHEREAS the respondents submitted in the alternative that the applications should therefore be dismissed, referring to a decision from the Full Bench of the Western Australian Industrial Relations Commission in *Crown Scientific Pty Ltd v Clarke* (2007) 87 WAIG 598 [72]-[75];

AND WHEREAS the Tribunal formed the view that OSHT 22 of 2009 and OSHT 28 of 2009 ought be discontinued;

AND WHEREAS the Tribunal advised the parties of the Tribunal's decision to issue orders discontinuing each application and advised it would provide reasons for the decision later;

NOW THEREFORE, the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984*, hereby orders:

THAT OSHT 22 of 2009 and OSHT 28 of 2009 be, and are hereby discontinued.

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

2009 WAIRC 01154

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	DANE PRIDMORE
	APPLICANT
	-v-
	SAFE & SOUND LABOUR HIRE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 3 NOVEMBER 2009
FILE NO	OSHT 24 OF 2009
CITATION NO.	2009 WAIRC 01154

Result	Change of respondent's name
Representation	
Applicant	Mr S Millman (of Counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (of counsel)

Order

AND WHEREAS this application was listed for hearing on 26 October 2009;

AND WHEREAS at the hearing on 26 October 2009 Mr Blackburn, counsel for the respondent, advised the respondent's name had been incorrectly identified in that the respondent ought be listed as Safe & Sound Labour Hire Pty Ltd;

AND WHEREAS the Tribunal formed the view it was appropriate to make the amendment;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on the Tribunal under s 51I of the *Occupational Safety and Health Act 1984* hereby order:

THAT with respect to OSHT 24 of 2009 Safe & Sound Scaffolding Pty Ltd be deleted as the name of the respondent and replaced with Safe & Sound Labour Hire Pty Ltd.

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

2009 WAIRC 01151

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS AND OTHERS
	APPLICANTS
	-v-
	HITACHI PLANT TECHNOLOGIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 3 NOVEMBER 2009
FILE NO/S	OSHT 2 OF 2009, OSHT 4 OF 2009, OSHT 5 OF 2009, OSHT 6 OF 2009, OSHT 18 OF 2009, OSHT 23 OF 2009, OSHT 24 OF 2009, OSHT 25 OF 2009, OSHT 27 OF 2009, OSHT 29 OF 2009
CITATION NO.	2009 WAIRC 01151

Result	Order for Production of Documents issued
Representation	
Applicants	Mr T Kucera on behalf of Matthew Gibbs, Matthew Dempsey, Clayton Higgins, Dean Lloyd, Antony Thompson, Colin Jones, Tom Blackledge and Rodney Martin
	Mr S Millman on behalf of Andrew Liley, Grant Veal, Dane Pridmore and Tony Woodhead
Respondents	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order for Production of Documents

WHEREAS following an application to the Tribunal by the respondent in each of the above matters, the Tribunal heard from the parties at a preliminary hearing held on 26 October 2009;

AND WHEREAS at the conclusion of the preliminary hearing the parties consented to the issuing of the following order;

NOW THEREFORE, I the undersigned pursuant to the powers conferred on the Tribunal under the *Occupational Safety and Health Act 1984* hereby order:

1. THAT each applicant shall produce in a timely fashion relevant documents and materials which are in the possession, power or control of the applicants for inspection by the respondents' legal representatives. At the same time the applicants' legal representatives shall furnish the respondents' legal representatives with copies of the same; and

2. THAT each respondent shall produce in a timely fashion relevant documents and materials which are in the possession, power or control of the respondents for inspection by the applicants' legal representatives. At the same time the respondents' legal representatives shall furnish the applicants' legal representatives with copies of the same.

3. The parties have liberty to apply at short notice.

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

2009 WAIRC 01157

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS AND OTHERS
	APPLICANTS
	-v-
	HITACHI PLANT TECHNOLOGIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 3 NOVEMBER 2009
FILE NO/S	OSHT 2 OF 2009, OSHT 4 OF 2009, OSHT 5 OF 2009, OSHT 6 OF 2009, OSHT 18 OF 2009, OSHT 23 OF 2009, OSHT 24 OF 2009, OSHT 25 OF 2009, OSHT 27 OF 2009, OSHT 29 OF 2009
CITATION NO.	2009 WAIRC 01157

Result	Directions issued
Representation	
Applicant	Mr T Kucera (of counsel) for Matthew Gibbs, Matthew Dempsey, Clayton Higgins, Dean Lloyd, Antony Thompson, Colin Jones and Rodney Martin
	Mr S Millman (of counsel) for Grant Veal, Dane Pridmore and Tony Woodhead
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Directions

WHEREAS these applications were listed for hearing the applicants' evidence by the Occupational Safety and Health Tribunal (the Tribunal) at a hearing commencing 26 October 2009;

AND WHEREAS the Tribunal held a preliminary hearing at the commencement of the hearing;

AND WHEREAS due to the unavailability of the Mr Higgins, Mr Thompson, Mr Pridmore and Mr Woodhead to give evidence in Collie on 26 October 2009 as advised, counsel for the named applicants sought to have their evidence adjourned and heard in Perth at a later date;

AND WHEREAS counsel for the respondents and applicants consented to directions issuing;

NOW THEREFORE the Tribunal pursuant to the powers of the *Occupational Safety and Health Act 1984* hereby directs:

1. That all remaining evidence be heard in Perth commencing 16 November 2009;
2. That counsel will provide seven days notice to the other party should witnesses no longer be available to give evidence;
3. Additionally, where new witnesses are to be added to the list of persons giving evidence, seven days notice of such change is to be provided to counsel for the other party; and
4. Liberty to apply to the Tribunal at short notice is granted to counsel for the applicants and respondents in relation to these directions.

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