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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

NOTICES—Application for General Order—

2010 WAIRC 00211

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
111 St Georges Terrace, Perth

Submissions for the 2010
WA Minimum Wage

The WAIRC is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee of $569.70 per week was set in June 2009 to apply from 1 October 2009.

The WAIRC invites interested persons or organisations to make a submission to the Commission on what the minimum wage should be. The Commission will hear oral submissions commencing on Tuesday, 1 June 2010. The proceedings are open to the public and will be webcast. Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Friday, 14 May 2010.

Written submissions are also welcomed. Any person or organisation who wishes to make a written submission should do so in writing or by email by Friday, 14 May 2010. Please note that copies of written submissions may be made available to other persons and may be displayed on the Commission's website.

Further particulars may be obtained from the Registry of the WAIRC and from the Commission's website at www.wairc.wa.gov.au.

All correspondence should be addressed to the Registrar at the above address or by email to registrar@wairc.wa.gov.au quoting Matter number 2 of 2010.

DATED at Perth this 7th day of April 2010.

J. SPURLING
REGISTRAR

FULL BENCH—Appeals against decision of Commission—

2010 WAIRC 00206

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2010 WAIRC 00206
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		COMMISSIONER S J KENNER
		COMMISSIONER S M MAYMAN
HEARD	**:**	THURSDAY, 11 FEBRUARY 2010
DELIVERED	**:**	THURSDAY, 15 APRIL 2010
FILE NO.	**:**	FBA 1 OF 2010
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		Appellant
		AND
		DIRECTOR-GENERAL, DEPARTMENT FOR CHILD PROTECTION
		Respondent
		AND
		MINISTER FOR COMMERCE
		Intervener

ON APPEAL FROM:

Jurisdiction	**:**	**Public Service Arbitrator**
Coram	**:**	**Acting Senior Commissioner P E Scott**
Citation	**:**	**[2009] WAIRC 01348; (2009) 90 WAIG 66**
File No	**:**	**PSACR 24 of 2009**

CatchWords	**:**	Industrial Law (WA) - Jurisdiction of Public Service Arbitrator - Jurisdiction of Public Service Appeal Board - Construction of s 80E and s 80I(1)(a) of the *Industrial Relations Act 1979* (WA) - Principles of statutory interpretation applied - Whether appeal by an ex-public service officer lies to the Public Service Appeal Board under s 80I(1)(a) considered - Circumstances where jurisdiction of Public Service Appeal Board may oust jurisdiction of Public Service Arbitrator considered.
Legislation	**:**	*Acts Amendment and Repeal (Industrial Relations Act (No 2)* (WA)
		Acts Amendment (Public Sector Management) Act 1994 (WA)
		Acts Amendment (Public Service) Act 1987 (WA)
		Industrial Relations Act 1979 (WA) s 7, s 7(1a), s 23, s 32, s 44, s 44(6)(ba), s 44(6)(bb), s 46, s 49, s 80C, s 80E, s 80E(1), s 80E(2), s 80E(5), s 80E(6), s 80E(7), s 80F, s 80F(1), s 80F(2), s 80G, s 80G(1), s 80H(1), s 80I, s 80I(1), s 80I(1)(a), s 80I(1)(b), s 80I(1)(c), s 80I(1)(d), s 80I(1)(e), s 80J, s 80J(b), s 80K, s 80L,
		Industrial Relations Amendment Act (No 4) 1987 (WA)
		Interpretation Act 1984 (WA) s 10, s 18
		Public Sector Management Act 1994 (WA) s 6(2), s 43, s 51A, s 52, s 64, s 67, s 76(1)(a), s 76(1)(b), s 78, s 78(1), s 78(1)(b), s 80, s 86(3)(b), s 94, s 96, s 97, s 97(1)(a), s 101, s 102, s 103
		Public Service Act 1904 (WA) s 48, s 49, s 50, s 51, s 52, s 53, s 54, s 55, s 56, s 57, s 59
		Public Service Act 1978 (WA)
		Public Service Arbitration Act 1966 (WA)
		Public Service Arbitration Amendment Act 1997 (WA) s 7
Result	**:**	Appeal dismissed.

Representation:

Counsel:

Appellant	:	Ms S Bhar and with her Ms C Reid
Respondent	:	Mr E Rea and with him Ms M Ross
Intervener	:	Mr R Andretich (of counsel)

Reasons for Decision

SMITH AP

Background and Grounds of Appeal

1 This is an appeal brought pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act). The appeal is against a decision made by the Public Service Arbitrator on 17 December 2009 dismissing an application made under s 44, s 80E and s 80G of the Act by The Civil Service Association of Western Australia Incorporated (the appellant). In the application the appellant sought an order that the Chief Executive Officer of the Department for Child Protection (the respondent) cease a disciplinary process brought against Mr van der Zanden a former public service officer employed by the respondent.

2 The matter was heard at first instance pursuant to a Memorandum of Matters Referred for Hearing and Determination made on 10 November 2009 under s 44 of the Act. The schedule to the Memorandum states as follows:

> The Applicant says that:
>
> 1. It is an organisation of employees authorised to represent Mr Luke van der Zanden, a former employee of the Department for Child Protection ('the Respondent').
> 2. It is in dispute with the Respondent over its power to continue a breach of disciplinary process under the *Public Sector Management Act 1994* ('the Act'), when Mr van der Zanden is no longer its employee.
> 3. Mr van der Zanden was presented with a suspected breach of discipline letter dated 20 April 2009.
> 4. Mr van der Zanden provided his written response addressing the allegations to the Respondent on 8 May 2009.
> 5. After Mr van der Zanden had submitted his response his fixed term contract of employment expired as at 4 June 2009 and was not renewed.
> 6. On 11 June 2009, the Respondent sent Mr van der Zanden a letter notifying him that an investigation into the suspected breaches of discipline would be commenced pursuant to s 81(2) of the Act.
> 7. The Respondent advised the Applicant in a letter dated 17 September 2009 that it would continue with the investigation notwithstanding the cessation of employment.
> 8. The Respondent has no power under the Act to pursue a disciplinary investigation of a former employee.
> 9. Furthermore, the Act provides a statutory mechanism for regulating disciplinary investigations of current employees only.
>
> The Applicant seeks an order that the Respondent ceases the disciplinary process immediately and any other orders the Public Service Arbitrator deems appropriate to resolve the dispute.
>
> The Respondent says that:
>
> 1. There is no legislative impediment to its continuing to undertake an investigation upon the cessation of employment of the officer.
> 2. It is desirable and appropriate to continue with the investigation and reach a conclusion regarding Mr van der Zanden's conduct.
> 3. Objects to the orders sought.

3 After hearing the parties, the application was dismissed on grounds that the Public Service Arbitrator has no jurisdiction to hear and determine the matter in dispute under s 80E of the Act. The substance of the Public Service Arbitrator's decision was a finding that the Public Service Appeal Board had jurisdiction to hear and determine the claim pursuant to s 80I(1)(a) of the Act and jurisdiction of the Public Service Appeal Board is exclusive of the jurisdiction of the Public Service Arbitrator under s 80E of the Act. The effect of the decision of the Public Service Arbitrator was that the general jurisdiction of the Public Service Arbitrator is ousted by the specific jurisdiction conferred on the Public Service Appeal Board in s 80I(1)(a) of the Act. Section 80I(1)(a) confers jurisdiction on the Public Service Appeal Board to hear and determine an appeal by a public service officer in relation to an interpretation of any provision of the *Public Sector Management Act 1994* (PSM Act) concerning the conditions of service of public service officers.

4 The appellant's grounds of appeal are as follows:

> 1. The Public Service Arbitrator erred in law and in fact in finding that she had no jurisdiction to hear the application under s. 7 Industrial Relations Act 1979 ['IR Act'] - industrial matters because the jurisdiction of the Public Service Appeal Board[PSAB] prevailed under s. 80I IR Act.

Particulars:

(a) S. 80I IR Act refers to '*conditions of service .... of public service officers.'* Mr van der Zanden's contract expired on 4 June 2009, and he had no conditions of service on foot as from that date. The provisions of the PSM Act could not apply to him.

(b) After the contract had expired, the Respondent indicated that it intended to continue with the investigation, and in effect the Respondent was imposing a condition, which was to take effect after termination within the meaning s. 7 IR Act.

(c) The decision involves a misconstruction of s. 80I(a) IR Act in the sense that it was not an appeal by a public service officer in relation to the Public Sector Management Act concerning the conditions of service.

(d) The PSAB had no jurisdiction to determine the subject matter of the application, and in this instance s. 80I did not oust the jurisdiction of the Arbitrator under s. 80E IR Act.

(e) In this particular instance the application of the rule in generalia specialiabus [sic] non derogant was an error of law because on the true construction of the IR Act and the facts, it could not apply.

2. In the alternative, the Public Service Arbitrator erred in law and in fact in finding set out in paragraph 39 that *'while the Arbitrator [had] jurisdiction which is broad and encompasses the issue in dispute, the Board's jurisdiction is more specific and specialised. The jurisdiction of the Board must prevail.'*

Particulars:

(a) In addition to the particulars already set out in the previous ground of appeal, the issue of the differences between public service officers and government officers in paragraph 35 is not relevant to coming to a result;

(b) The reasoning in paragraph 36 is wrong because the matter focuses on the act of the Respondent to continue a disciplinary process without statutory authority.

5 The appellant's grounds of appeal also state that the appeal should lie because the matter is of such importance in the public interest. The appellant, however, is not required by s 49(2a) of the Act to satisfy the Full Bench that the matter is of importance in the public interest as the appeal is not against a 'finding'. A 'finding' is a decision that does not finally decide, determine or dispose of the matter to which the proceedings relate.

Intervention by the Minister

6 Because the appeal raised an issue about the operation of the provisions of the Act, in particular the jurisdiction of the Public Service Arbitrator to hear and determine a matter where a matter might otherwise be brought by way of application to the Public Service Appeal Board, the Full Bench invited the Minister for Commerce to intervene in these proceedings and make submissions as to the legal issues raised in the grounds of appeal. The Minister accepted the invitation and instructed counsel to appear and make oral and written submissions in respect of the grounds of appeal.

Statement of Agreed Facts

7 No evidence was led in the proceedings before the Commission. The jurisdictional argument was heard and determined by regard to the following agreed facts:

1. The Applicant is The Civil Service Association of Western Australia Incorporated ('the CSA').

2. The CSA is a registered organisation of employees authorised to represent Mr Luke van der Zanden.

3. The Respondent is the Director General, Department for Child Protection.

4. Mr van der Zanden was employed with the Respondent pursuant to Section 64(1)(b) of the *Public Sector Management Act* 1994 ('the Act') as a Residential Care Officer.

5. The Respondent presented Mr van der Zanden with a suspected breach of discipline letter dated 20 April 2009 identifying three suspected breaches of discipline.

6. Mr van der Zanden responded to the three allegations in writing and provided his response to the Respondent on 8 May 2009.

7. Mr van der Zanden's fixed term contract of employment expired as at 4 June 2009. As of the expiration of Mr van der Zanden's fixed term contract Mr van der Zanden was no longer an employee of the Respondent.

8. On 11 June 2009 the Respondent sent Mr van der Zanden a letter notifying him that an investigation into the suspected breaches of discipline would be commenced pursuant to section 81(2) of the the (sic)Act.

9. On 11 September 2009 the Applicant sent the Respondent a letter stating that as Mr van der Zanden was no longer an employee of the Respondent and the Respondent had no ability to continue its investigation.

10. On 17 September 2009 the Respondent wrote to the Applicant and advised that the Respondent believed that it did have the ability to continue its investigation.

11. On 23 September 2009 the Applicant wrote to the Respondent requesting the disciplinary investigation be stayed until such time as the matter could be determined by the Public Service Arbitrator.

12. The Respondent acceded to this request.

13. The Applicant contends that the Respondent does not have the power under the Act to continue the breach of discipline process against Mr van der Zanden.

14. The Respondent contends that it does have the power under the Act to continue the breach of discipline process against Mr van der Zanden."

The Findings made by the Public Service Arbitrator

8 When the matter was heard by the Public Service Arbitrator the respondent did not dispute the contention that the Arbitrator would have jurisdiction to hear and determine the matters in dispute. However the respondent contended that the jurisdiction of the Public Service Arbitrator had been ousted because the jurisdiction of the Public Service Arbitration Board is more particular to the matter.

9 The Public Service Arbitrator observed that the terms of the Matters Referred for Hearing and Determination and the parties' submissions made it clear that the dispute did not simply involve a question of interpretation and a consequential declaration as to the meaning of the provisions of the PSM Act. She found the interpretation of the provisions of the PSM Act would deal with matters going beyond that interpretation, to include, if power exists to continue investigation and whether the respondent should be prevented from doing so. This would include also questions of merit and may involve the issuing of orders to require the respondent to cease the investigation.

10 The Public Service Arbitrator considered whether the jurisdiction of the Arbitrator was ousted by the jurisdiction of the Public Service Appeal Board on account of the principle of generalia specialibus non derogant. This Latin maxim of statutory interpretation when translated means that where there is a conflict between general and specific legislative provisions, the specific provisions prevail. In considering this issue, the Public Service Arbitrator analysed the jurisdiction of the Arbitrator in s 80E of the Act and the jurisdiction of the Public Service Appeal Board in s 80I of the Act. The Public Service Arbitrator observed that the Arbitrator's jurisdiction under s 80E of the Act is an exclusive jurisdiction to inquire into and deal with any 'industrial matter' relating to a government officer. The Public Service Arbitrator had regard to the definition of an 'industrial matter' in s 7 of the Act which relevantly provides in relation to the issue in dispute between the parties that an 'industrial matter' means:

> any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to -
>
> …
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

11 The Public Service Arbitrator also had regard to the observations of Wheeler and Le Miere JJ in *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244 where their Honours found that in order to determine how to 'deal with' an industrial matter the Arbitrator must find relevant facts [30] and they went on to state:

> Where, as is presently the case, the way in which officers in the public service deal with each other is the subject of principles and requirements contained in legislation such as the PSM Act, it will often be desirable for the Arbitrator to consider whether the behaviour of individuals involved in the industrial matter has been in conformity with those principles and requirements. Again, findings of that kind would not be made as an end in themselves, but would be made in order to determine how, in the broad statutory context, it would be appropriate to deal with the industrial matter.
>
> It will on occasion, as part of that process, be necessary for the Arbitrator to undertake a consideration of the relevant statutes, so as to ascertain how they apply to the facts as found. That exercise is undertaken, not in order authoritatively to declare the meaning of the statutory provision, but again as a step in the process of ascertaining what is required, in the statutory context, to deal with the industrial matter [31] - [32].

12 The Public Service Arbitrator set out the statutory powers of the Arbitrator to review an employer's decision and observed that pursuant to s 80E(5) of the Act, the employer's decision can be reviewed, nullified, modified or varied by the Arbitrator in the course of the exercise of jurisdiction and the Arbitrator has very wide powers to deal with the industrial matter for the purpose of resolution. In respect of the Public Service Appeal Board's jurisdiction under s 80I(1)(a), the Public Service Arbitrator observed that the Public Service Appeal Board has power to hear and determine 'an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the PSM Act concerning conditions of service … of public service officers'. The Public Service Arbitrator held that s 80I(1)(a) does not simply provide for an appeal against the employing authority's interpretation of a provision of the PSM Act. Rather it provides for an appeal against any decision in relation to an interpretation of any provision of the PSM Act concerning conditions of service of public service officers. For this reason, the Public Service Arbitrator made the finding that the power in s 80I(1)(a) is not a power to make a declaration that can be characterised as a bare or bald interpretation as discussed by the Full Bench in *Crewe and Sons Pty Ltd v AMWSU* (1989) 69 WAIG 2624.

13 The Public Service Arbitrator then went on to examine the meaning of the term 'conditions of service' in s 80I(1)(a) and observed whilst the term is not defined, that such conditions could be found in a number of provisions of the PSM Act. These are contained in Part 3 of the PSM Act, in particular s 64 to s 67 which deal with appointments; transfers within and between departments and organisations; secondments and vacation of office; Part 5 – Substandard performance and disciplinary matters, including rights to procedural fairness and rights of appeal; Part 6 – Redeployment and redundancy. Other miscellaneous conditions including s 102 – Employees not to engage in activities unconnected with their functions.

14 The Public Service Arbitrator pointed out that the jurisdiction of the Public Service Appeal Board includes the power to adjust all such matters under s 80I(1) of the Act and in this matter the adjustment would be to the decision of the employing authority in relation to the interpretation of any provision of the PSM Act concerning conditions of service of public service officers. The Public Service Arbitrator found that the jurisdiction of the Public Service Appeal Board in this matter would provide for the adjustment of the employer's decision in relation to the interpretation of a provision of the PSM Act concerning whether the conditions of service include the capacity of the employer to instigate or continue to investigate a suspected breach of discipline when the employment has ended.

15 The Public Service Arbitrator then turned her mind as to whether the principle of generalia specialibus non derogant applies and made the following findings:

(a) Section 80I(1)(a) of the Act is limited to persons who are public service officers who are a subset of government officers, whereas the Public Service Arbitrator's jurisdiction is broader, dealing with government officers.

(b) In respect of the subject matter of the application, the Public Service Appeal Board's jurisdiction covers the dispute as to the employer's decision in relation to an interpretation of the PSM Act concerning conditions of service of public service officers. This is more narrowly focussed on the issue in dispute, than a dispute about an industrial matter in respect of conditions which are to take effect after termination of employment. This is because the dispute is about the particular decision of the respondent, which relies upon an interpretation of the provisions of the PSM Act which relate to a condition of service, being the disciplinary process.

(c) When regard is had to the discussion about the application of the principle of generalia specialibus non derogant in the decision of the Full Bench in *Bellamy v Chairman, Public Service Board* (1986) 66 WAIG 1579, it follows that the legislature intended that there be a special and particular tribunal whose purpose was to deal with a claim of the nature referred for hearing and determination in this matter. This special tribunal is the Public Service Appeal Board. Consequently the jurisdiction of the Public Service Appeal Board must prevail over the general jurisdiction of the Public Service Arbitrator whose jurisdiction is broad and also encompasses the issue in dispute.

The Appellant's Submissions

16 The appellant argues that the Public Service Arbitrator misconstrued the application of s 80I(1)(a) of the Act in relation to the facts in issue. In particular they say the Public Service Arbitrator misconstrued s 80I(1)(a) by applying the maxim generalia specialibus non derogant, as this rule is only applied when two inconsistent provisions cannot be reconciled as a matter of ordinary interpretation and the maxim is a rule of last resort in overcoming direct statutory inconsistencies (Gifford D, *Statutory Interpretation* (1990) 111).

17 The appellant points out that the application was initiated as a registered organisation on its own behalf under s 80F of the Act which gives the appellant standing to apply to the Public Service Arbitrator. The application was not brought under s 80J of the Act. Section 80J provides that the appellant may bring an application under s 80I on behalf of the public service officer. The appellant contends that it is not acting as an agent of a member. They also say that individual employees have limited access to the Public Service Arbitrator and that this dispute was not one that an employee could have brought before the Commission under s 80E of the Act. Consequently the appellant says that the application properly invoked the jurisdiction of the Public Service Arbitrator as an 'industrial matter' pursuant to the definition in s 7 of the Act, as an industrial matter in paragraph (b) of the definition extends to any matter affecting, or relating, or pertaining to, conditions of employment which are to take effect after the termination of employment.

18 The appellant also says that the jurisdiction of the Public Service Arbitrator in relation to conditions of employment which are to take effect after termination of employment is explicit and there is no competing provision in the PSM Act to collide with, or override, it. The appellant also makes a submission that s 80I(1)(a) of the Act is for the benefit of public service officers who have contracts of employment on foot and that the PSM Act prescribes no conditions of service which are to take effect after the termination of employment. The appellant argues that s 80I(1)(a) of the Act cannot be invoked to deprive the appellant from making a s 44 application as Mr van der Zanden's contract of employment effluxed by time on 4 June 2009. On 11 June 2009, the respondent notified its former employee of its intention to commence an investigation when there was no employment relationship in existence. The contention that sits behind this submission is that once a person has ceased to hold office as a public service officer, they cannot bring an application under s 80I(1) and s 80J of the Act as at the time of making the application, the person cannot be characterised as a public service officer within the meaning of s 80I(1) and s 80K.

19 The appellant contends that if the maxim generalia specialibus non derogant should be applied, the jurisdiction of the Public Service Arbitrator to deal with conditions which are to take effect after termination of employment is a more specific power than the general power found in s 80I(1)(a) which provides the Public Service Appeal Board with jurisdiction to interpret conditions concerning the conditions of service (other than salaries and allowances) of public service officers. The appellant also argues that maxim is only to be applied when two inconsistent provisions cannot be reconciled as a matter of ordinary interpretation. They contend the apparent conflict can be reconciled by ordinary interpretation. They also say that the reference to conditions of service in s 80I(1)(a) must be given a constrained interpretation because the terminology used in s 80I(1)(a) is conceptually different to the reference to conditions of employment in s 7 of the Act. In particular they make a submission that 'conditions of service' are a subset of the genus – 'conditions of employment', and conditions which are to take effect after termination of employment is another subset of the genus.

20 The appellant contends that conditions of employment and conditions of service are not always synonymous. In developing this submission they say that the classification or definition of 'conditions of service' and 'conditions which are to take effect after termination of employment' are subsets of the genus 'conditions of employment'. In particular they rely upon the dicta of Isaacs and Rich JJ in *Australia Tramway Employees Association v Prahan and Melvern Tramway Trust* [1913] HCA 53; (1913) 17 CLR 680 where their Honours observed:

> [A]s to the phrase 'terms and conditions of employment or non-employment.' Read secundum subjectam materiam, as words in every document must be, the word 'employment' in relation to industrial disputes has a large meaning. It certainly includes in this place, the state of employment, the acts of service rendered by an employé during his engagement, the performance of his part in the industry. The 'terms' of employment are the stipulations agreed to or otherwise existing on both sides upon which the service is performed. The 'conditions' of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment (693).

21 The appellant also relies upon the definition of 'service' in the New Shorter Oxford English Dictionary in support of its submission that conditions of service cease on cessation of office. The New Shorter Oxford English Dictionary (1993) defines service (among other things) as:

> II 7 The condition, status, or occupation of being a servant or employee, …
>
> II 8 The condition of a public servant … in the employment of a ruler or the State
>
> III 11 Performance of the duties of a servant; work undertaken according to instructions …; a period of employment …; An act or instance of serving.

22 The appellant contends that as Mr van der Zanden was not a public service officer from 4 June 2009, Part 5 of the PSM Act which deals with disciplinary matters, could not apply to him after that date. They say that s 76(1)(a) of the PSM Act applies to "all public service officers" only and former public service officers are not prescribed persons for the purposes of s 76(1)(b) of the PSM Act. The rights of appeal specified in s 78 of the PSM Act are limited to government officers, as public service officers and by the use of the term 'employee' in s 80 of the PSM Act, that term means an employee as a current public service officer.

23 The appellant also puts forward an argument that the Public Service Arbitrator's interpretation of the application of s 80I(1)(a) of the Act and the definition of 'industrial matter' in s 7 does not accord with the purpose and objects of the Act. In support of the submission the appellant relies upon s 18 of the *Interpretation Act 1984* which provides:

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

24 The appellant points out that the jurisdiction of the Public Service Arbitrator and the Public Service Appeal Board as constituent authorities were established in 1984, when Part IIA, Division 2 was inserted into the Act, by the *Acts Amendment and Repeal (Industrial Relations) Act (No 2)* – No 94 of 1984. The current s 80I(1)(a) was inserted into the Act by the *Acts Amendment (Public Sector Management) Act 1994* – No 32 of 1994 and assented to on 29 June 1994. Previously s 80I(1)(a) referred to interpretation of any provision of the *Public Service Act 1978*, and regulations made there under. The appellant contends that the effect of the 1994 amendments to s 80I was to continue parts of the determinative powers of the Public Service Appeal Board in respect of employer decisions. In 1994, the Public Service Board was abolished and its role devolved to employing authorities under the PSM Act. The Public Service Appeal Board was initially established by s 7 of the *Public Service Arbitration Amendment Act 1997*, which contained a similar power as exemplified in s 80I(1)(a). The function of the Public Service Arbitrator was established by the *Public Service Arbitration Act 1966*. This function predated the existence of the Public Service Appeal Board.

25 The appellant says that s 80I(1)(a) of the Act is a renovation of previous legislative changes enacted in 1984 and earlier. Consequently it is important to identify what conditions were set out in the Public Service Act and the PSM Act. The appellant points out that the *Public Service Act 1904* prescribed the following conditions of service:

> (a) The ability to make a deduction from salary for a fair rent: s 48.
>
> (b) Calling upon an officer to retire or be transferred if incapable of performing duties: s 49.
>
> (c) Forfeiture of office if convicted of an indictable offence: s 50.
>
> (d) Deductions from salary for procuring penalties: s 51.
>
> (e) Annual recreation leave of four weeks: s 52.
>
> (f) Deduction from salary for unauthorised absence: s 53.
>
> (g) Absence for illness or other pressing necessity: s 54.
>
> (h) Leave without pay: s 55.
>
> (i) Long service leave: s 56.
>
> (j) Public service holidays: s 57.
>
> (k) Mandatory retirement at 65 unless otherwise determined: s 59.

26 The 1904 Act was repealed in 1978 by the *Public Service Act 1978* – No 86 of 1978. The conditions of service identified from the 1904 Act were not included. In 1978, Part IV – Discipline, s 43 to s 53 became operative. These provisions became the forerunner of Part 5 of the PSM Act – Substandard performance and disciplinary matters. Part IV did not expressly cover former officers. Section 51 provided for an appeal from a decision of the Public Service Board to the Public Service Appeal Board and this provision became the model of the more elaborately written provisions in s 78 of the PSM Act.

27 The *Acts Amendment (Public Service) Act 1987* made further adjustments and inserted other structures, which became the model for the PSM Act. It shifted responsibilities to Chief Executive Officers from the Public Service Appeal Board and defined the State Executive Service, and organisations. Part 5 of the PSM Act disciplinary process did not exist in the *Public Service Act 1978* until 1978. None of the 1904 conditions were repeated in the PSM Act or the PSM Regulations. The public service conditions of service identified in the 1904 Act were superseded by the conditions in either the Public Service Salaries Agreement 1985 (PSA AG 5 of 1985) or the Public Service General Conditions of Service and Allowances Award (PSA A 4 of 1989), or earlier, and thereafter by the Public Service Award 1992.

28 The appellant submits that because the 1904 public service conditions have not been replicated in the PSM Act or its immediate predecessor, the *Public Service Act 1978*, it is probable that s 80I(1)(a) of the Act and its previous formats were redundant or inserted on the basis of extreme caution. The appellant says that this is a situation which has been described in Gifford as:

> [I]t is equally possible for a conflict to arise between different sections of the same Act. This can occur either as a result of sloppy draftsmanship or as a result of repeated amendments passed over a period of many years, creating a patchwork Act which is not the work of any one individual (112).

29 For these reasons the appellant says the application of the maxim generalia specialibus non derogant is not apposite.

30 The appellant also makes the submission that the decision in *Bellamy* is no longer good law because of amendments made to the Act in 1987 by the enactment of the *Industrial Relations Amendment Act (No 4) 1987*. These amendments included the insertion of s 44(6)(ba) and s 44(6)(bb) of the Act. The appellant says it follows that the object, and the remedial purpose of the 1987 amendments prevent the operational application of generalia specialibus non derogant and that *Bellamy* is only correct on its jurisdictional facts. In support of this submission they say that the Second Reading Speech to the 1987 amendments given by the Honourable J Berenson in the Legislative Council set out the policy of those amendments. In particular they referred to the following passage of Hansard:

> This package of amendments, in essence, extends, clarifies, and improves the procedures and jurisdiction of the Industrial Relations Commission, its constituent parts, and the Industrial Appeals Court to enable the conciliation and arbitration process to function more expeditiously for the mutual benefit of all concerned.
>
> That body serves the State extremely well … but as a result of the now famous Robe River dispute, subsequent decisions of the Industrial Appeals Court have revealed shortcomings in the extent of the Commission's powers to make interim orders against parties continuing to inflame the situation during the dispute settling process. It was agreed by all parties involved in the tripartite consultations that the Commission must have wide powers in order to be able to deal with the cause while controlling the symptoms of the disputation. (Hansard, 1987, (798-800).

31 The appellant also says the 1984 Act was also remedial, because it located the jurisdictions of both the Public Service Arbitrator and the Public Service Appeal Board in the Industrial Relations Commission itself, amongst other things. Indeed the powers of the Public Service Arbitrator were broadened, and those powers that existed under the *Public Service Arbitration Act* were redrafted, and became part of s 80E. The remedial nature of this legislation is indicated from the Second Reading Speech of the Honourable D Dans MLC (Hansard, 1984, (1053-1058).

The Respondent's Submissions

32 The respondent argues that the definition of 'industrial matter' in s 7 of the Act has no bearing on the jurisdiction of the Public Service Arbitrator in this matter. It is conceded, however, that the Public Service Arbitrator, but for the jurisdiction of the Public Service Appeal Board under s 80I(1)(a) of the Act, would have jurisdiction to deal with the application. The respondent says that the provisions of the PSM Act formed part of the conditions of employment of Mr van der Zanden's fixed term contract. The respondent says it follows therefore that the respondent's decision to continue the disciplinary process following the expiry of Mr van der Zanden's fixed term contract did not of itself, impose a condition that which was to take effect after the expiry of the contract. The respondent says that the appellant should have brought an application as an appeal to the Public Service Appeal Board to deal with the matter in dispute between the parties. The respondent points out the only grounds the appellant relied upon in its application to seek the assistance of the Public Service Arbitrator was to seek an order that the respondent cease the disciplinary process on grounds that the respondent had no power to continue the process in relation to Mr van der Zanden. The respondent also points that at no stage has the appellant claimed that the respondent was acting harshly or unfairly in its dealing with Mr van der Zanden, nor has any claim been put forward that he was denied procedural fairness or natural justice.

33 The respondent says that the jurisdiction to deal with the subject matter of the application before the Public Service Arbitrator clearly falls within the meaning and intention of s 80I(1)(a) of the Act and therefore within the exclusive jurisdiction of the Public Service Appeal Board, thereby ousting the jurisdiction of the Public Service Arbitrator. The respondent also says that the appellant, in challenging the respondent's power to continue the disciplinary process following the ending of the employer-employee relationship, ought to have filed an appeal to the Public Service Appeal Board, as the subject matter of the application to the Public Service Arbitrator amounted to an argument in, or as to the correctness or otherwise of the respondent's interpretation of the provisions of the PSM Act as they relate to Mr van der Zanden.

34 The respondent accepts that, pursuant to s 80E(1) of the Act, the Public Service Arbitrator has 'exclusive jurisdiction to enquire and deal with any industrial matter relating to a government officer' but, in doing so, says that the generality of the Public Service Arbitrator's jurisdiction is limited by the specific matters allocated by the legislature, to the Public Service Appeal Board pursuant to s 80I(1) of the Act. Consequently, the respondent says that the Public Service Arbitrator correctly applied the rule generalia specialibus non derogant.

35 The respondent contends that the subject matter of the application to the Public Service Arbitrator was whether or not the respondent in continuing the disciplinary process acted without statutory authority is matter that cannot be determined other than by way of an interpretation of the PSM Act.

36 The respondent points out that the appellant clearly filed the application on behalf of Mr van der Zanden and claimed to represent Mr van der Zanden in schedule A of the application. Further it was made clear in submissions before the Public Service Arbitrator that the application relates not to government officers generally but only to Mr van der Zanden. The application at first instance did not, for example, purport to deal with an industrial matter which affects government officers generally nor did it purport to deal with an industrial matter relating to public service officers generally. To the contrary the application at first instance purported:

(a) To represent Mr van der Zanden; and

(b) To be in dispute with the respondent's decision to continue the disciplinary process under the PSM Act when Mr van der Zanden was no longer its employee.

37 The respondent says the Public Service Arbitrator did not have the power to intervene in the application due to the fact that the subject matter of the application went to a decision of the respondent made pursuant to Part 5 of the PSM Act to continue a disciplinary process commenced prior to Mr van der Zanden's contract of employment having ended due to the effluxion of time. The respondent contends that the two inconsistent provisions under the Act to be reconciled are:

(a) The jurisdiction of the Public Service Arbitrator under s 80E of the Act to deal with any 'industrial matter'; and

(b) The exclusive jurisdiction of the Public Service Appeal Board to deal with specific matters pursuant to s 80I(1) of the Act, all of which raise 'industrial matters' which are incapable of being dealt with by the Public Service Arbitrator.

38 The respondent contends that when one reads the whole of s 80I it is clear that a person does not have to be a public service officer at the time an appeal is lodged. For example, a government officer whose employment has come to an end because of dismissal can appeal the dismissal under s 80I(1)(b) of the Act.

39 The respondent says it was open to the appellant to essentially file the same application on behalf of Mr van der Zanden for hearing by the Public Service Appeal Board. It was also open to Mr van der Zanden to file essentially the same application on his own behalf.

40 The respondent contends the Act does not preclude public service officers or government officers from seeking a remedy under s 80I(1)(a) to (e) subsequent to the termination of the contract of employment as it says that Part 5 of the PSM Act contemplates the continuation of the disciplinary process in the absence of an ongoing employment relationship.

41 The respondent accepts that conditions of employment and conditions of service are not always synonymous but says that this is irrelevant in the face of the specific matters which may be appealed to the Public Service Appeal Board pursuant to s 80I(1)(a) of the Act.

42 The respondent argues that the interpretation placed on s 80I(1)(a) of the Act by the Public Service Arbitrator is not in conflict with the definition of 'industrial matter' in s 7 of the Act. In particular, they say that the definition of 'industrial matter' in s 7, deals with the general interpretation of an industrial matter as it relates to the general jurisdiction of the Public Service Arbitrator whereas s 80I of the Act deals with specific matters (which are also industrial matters) which come within the jurisdiction of the Public Service Appeal Board.

43 The respondent does not quarrel with the history of the enactments which led to the creation of the Public Service Appeal Board, the Public Service Arbitrator, and the history of amendments to the *Public Service Act 1904* but says that these enactments have no relevance to the issue in dispute in this appeal.

44 The respondent maintains that the *Bellamy* decision remains good law for the purpose of determining the jurisdiction of the constituent authorities of the Public Service Arbitrator and the Public Service Appeal Board.

The Minister's Submissions

45 Counsel for the Minister submits that it is clear that the substantial issue between the parties is whether the respondent can continue a disciplinary process, commenced under Part 5 of the PSM Act, after the respondent's member Mr van der Zanden ceased to be a public service officer but this appeal is not about whether proceedings may be continued against an employee who ceases to be a public service officer but to what constituent authority that question can be referred and by whom.

46 Counsel points out that Part 5 of the PSM Act contains comprehensive provisions, supported by regulations made under the PSM Act, which deal with breach of discipline proceedings against public service officers.

47 It is pointed out that s 80E(1) of the Act confers upon a Public Service Arbitrator exclusive jurisdiction to inquire into and deal with any 'industrial matter' relating to government officers, a group of government officers or government officers generally. Public service officers are by s 80C of the Act 'government officers'. Section 80F(1) of the Act provides, except in limited circumstances, not relevant here, that an industrial matter concerning a 'government officer' can only be referred by an employer, organisation, association or by the Minister.

48 The Public Service Appeal Board is constituted under s 80H(1) of the Act. Section 80I(1)(a) of the Act provides the Public Service Appeal Board with jurisdiction to hear an appeal by any public service officer against any decision of employing authority in relation to an interpretation of any provision of the PSM Act, and any provision of the regulations made under that Act, concerning conditions of service (other than salaries and allowances) of public service officers.

49 It is important to note that only specific decisions of employing authorities can be the subject of an appeal to the Public Service Appeal Board and are not identified by reference to being an 'industrial matter'.

50 Section 80J(b) enables either the public service officer concerned or an organisation on his or her behalf to institute an appeal under s 80I.

51 The Minister says that conditions of service of public service officers are to be found in:

(a) The Public Service Award 1992 and the Public Service General Agreement 2008 (the Agreement);

(b) The contract of employment; and

(c) The PSM Act and the Regulations made there under.

52 It has not been submitted that there are any relevant provisions in the Agreements or in a contract of employment. Part 5 of the PSM Act deals comprehensively with disciplinary proceedings that may be commenced against a public service officer and are properly considered conditions of service. Part 5 prescribes the circumstances under which disciplinary proceedings may be commenced, the process to be followed and the penalties that are available when a breach of discipline is found, where 'a person has committed a breach of discipline while serving as an employee' in a 'public sector body'.

53 An appeal under s 80I(1)(a) must concern a decision in relation to an interpretation of any provision under the PSM Act concerning conditions of service of public service officers. That an appeal may be instituted by or on behalf of a public service officer after employment has ceased, is clear, as appeals are available against decisions to dismiss: s 80I(1)(c) and s 80I(1)(e).

54 The issue squarely raised in these proceedings involves an interpretation of Part 5 of the PSM Act, that is, whether it is possible to bring to an end disciplinary proceedings against a former public service officer when those proceedings were commenced at the time when he was a public service officer.

55 It is contended that it simply must be a condition of service that you are amenable to some sort of penalty for transgression of employment when you are employed as a public service officer. It is inarguable that that is not a condition of service and it cannot be a condition which takes effect after employment has been completed. It is a condition of service of a public service officer that he or she will be amenable to some sort of punishment or penalty as a result of a disciplinary breach that occurred whilst employed, as a serving officer.

56 It is argued by the Minister that the continuation of a disciplinary process is a condition of service and is not a condition which takes effect after service has ended.

57 The Minister agrees with the submissions made on behalf of the respondent that this was an application made on behalf of Mr van der Zanden, a former public service officer and the application concerned the interpretation of the provisions of the PSM Act. Prior to the enactment of s 7(1a) of the Act which provides that a matter relating to the dismissal of an employee by an employer; or the refusal of an employer to allow an employee a benefit under his contract of service remains an industrial matter for the purpose of the Act even though their relationship of employee and employer has ended. It might have been argued at one time that no industrial matter arose in the case of unfair dismissal once the dismissal had taken effect, because the relationship of employer and employee (upon which the Commission's jurisdiction is founded) had come to an end: see Industrial Appeal Court in *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of WA* (1987) 68 WAIG 11 (Pepler's case). Mr Andretich on behalf of the Minister directed the Full Bench's attention to s 7(1a) of the Act which only extends the jurisdiction of the Commission to deal with a matter relating to a dismissal of an employee or the refusal to allow a contractual benefit. The Minister says this provision does not extend to the matter which was before the Public Service Arbitrator as the subject matter before the Public Service Arbitrator was a statutory condition of employment. The disciplinary provisions in Part 5 of the PSM Act apply as a matter of statute. The Minister says it follows therefore that as this matter does not come within the extension in s 7(1a) as the jurisdiction of the Public Service Arbitrator relies upon an employment relationship being on foot. Consequently if the Public Service Arbitrator has no jurisdiction because an industrial matter is not raised, the only application that can be made is under s 80I(1)(a) of the Act to the Public Service Appeal Board.

58 It is also argued on behalf of the Minister that the power to consider conditions of service in s 80I(1)(a) is very wide. In *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513 Toohey J stated that it may be accepted that there will be always be a question of degree involved where the issue is the relationship between two subject matters. The words 'in relation to' are wide words which do more, at least without reference to context, than signify the need for there to be some relationship or connection between the two subject matters.

59 It is contended that the decision under consideration can fairly be described as one which relates to the interpretation of the provisions of the PSM Act concerning conditions of service of public service officers. That is, whether Part 5 provides the power to continue disciplinary proceedings after a public service officer has resigned. It is said that whether the disciplinary process should be continued or whether it is an abuse of the disciplinary process as a matter of merit to continue the process after Mr van der Zanden's fixed term contract has come to an end is a matter going to the individual merits of Mr van der Zanden's position which has not at this point been argued and this is a matter that can be dealt with by the Public Service Appeal Board under s 80I(1)(a) of the Act, and that is the proper forum for those issues to be raised and determined.

60 The scheme of the Act is not for a constituent authority or the Commission to have concurrent jurisdiction over matters in respect of which jurisdiction has been specifically conferred. The scheme of the Act is clear. Where a matter is one in respect of which the Public Service Appeal Board has jurisdiction, relief cannot be sought from the Public Service Arbitrator or the Commission, and is only available to the persons specified in the relevant section. It is not a sensible interpretation that the legislation intended relief could be sought from either the Public Service Arbitrator or the Public Service Appeal Board in

respect of matters where jurisdiction has been specifically conferred upon the Public Service Appeal Board. The Commissioner, with respect, correctly set out the approach to be followed in construing the relevant provisions in paragraph [37] of her reasons and correctly concluded that the legislature intended that the Public Service Appeal Board, only, could hear and determine the powers of an employing authority in relation to the disciplinary process conducted under the PSM Act against Mr van der Zanden.

The Appellant's Submissions in Reply

61 The appellant was granted leave to file and serve written submissions following the hearing of the appeal on 11 February 2010. The appellant filed written submissions in reply on 26 February 2010. In the written submissions the appellant made a number of comprehensive submissions in respect of the following matters.

62 The appellant submits that respondent's and Minister's submissions are unsustainable as a matter of interpretation, in particular their submissions are not in accord with s 6(2) of the PSM Act and s 80E of the Act, or the objects and purpose of the Act. Section 6(2) of the PSM Act provides:

> Except to the extent to which a provision of this Act specifies otherwise, the *Industrial Relations Act 1979* applies to and in relation to matters dealt with by this Act.

63 Consequently it said that s 6(2) requires an express provision of the PSM Act to override the provisions of the Act.

64 The appellant points out the jurisdiction exercised by the Public Service Arbitrator under s 80E(1) is not expressly trammelled by the jurisdiction of the Public Service Appeal Board under s 80I, because s 80E is not expressly subject to s 80I. Under s 80I(1) the Public Service Appeal Board is subject to s 52 and s 94 of the PSM Act. Neither s 80E nor s 80I is expressed as subject to any other provisions of the Act. The absence of this type of restriction from both jurisdictions contrasts with s 23 of the Act which sets out the general jurisdiction of the Commission as being 'subject to this Act'. This means that the general jurisdiction of the Commission is displaced by either the jurisdiction of the Public Service Arbitrator or the Public Service Appeal Board as the case may be. Hence in this context Bellamy was rightly decided, but can not be extended to the current controversy.

65 The appellant says the jurisdiction of the Public Service Arbitrator under s 80E is, however, subject to Division 3 of Part II of the Act which deals with the power of the Commission to make general orders, including orders for public sector discipline under s 51A. Otherwise, the jurisdiction of the Public Service Arbitrator under s 80E, is subject to subsections (6) and (7) of s 80E. These subsections deal with referring matters to the Commission in Court Session or to the Full Bench, which are not relevant to this matter; or to public sector standards as referred to in s 97(1)(a) of the PSM Act.

66 Section 80I does not expressly exclude the appellant from making an application under s 80E. Ouster of jurisdiction should not be effected by implication, but by express intendment: Owen J in *Bateman Project Engineering Pty Ltd v Resolute Ltd* [2000] WASC 284. Section 80I is not like s 80E(7) which ousts the jurisdiction of the Public Service Arbitrator with respect to public sector standards under s 97 of the PSM Act, except for those standards relating to substandard performance or discipline because of the operation of s 96 of the PSM Act.

67 During the course of the appellant's submissions the appellant was asked by the Bench why the 1987 changes to s 44 of the Act was significant and relevant to the jurisdiction of the Public Service Arbitrator under s 80E(1). The appellant says the changes to the Act initiated in 1984 and 1987 were remedial. Consequently they argue that the object and purpose of the amendments must be considered as paramount rather than a minor canon like generalia specialibus non derogant. They also say the same rationale applies to the 2002 amendments to the definition of 'industrial matter' by the enactment of the *Labour Relations Reform Act 2002*. The appellant also argues that amendments made in 2002 to the definition of 'industrial matter' in s 7 of the Act broadened the scope of matters that the Commission may deal with as industrial matters and extend beyond the existence of an employment relationship. In 2002 by the enactment of the *Labour Relations Reform Act 2002* the following words were inserted into the definition of 'industrial matter' following immediately after s 7(i):

> and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include —

68 In *Director General, Department of Justice v Civil Service Association of Western Australia Incorporated* (2004) WAIRC 13765 Sharkey P stated, with whom Gregor C and Kenner C agreed:

> Most specifically, there is not required to be any direct relationship, as required by the authorities, before the amendments of 2002 were enacted. The words of an 'industrial nature' are a clear recognition that now there is not to be required to be an employment relationship provided that there is a dispute, the matter is one of an industrial nature and/or there is a situation likely to give rise to a dispute [33].

69 The appellant contends that the 2002 amendments and the observations made by the Full Bench in that case, contrary to the respondent's and Minister's submissions, has the effect that the line of reasoning considered in *Pepler's* case with respect to limiting the application of the words in s 7 - 'including conditions which are to take effect after the termination of employment' can no longer stand.

70 They say that in 1987 there were changes to the jurisdiction of the Public Service Arbitrator in s 80E by virtue of amendments to s 44 of the Act. However, there were no changes to the jurisdiction of the Public Service Appeal Board at that time. They point out pursuant to s 80G(1) of the Act, s 44 applies to the exercise of the jurisdiction of the Public Service Arbitrator. The appellant contends the s 44 amendments in Division 2C Part II of the Act enhanced both the conciliation and arbitration powers of the Public Service Arbitrator to make interim orders in the case of harsh, oppressive or unfair dismissal, and other orders 'as will ... (i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved the matter'. They say it follows from these amendments that as the Public Service Arbitrator's powers

and jurisdiction were enhanced in 1987, and not the Public Service Appeal Board's jurisdiction, it is difficult to apply the principle generalia specialibus non derogant because s 80E cannot be considered 'impliedly repealed by a later inconsistent special [provision]'; see Gifford at p 111 and the authorities cited therein. This submission also applies to the 2002 amendments to the definition of 'industrial matter' as the jurisdiction of the Public Service Appeal Board in s 80I(1)(a) remained unchanged.

71 The appellant disputes the submission made on behalf of the Minister that disciplinary provisions of the PSM Act in Part 5, Division 3 can be classified as conditions of service or employment. The appellant says that more likely the statutory provisions impose a status or burden on the employee and vest a right or power in the employer, and thus on the basis of this classification, the disciplinary incidents would be within the power of the Public Service Arbitrator in the absence of a general order for public sector discipline. In *Civil Service Association of Western Australia Inc v Director General of Department for Community Development* [2002] WASCA 241, the Industrial Appeal Court held unanimously that the Public Service Arbitrator had power to intervene in the PSM Act disciplinary processes if it found that the allegations were baseless. The appellant says that it can be implied from this decision that the disciplinary process is not a condition of service for the purposes of s 80I(1)(a).

72 The appellant argues that the disciplinary provisions of the PSM Act are not terms of contract. In support of this submission they rely upon the observations of Scott J in *Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch* [2002] WASCA 355 at [22] and [23] in which his Honour made observations about the statutory status of an industrial agreement once freely and voluntarily made and registered. They also rely upon the observations of McHugh and Gummow JJ in *Byrne and Frew v Australian Airlines Ltd* [1995] HCA 24 who approved the observations of Gibbs J in *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 who with other members of the Court considered the terms of the 1972 South Australian Act which empowered the Industrial Court to order re-employment of employees or temporary employees of the Australian Broadcasting Commission. In respect of these provisions Gibbs J observed that:

> Those provisions do not require a new term to be implied in every contract of employment. They do not give a quasi-contractual right to every employee. They confer jurisdiction and power upon the industrial Court to make orders of the kind therein described. The jurisdiction is not limited to cases in which the dismissal has been in breach of contract or otherwise wrongful. ... In other words s 15(1)(e) is not a part of the State law regarding contracts of employment (403).

73 The appellant points out that the agreed statement of facts evinces a dispute of an industrial nature and so does Schedule A attached to the s 44 application. They also point out that the Public Service Arbitrator accepted there was a dispute between the parties. The issue was which authority had jurisdiction. However, the appellant says that the Public Service Arbitrator wrongly concluded that the disciplinary process related to a condition of service.

74 In the appellant's written submissions filed on 4 February 2010, the appellant identifies what it says are conditions of service in the PSM Act. They now say in their written submissions filed on 26 February 2010, that they omitted to include modes of employment under s 64 of the PSM Act as a condition of service and should have done so.

75 The appellant also says that while the jurisdiction of the Public Service Arbitrator is constrained by the existence of public sector standards pursuant to s 80E(7) of the Act, the jurisdiction of the Public Service Appeal Board under s 80I(1) or elsewhere is not. They say this means that a decision of an employing authority with respect to conditions, like modes of employment or transfer may be appealed even if the appeal raises an issue of a breach of a public sector standard in passing or otherwise. The absence of a privative provision in s 80I(1) tends to support the appellant's broad submission that the Public Service Arbitrator has jurisdiction to determine this dispute.

76 The appellant says they are not seeking a 'bald' interpretation of the PSM Act. They say they are seeking a particular end, the cessation of the investigation on the grounds of a lack of statutory authority.

77 The appellant has standing in their own right to invoke s 80E(1) rather than to institute an appeal under s 80I. There is a conceptual difference between the notion of industrial dispute and an appeal. Further they say that s 80J(b) does not give the appellant status as an applicant or appellant. Under s 80J(b) the appellant as an industrial association is a mere agent of the appealing employee. They contend that given the history of and evolution of the definition of 'industrial matter' it was not the intention of the legislature to limit union initiated disputes under s 80E by implication.

78 Whether one provision excludes the operation of another was considered in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; [2006] HCA 50; and applied by the Full Bench in *The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Roman Catholic Bishop of Bunbury Chancery Office* (2007) 87 WAIG 1147. The appellant contends that applying Gleeson CJ's observations in *Nystrom* the two provisions, s 80E and s 80I, are not 'repugnant, in the sense that they contain conflicting commands which can not both be obeyed, or produce irreconcilable legal rights or obligations'. The appellant says that neither the respondent nor the Minister has identified any repugnancy. There are no conflicting commands nor irreconcilable rights or duties.

79 The appellant also says that the observations of Gummow and Hayne JJ in *Nystrom* should also be applied as s 80I and s 80E do not cover the 'same power' or the 'same subject matter'. They also contend that s 80I is not declared exhaustive by its provisions. Consequently they say one provision does not encroach on the other. They also contend that the structure and application of s 80E and s 80I(1)(a) is different, and so the reasoning by the Full Bench in *The Roman Catholic Bishop of Bunbury Chancery Office* which concerned the application of s 44 and s 46 with respect to applications for interpretation is not an apposite analogy. They say in the words of Heydon and Crennan JJ in *Nystrom*, the powers of the Public Service Arbitrator set out in s 80E(5) of the Act are different from the powers 'to adjust' set out for the Public Service Appeal Board in s 80I(l) with respect to the criteria for their exercise and consequences. They contend that both s 80E and s 80I are special powers, which 'are consonant with each other'.

80 Consequently the appellant argues that the Minister's submission that the observations of Toohey J in *Smith* cannot withstand scrutiny because of the decision in *Nystrom*, including the application of its principles in *The Roman Catholic Bishop of Bunbury Chancery Office* by the Full Bench.

81 The appellant also argues that the decision of Kenner C in *Civil Service Association of Western Australia Incorporated v Disability Services Commission* [2005] WAIRC 01349 and the arguments considered when the matter went on appeal in *Civil Service Association of Western Australia v Disabilities Services Commission* [2005] WAIRC 02043 set out similar arguments presented by the appellant in this matter to the arguments presented in the *Disability Services Commission* cases. Further they say there was an erroneous reliance on *Bellamy* in the *Disability Services Commission* cases and a failure to consider the 1987 amendments to the Act. However, they point out that the *Disability Services Commission* matter and this appeal demonstrate an ongoing controversy and vexed question in which there is a public interest about the jurisdiction of the Public Service Arbitrator and jurisdiction of the Public Service Appeal Board.

Conclusion

82 The first question that must be resolved in this appeal is whether the Public Service Arbitrator had jurisdiction to deal with the matters in dispute but for the jurisdiction of the Public Service Appeal Board. If the answer to that question is yes, then the next question that must be answered is whether the Public Service Appeal Board had jurisdiction to deal with the matters in dispute. If the answer to that question is no, then no conflict between s 80E and s 80I would arise. If, however, the answer is yes, then the issue whether the maxim generalia specialibus non derogant applies to oust the jurisdiction of the Public Service Arbitrator must be considered.

(a) Jurisdiction of the Public Service Arbitrator

83 The powers of the Public Service Arbitrator which are relevant to this appeal are contained in s 80E(1), s 80E(2), s 80E(5), s 80F(1), s 80F(2) and s 80G of the Act. Section 80E(1), s 80E(2) and s 80E(5) of the Act provides:

> (1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.
>
> (2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —
>
> (a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and
>
> (b) a claim in respect of a decision of an employer to downgrade any office that is vacant.
>
> …
>
> (5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division.

84 Section 80F(1) and (2) of the Act provides:

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

85 Section 80G of the Act provides:

> (1) Subject to this Division, the provisions of Part II Divisions 2 to 2G that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a commissioner shall apply with such modifications as are prescribed and such other modifications as may be necessary or appropriate, to the exercise by an Arbitrator of his jurisdiction under this Act.
>
> (2) For the purposes of subsection (1), section 49 shall not apply to a decision of an Arbitrator on a claim mentioned in section 80E(2).

86 It has long been established that paragraph (b) of the definition of 'industrial matter' in s 7 of the Act extends to claims by former employees in respect of matters that come within this provision. Paragraph (b) of the definition of 'industrial matter' in s 7 of the Act provides:

> ***industrial matter*** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

87 Whether conditions of employment that take effect after an employment relationship has ceased can be considered an 'industrial matter' was raised in *Totalisator Agency Board v Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch* (1980) 60 WAIG 624. Prior to *Pepler's* case and the amendment to s 7(1a) to extend the definition of 'industrial matter' and the amendment of the definition of 'industrial matter' in (b) to include the words 'which are to take effect after the termination of employment' the Industrial Appeal Court was called upon to consider the scope of the words 'industrial matters' in the *Industrial Arbitration Act 1912*. The Court held an 'industrial matter' includes the question of alternative employment with another employer in redundancy, even though it related to a matter which was to come into effect after the employment relationship had ended. Brindsen J with whom Smith J agreed held that the foundation of the clause in the award in question was an existing employment relationship whereby any employer bound by the award who had an alternative position available was required to offer that position to the employee of another employer affected by the redundancy order. His Honour found the matter was an industrial matter as the matter affected or related to the rights or privileges of a worker in an industry. The Presiding Judge of the Industrial Appeal Court, Wallace J made a similar finding. He, however, also observed that paragraph (b) of the definition of 'industrial matter' in the 1979 Act would put the matter completely beyond doubt. In *Amalgamated Metal Workers and Shipwrights Union of Australia, WA Branch v Bell Bros Pty Ltd* (1983) 63 WAIG 1547 the Full Bench applied the reasoning in *Totalisator Agency Board* and held a claim by a former employee to be paid pro rata long service leave following retrenchment by his employer was an 'industrial matter'.

88 In my view these decisions put the issue whether disciplinary proceedings can be continued post employment under Part 5 of the PSM Act beyond doubt. It is clear that such a matter arises out of the employment relationship as disciplinary action under Part 5 is a matter relating to or pertaining to terms and conditions of employment which are to take effect after the termination of employment. In absence of considering the issue whether the Public Service Appeal Board has jurisdiction to hear and determine this matter or whether s 80I(1)(a) ousts the jurisdiction of the Public Service Arbitrator, the jurisdiction of the Public Service Arbitrator was but for the determination of that issue properly enlivened in this matter.

89 It is also correct at law that the appellant is empowered under s 80F to bring an application under s 80E in their own right. When an application is made by an organisation under s 80E, the organisation does not act as an agent for any member of the organisation even though the rights of a member or members may be directly affected by the issue or issues in dispute: *R v Dunlop Rubber; Ex Parte FMWU* (1957) 97 CLR 71, 81 - 85 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ). Therefore, the fact that the application before the Public Service Arbitrator in this matter relates only to Mr van der Zanden, does not have the effect that the appellant acts as an agent for Mr van der Zanden. This issue, however, in my view is not determinative in the resolution of this appeal.

(b) Jurisdiction of the Public Service Appeal Board

90 The power of the Public Service Appeal Board to hear and determine a decision in relation to an interpretation of the PSM Act is set out in s 80I(1)(a) of the Act. Section 80J is also relevant to this appeal. Section 80I(1) provides:

> (1) Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
>
> (b) an appeal by a government officer, who is the holder of an office included in the Special Division of the Public Service for the purposes of section 6(1) of the *Salaries and Allowances Act 1975*, under section 78 of the *Public Sector Management Act 1994* against a decision referred to in subsection (1)(b) of that section;
>
> (c) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary not lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed;
>
> (d) an appeal by a government officer, other than a person referred to in paragraph (b), under section 78 of the *Public Sector Management Act 1994* against a decision referred to in subsection (1)(b) of that section;
>
> (e) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d) and (e).

91 Section 80J provides:

> An appeal under section 80I —
>
> (a) shall be instituted in the prescribed manner and within the prescribed time;
>
> (b) may be instituted by the public service officer or other government officer concerned or by an organisation on his behalf.

92 A central issue sitting behind the appellant's arguments is whether the Public Service Appeal Board has jurisdiction to hear and determine an appeal under s 80I(1)(a) by a former public service officer. The exercise of jurisdiction of the Public Service Appeal Board to hear and determine an appeal under s 80I is contained in s 80L of the Act and s 78(1) of the PSM Act. Section 80L of the Act provides:

> (1) Subject to this Division the provisions of sections 22B, 26(1) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 34(3) and (4) and 36 that apply to and in relation to the exercise of the jurisdiction under this Act of the Commission constituted by a commissioner shall apply, with such modifications as are prescribed and such other modifications as may be necessary, to the exercise by a Board of its jurisdiction under this Act.
>
> (2) For the purposes of subsection (1) section 31(1) shall apply as if paragraph (c) were deleted and the following paragraph were substituted —
>
> "
>
> (c) by a legal practitioner.
>
> ".

93 Section 78(1) of the PSM Act provides:

> (1) Subject to subsection (3) and to section 52, an employee who —
>
> (a) is a Government officer within the meaning of section 80C of the *Industrial Relations Act 1979*; and
>
> (b) is aggrieved by a decision made in the exercise of a power under section 79(3)(b) or (c) or (4), 82, 86(3)(b), (8)(a), (9)(b)(ii) or (10)(a), 87(3)(a), 88(1)(b)(ii) or 92(1),
>
> may appeal against that decision to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the *Industrial Relations Act 1979*, and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to that Division.

94 It is notable that s 78 of the PSM Act does not apply to an appeal under s 80I(1)(a) of the Act. Whereas the general jurisdiction of the Commission under s 23 of the Act and the jurisdiction of the Public Service Arbitrator under s 80E of the Act is in respect of an 'industrial matter', the jurisdiction of the Public Service Appeal Board is not confined to or defined by reference to an 'industrial matter' but by the express terms of the relevant provisions that confer jurisdiction on the Public Service Appeal Board. In respect of s 80I(1)(a) jurisdiction is conferred upon the Public Service Appeal Board to hear an appeal against a decision in relation to an interpretation of any provision to the PSM Act, any provision of any regulations made under that Act, concerning conditions of service (other than salaries and allowances) of public service officers.

95 I do not agree that the term 'conditions of service' in s 80I(1)(a) should be read narrowly as the appellant contends. Historically, officers who are employed by the Crown or government agencies were career appointments and career appointments are still made under the PSM Act. These officers receive a salary for holding office as a public service officer. In the past they were appointed as 'public servants'. The term 'conditions of service' in s 80I(1)(a) of the Act in my view has no special meaning and perhaps can be said to have been used in s 80(1)(a) because of the statutory context of appointment of public service officers rather than employment at common law. This does not mean that the majority of persons appointed to positions under the PSM Act would not be regarded as employees at common law. At common law the term 'conditions of service' can be construed as broadly as the term 'conditions of employment': see the brief observations of Kirby J in *Westwood v Lightly* (1984) 2 FCR 41 (50 - 51) in relation to the expression 'terms and conditions of service'. In my opinion the term 'conditions of service' is wide enough to encompass all statutory and contractual terms of appointments. It follows therefore that the Public Service Arbitrator did not err in finding that the provisions of Part 5 of the PSM Act are conditions of service. Part 5 contains a statutory code of conditions which apply to substandard performance and disciplinary matters in relation to, among others, public service officers.

96 A more difficult issue is whether the appellant may institute an appeal on behalf of an ex-public service officer under s 80I(1) and s 80J(b) of the Act. Can the circumstances of a person whose employment as a public service officer has ceased but who wishes to appeal a decision that relates to a condition of service or conditions of service that applied during his or her employment be characterised as 'an appeal by any public service officer' within the meaning of s 80I(1) of the Act?

97 The words 'an appeal by any public service officer' should not be construed in isolation or without regard to the whole of s 80I and without regard to the legislative scheme as a whole. I recently observed in *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Director General, Department of Education and Training* (2010) 90 WAIG 127 the modern approach to statutory construction requires courts and tribunals when construing legislation to have regard to the legislative scheme. In particular I said:

> As Ritter AP observed in *Kenji Auto Parts Pty Ltd t/as SSS Auto Parts (WA) v Fisk* (2007) 87 WAIG 328 [38] statutory construction involves a consideration and analysis of the meaning of the words used in a section in the context of the legislation and legislative scheme as a whole, to try to discern the intention of the legislature: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (381) (McHugh, Gummow, Kirby and Hayne JJ); and *Wilson v Anderson* [2002] HCA 29; (2002) 213 CLR 401 [8] (Gleeson CJ). Courts must seek to ascertain the statutory purpose and legislative intention from the words used in the statute (and can use other aids as are legitimately available). Where the will of Parliament is clear, a court or tribunal must give effect to that clearly expressed will [16].

98 In *Project Blue Sky Inc*, McHugh, Gummow, Kirby and Hayne JJ observed at 381-382:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute (see *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per

Barwick CJ). The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole' (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320, per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617, per Lord Scarman, 'in the context of the legislation read as a whole'). In *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed (*Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ; at 315, per Mason J; at 321, per Deane J) [69].

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals (*Ross v The Queen* (1979) 141 CLR 432 at 440, per Gibbs J). Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions (See *Australian Alliance Assurance Co Ltd v Attorney-General (Q)* [1916] St R Qd 135 at 161, per Cooper CJ; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574, per Gummow J). Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other' (*Institute of Patent Agents v Lockwood* [1894] AC 347 at 360, per Lord Herschell LC). Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme [70].

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision (*The Commonwealth v Baume* (1905) 2 CLR 405 at 414, per Griffith CJ; at 419, per O'Connor J; *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12-13, per Mason CJ). In *The Commonwealth v Baume* at 414 Griffith CJ cited *R v Berchet* ((1688) 1 Show KB 106 [89 ER 480]) to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent' [71].

99 The obligation on a court or tribunal when construing legislation is to prefer a construction that will promote the purpose of legislation and to avoid the construction that would not promote that purpose or object: s 18 of the *Interpretation Act 1984.* Context is an aid to statutory interpretation. In *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 Kirby J noted there are three interpretative principles:

Purposive interpretation: The first principle holds that a purposive and not a literal approach (*Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272-273, 275, 280, 290) is the method of statutory construction that now prevails (*Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423, per McHugh JA, approved in *Bropho v Western Australia* (1990) 171 CLR 1 at 20):

> 'A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act.' [35].

Courts are no longer satisfied with a literal or grammatical meaning of words that does not conform to the presumed legislative intention, including the policy that can be discerned from the law in question (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321). As Lord Diplock explained, in an extra-judicial comment (Referring to *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641), "if ... the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed" (Diplock, "The Courts as Legislators", in *The Lawyer and Justice* (1978) 263, at p 274, cited in *Kingston* (1987) 11 NSWLR 404 at 424) [36].

Contextual interpretation: The second principle holds that the meaning of words in legislation is not derived by taking a word in isolation and construing it as if it existed in a vacuum. In the law, context is critical (*R (Daly) v Home Secretary* [2001] 2 AC 532 at 548 [28], per Lord Steyn). In a statute, a word (if undefined) normally takes its meaning from the surrounding text. Isolating a word, such as "pawned", and affording it meaning torn from its context is a discredited approach to interpretation, given the way that language is ordinarily used and understood by human beings (*Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397, citing *R v Brown* [1996] AC 543 at 561) [37].

Access to extrinsic materials: The third principle holds that courts, in construing contested statutory language, may have resort to extrinsic materials, in order to throw light on the meaning of that language and the purpose of Parliament (cf *Interpretation Act* 1987 (NSW), s 34(1)). This development allows a court, resolving the question, to consider a wider range of materials than was previously available to judges. Such materials may not contradict the statutory text (*Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518). However, where, as here, there is ambiguity in the statutory text – such that there is a question as to whether the language has a *strict* meaning of a particular kind or is used in a more *common* sense of everyday speech – courts now have access to extrinsic materials, to help resolve that ambiguity. In this case, such extrinsic materials include the Minister's Second Reading Speech, made in support of the Bill that became the Act that contains the contested expression (*Interpretation Act* 1987 (NSW), s 34(2)(f)) [38].

Time was, not so long ago, that Australian lawyers could say with reasonable confidence that this Court consistently applied the foregoing principles, which are obviously inter-related. That trend was encouraged by legislative instruction

(*Acts Interpretation* Act 1901 (Cth), s 15AA; *Interpretation Act* 1987 (NSW), s 33; *Interpretation of Legislation Act* 1984 (Vict), s 35(a); *Acts Interpretation Act* 1954 (Q), s 14A; *Acts Interpretation Act* 1915 (SA), s 22; *Interpretation Act* 1984 (WA), s 18; *Acts Interpretation Act* 1931 (Tas), s 8A; *Legislation Act* 2001 (ACT), s 139; *Interpretation Act* (NT), s 62A). Obviously, there are limits to any interpretation that involves an apparent departure from requirements that appear to be demanded by the language of the legislation. Moreover, interpretation is a text-based activity (*Trust Co of Australia Ltd v Commissioner of State Revenue (Q)* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 271 at 305-306 [87]) in which divergences of opinion are common and inescapable (*Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 175-176 [54]; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42]) [39].

Because the approach taken by this Court to problems of statutory interpretation is influential upon all Australian courts, we should be on guard against any temptation to return to the dark days of literalism (*Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 146 [82]). Above all, this Court should strive to be consistent. In all cases, but especially in legislation enacted to achieve important social objectives, the purposive approach is the correct one to follow [40].

100 It is also notable that under s 80I(1)(b) and (d) an appeal to the Public Service Appeal Board lies by a 'government officer' against a decision under s 78(1)(b) of the PSM Act. Under s 78(1)(b) of the PSM Act an employee who is a 'government officer' may appeal a decision (amongst others) made in the exercise of a power under s 86(3)(b) which includes a power to dismiss. An appeal by a 'government officer' other than an appeal under s 78(1)(b) also lies against a decision to dismiss under s 80I(1)(e) of the Act. Pursuant to s 80J an appeal is required to be instituted within the prescribed time. The time prescribed under the regulations is 21 days after the date of the decision: r 107 of the *Industrial Relations Commission Regulations 2005*. Whilst the time prescribed is not material, it is a matter of common sense that in a majority of matters an application is unlikely to be filed prior to a decision to dismiss taking effect, so that at the time of making a decision the person concerned would have ceased to hold office as a 'government officer'. Consequently if s 80I was to be construed as conferring jurisdiction on the Public Service Appeal Board to hear appeals by 'government officers' (or public service officers in the case of an appeal under s 80I(1)(a)) whose contracts of employment are still on foot, the legislative scheme of appeals to the Public Service Appeal Board would be frustrated to a large extent as one of the most important categories of appeals the Public Service Appeal Board has jurisdiction to hear and determine are appeals against a decision to dismiss.

101 Whilst s 80I(1)(a) does not expressly contemplate an appeal against a dismissal, as the provision provides for an appeal against any decision in relation to an interpretation of any provision of the PSM Act and any provision of the regulations made under that Act, concerning conditions of service, a decision could be made under the PSM Act which has the effect of, or concerned, conditions of employment that are to take effect on or following termination of employment. For example, a decision about compensation for early termination of employment which raises an interpretation of s 101 of the PSM Act in respect of maximum compensation payable on early termination of employment could be made by an employing authority. If s 80I(a) is interpreted to confine appeals to persons who serve as public service officers at the time an application is lodged such an appeal under s 80I(1)(a) of the PSM Act would not lie, if s 80I was to be construed as not applying to an ex-employee. Another example where s 80I(a) could not be enlivened if the provision is construed in this way is in relation to a dispute about a decision made under s 103 of the PSM Act and the interpretation of that provision in respect of re-appointment of an unsuccessful electoral candidate who had been a public service officer and who had resigned prior to nominating for election as required by s 103.

102 For these reasons, I am of the opinion that without considering the jurisdiction of the Public Service Arbitrator to deal with the matters in dispute in the application, the Public Service Appeal Board would have jurisdiction to hear and determine an appeal under s 80I(1)(a) which raises the matters that are raised in the application.

(c) Generalia specialibus non derogant

103 In *Hungry Jacks Pty Ltd v Wilkins* (1991) 71 WAIG 1751 Nicholson J conveniently summarised the law in respect of the canon of construction, generalia specialibus non derogant as follows at (1755):

As stated by O'Connor J in Goodwin *v.* Phillips (1908) 7 CLR 1 at 14 it is:

> 'Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far *(sic)* as it is inconsistent with the special provision, must be deemed not to apply.'

This is a principle applicable to determining the effect of a later statute on an earlier statute and for resolving a conflict between two sections of the one act: see D C Pearce, Statutory Interpretation in Australia (1988) at 83 and 149. In The Bank Officials' Association (South Australian Branch) v. The Savings Bank of South Australia (1923) 32 CLR 276 Isaacs and Rich JJ (at 289-290) described the principle as follows:

> 'As to the second ground, namely, the maximum Generalia specialibus non derogant, the first requisite is to get a clear understanding of its meaning. In Barker v. Edger (1898) A.C., at p.754 it is said:- 'The general maxim is, Generalia specialibus non derogant. When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms.' Now, the first thing we have to understand is what is the meaning of 'separate subject' and 'a subsequent general enactment.' In Blackpool Corporation v. Starr Estate Co. (1922) 1 A.C., at p.34 Viscount Haldane, as to that rule of construction, says:- 'It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before

> provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest.' Viscount Cave, the present Lord Chancellor, quoted with approval (1922) 1 A.C., at p.38 the rule in Barker v. Edger (1898) A.C., at p.754. Lord Cave also, for himself, said: 'The rule is clear that a general statute will not, in the absence of clear words, be construed as derogating from special provisions in a previous statute.' The language in those two cases – and they are in accordance with previous authorities – shows that the subject matter in the earlier Act must be the same as that in the later Act before the maximum can have any possible application.
>
> …'

The principle has recently been recognized by Deane J in Refrigerated Express Lines (A/Asia) Pty Ltd v. Australian Meat and Live-Stock Corporation (1980) 29 ALR 333 at 347 where he referred to the statement by Romilly MR in Pretty v. Solly (1859) 26 Beav 606 at 610 that:

> 'The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be taken to be operative ...'.

104 Where two procedures in an enactment are provided for, the maxim expressum facit cessare tacitum may also become relevant. This maxim when translated means where a particular procedure is designated to achieve something, other procedures are thereby excluded.

105 In *Nystrom*, Gummow and Hayne JJ explained that where there are two powers available in an enactment in a particular matter whether as the same power, the same subject matter or whether the general power encroaches on the subject matter exhaustively governed by the special power, it must be possible to say that the statute in question confers only one power to take the relevant action. Their Honours stated [54] - [55]:

> Underlying *Anthony Hordern* and later cases is the notion 'that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise'. This statement was made by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *R v Kirby; Ex parte Boilermakers' Society of Australia* ((1956) 94 CLR 254 at 270. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 409 [241]) and applied to Ch III of the *Constitution* as a 'very evident example'. Counsel for the Minister, in oral argument, invoked the maxim expressum facit cessare tacitum (when there is express mention of certain things, then anything not mentioned is excluded), and its affinity with the above statement will be apparent. But, whilst 'rules' or principles of construction may offer reassurance, they are no substitute for consideration of the whole of the particular text, the construction of which is disputed, and of its subject, scope and purpose.
>
> *Anthony Hordern* ((1932) 47 CLR 1) concerned the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (the Conciliation and Arbitration Act) which apparently contained two powers for the making of an award with respect to union preferences. Section 40 empowered the Court of Conciliation and Arbitration by award to give preferential employment to members of unions over other persons, subject to certain conditions, including that such an award was to be made only 'other things being equal'. The power in s 40 was not expressly confined to the situation where there was an industrial dispute about preference. However a judge of the Court, acting under the general powers in ss 24(2) and 38(a) to hear and determine industrial disputes, made an order unconditionally requiring certain employers to give preference to union members in employing female workers. This Court by majority (Gavan Duffy CJ and Dixon J, McTiernan J, Starke and Evatt JJ dissenting) held that those general powers did not authorise the judge to make an award which 'ignored the exception[s] ((1932) 47 CLR 1 at 8) contained in s 40. McTiernan J concluded as follows ((1932) 47 CLR 1 at 20):
>
> > "Reading the Act as a whole, there does not appear to me to be any reason for holding that Parliament intended to give to the Court two powers, entirely different in scope, to order 'preference'. I do not think that the Legislature intended that, in a case in which preference was in dispute, the Court should be free to make any award it deemed fit and that the award might be entirely unconditional, whereas, in a case in which preference was not in dispute, the Court should be fettered and its award moulded by the provisions of s 40."
>
> This is a rather more compendious expression of what was said by Gavan Duffy CJ and Dixon J in the passage set out earlier in these reasons. As a matter of construction (and not as one of implied repeal) there was only one power which could be relied upon to make awards giving preferential employment to union members.

106 The history of the enactment of the jurisdiction of the Public Service Arbitrator and the Public Service Appeal Board are set out at length in the appellant's submissions. In relation to the conclusions drawn by the appellant in relation to that history, I do not agree that:

(a) the jurisdiction of the Public Service Arbitrator can be characterised as a more specific power than the jurisdiction of the Public Service Appeal Board;

(b) because of amendments made to the Act in 1987 and 2002 that s 80E can be considered a 'later enactment'; and

(c) s 80I(1)(a) is a redundant provision.

107 It is often contestable as which enactment is the special and which is the general: *Bank Officials' Association (SA Branch)* (297) (Higgins J). The jurisdiction of the Public Service Arbitrator by operation of s 80E(1) is substantially the same as the

general jurisdiction of the Commission in respect of 'industrial matters'. Whilst the jurisdiction of the Public Service Arbitrator can only be considered a special power when compared to general jurisdiction of the Commission, in respect of an industrial matter, when regard is had to the scheme of the Act, the jurisdiction of the Public Service Arbitrator is special only when compared to the general jurisdiction. It is special in that it only applies to government officers.

108 The definition of 'industrial matter' in s 7 and extended in s 80E(2) covers a very wide variety of matters which are matters of an industrial nature: *Hotcopper Australia Ltd v Saab* (2002) 117 IR 256. On the other hand the jurisdiction of the Public Service Appeal Board is solely confined to special matters in s 80I of the Act. When the jurisdiction of the Public Service Appeal Board under s 80I is compared to the jurisdiction of the Public Service Arbitrator under s 80E it is clear that the power in s 80E can be said to be a general power and the power under s 80I a specific power. The Public Service Appeal Board has no general jurisdiction to deal with any matters other than appeals against specified decisions by an employing authority. Unlike s 80E, the jurisdiction of the Public Service Appeal Board conferred by s 80I can not be invoked to review any decision of an industrial nature of an employing authority. Section 80I(1)(a) is even more specific as it only applies to 'public service officers' and not to other categories of 'government officers' In addition, the Public Service Appeal Board only has power to hear and determine an appeal, and to adjust all matters referred to in s 80I(1)(a) to (e). In contrast the Public Service Arbitrator has broad power to conciliate and arbitrate, including the power to make interim orders under s 32 and s 44 of the Act.

109 There is a strong presumption that the legislature does not intend to contradict itself but intends both provisions to operate within their given sphere: *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 (276) (Fullagar J); *Saraswati v R* (1991) 172 CLR 1 (17) (Gaudron J) and *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 (437)-(438) per Gummow, Hayne and Heydon JJ.

110 The amendments to s 44 of the Act in 1987 to extend the definition of 'industrial matter' and the amendments in 2002 can not have the effect at law of characterising s 80E as a later enactment, as s 80E was not amended by the enactment of these provisions. In any event even if s 80E could be regarded as a later enactment the maxim of generalia specialibus non derogant may still apply as both provisions are in the same enactment.

111 I also do not agree that s 80I(1)(a) is a redundant provision. It is important to note that both the Public Service Appeal Board and the Public Service Arbitrator were established as constituent authorities under the Act at the same time by the *Acts Amendment and Repeal (Industrial Relations Act (No 2) – No 94 of 1984* by the enactment of Part IIA Constituent Authorities of the Act. Section 80I(1)(a) was amended by the *Acts Amendment (Public Sector Management) Act 1994*. The only change to s 80I(1)(a) was to change the reference to the *Public Service Act 1978* to the PSM Act. With respect it does not follow that because the conditions of service in the *Public Service Act 1904* were not replicated in the PSM Act that s 80I(1)(a) was redundant or retained on the basis of extreme caution. By the time s 80I(1)(a) was enacted in 1984, the majority of the conditions of service the appellant relies upon were not to be found in the *Public Service Act 1978*. The PSM Act is not an Act of Parliament that amended the *Public Service Act 1904*. It repealed that Act in its entirety and brought about a substantially new scheme of management of public sector employment, including management of public service officers. One of the most notable changes was that the position of Public Service Commissioner was abolished and public service officers who had been appointed by the Public Service Commissioner were deemed to be appointed and holding office under the PSM Act: Schedule 5 of the PSM Act. The effect of this legislative change is that public service officers were deemed to be employed by an 'employing authority' within the meaning of s 5 of the PSM Act. In addition a substantial part of the PSM Act only applies to public service officers. These are the provisions that form part of Part 3 of the Act in s 34 to s 67. The Public Service Appeal Board and the Public Service Arbitrator have no jurisdiction to deal with a decision of an employing authority in relation to a Chief Executive Officer. However, there are many conditions of service in Part 3 and Part 5 of the PSM Act that could be the subject of a decision in relation to the interpretation concerning conditions of service. For example, a decision made by an employing authority under s 43 to appoint a person to a SES post. If there is a debate about the meaning of a SES post in s 43 of the PSM Act, s 80I(1)(a) may be enlivened. A question of relevance in these proceedings is whether in those circumstances would the jurisdiction of the Public Service Arbitrator be ousted. Whether it would occur would, in my view, depend upon the facts of the particular matter.

112 When the scheme of the Act, in particular the establishment of the constituent authorities in the Act is examined it is apparent that the Public Service Appeal Board was established and continues to be constituted to deal with decisions of employing authorities that deal with specific matters that involve a single individual, that is a public service officer where an appeal is instituted under s 80I(1)(a) or a government officer under s 80I(1)(a) to (e) or perhaps a number of public service officers or government officers in respect of a decision of an employing authority through the operation of s 10 of the *Interpretation Act 1984* which requires words in the singular to also include the plural. This is also reflected in s 80J as the appellant as an organisation registered under the Act to represent the interests of a large number of public service officers and government officers is unable to institute an appeal on its own behalf. It can only act as an agent in an appeal. Further s 80I(1) only applies when a relevant decision is made by an employing authority. Section 80E is not so confined and the power under s 80E can be invoked in many matters where the jurisdiction in s 80I(1) is not raised. For example, if there is a dispute about whether SES posts should be created in an organisation pursuant to s 43 of the PSM Act, the Public Service Arbitrator would have jurisdiction to deal with the matter as the circumstances of the dispute would give rise to an 'industrial matter'. However, no appeal could be instituted to the Public Service Appeal Board if no decision had been made by an employing authority or alternatively on the facts there was no dispute about the interpretation of s 43 or any other provision of the PSM Act or regulations made under the PSM Act so as to enliven the jurisdiction of the Public Service Appeal Board under s 80I(1)(a) of the Act.

113 Having considered the establishment of the constituent authorities of the Public Service Appeal Board and the Public Service Arbitrator under the Act, I agree the maxim of generalia specialibus non derogant does not apply as it can not be said that the provisions of s 80E impliedly repeals s 80I. Nor is there an irreconcilable conflict between the two provisions. In my view the two provisions can stand together. However it does not follow from this finding that the Public Service Arbitrator has jurisdiction to deal with matters in dispute between the parties in this matter.

114 I do not agree that it was intended that the two jurisdictions operate cumulatively. To find otherwise would have the effect that where the pre-conditions are raised for the filing of an appeal to the Public Service Appeal Board by an individual public service officer or other government officer, the same facts and issues could be raised in an application to the Public Service Arbitrator. Such a result could leave the Public Service Appeal Board little if any work to do under the provisions of the Act. Alternatively, applications raising the same matters could be brought in two forums as it would be possible for the appellant as an organisation to bring an application under s 80E(1) in relation to the same issue in respect of a particular public service officer or government officer that is the subject of an appeal by the public service officer or other government officer under s 80I(1) of the Act acting on his or her own behalf. This could lead to conflicting decisions being made in respect of the same decision of an employing authority. Such a result was in my view not intended as it is clear from the express terms of s 80I when considered together with the jurisdiction of the Public Service Arbitrator that the scheme of the Act in establishing two Constituent Authorities is such that a small number of matters which deal with specific decisions by employing authorities be reviewed only by the Public Service Appeal Board by way of an appeal and not by conciliation and arbitration by a Public Service Arbitrator.

115 In this matter as the jurisdiction of the Public Service Appeal Board is capable of being enlivened by the subject matter of the application before the Public Service Arbitrator, the jurisdiction of the Public Service Arbitrator is excluded.

116 For these reasons I would make an order that the appeal be dismissed.

KENNER C:

117 This is an appeal under s 49 of the Industrial Relations Act 1979 ("the Act") from a decision of a Public Service Arbitrator ("the Arbitrator") of 17 December 2009. The background to the matter is as follows.

The Background

118 The proceedings at first instance before the Arbitrator concerned a dispute between the applicant and the respondent as to whether disciplinary proceedings commenced by the respondent under s 81 of the Public Sector Management Act 1994 ("the PSM Act") could continue after the employee concerned, Mr van der Zanden, ceased to be an employee. The relevant factual issues at first instance were set out in a Statement of Agreed Facts appearing at par 2 of the Arbitrator's reason for decision as follows:

> "1. The Applicant is the Civil Service Association of Western Australia Incorporated ("the CSA").
>
> 2. The CSA is a registered organisation of employees authorised to represent Mr Luke van der Zanden.
>
> 3. The Respondent is the Director General, Department for Child Protection.
>
> 4. Mr van der Zanden was employed with the Respondent pursuant to Section 64(1)(b) of the *Public Sector Management Act* 1994 ("the Act") as a Residential Care Officer.
>
> 5. The Respondent presented Mr van der Zanden with a suspected breach of discipline letter dated 20 April 2009 identifying three suspected breaches of discipline.
>
> 6. Mr van der Zanden responded to the three allegations in writing and provided his response to the Respondent on 8 May 2009.
>
> 7. Mr van der Zanden's fixed term contract of employment expired as at 4 June 2009. As of the expiration of Mr van der Zanden's fixed term contract Mr van der Zanden was no longer an employee of the Respondent.
>
> 8. On 11 June 2009 the Respondent sent Mr van der Zanden a letter notifying him that an investigation into the suspected breaches of discipline would be commenced pursuant to section 81(2) of the (sic) Act.
>
> 9. On 11 September 2009 the Applicant sent the Respondent a letter stating that as Mr van der Zanden was no longer an employee of the Respondent the Respondent had no ability to continue its investigation.
>
> 10. On 17 September 2009 the Respondent wrote to the Applicant and advised that the Respondent believed that it did have the ability to continue its investigation.
>
> 11. On 23 September 2009 the Applicant wrote to the Respondent requesting the disciplinary investigation be stayed until such time as the matter could be determined by the Public Service Arbitrator.
>
> 12. The Respondent acceded to this request.
>
> 13. The Applicant contends that the Respondent does not have the power under the Act to continue the breach of discipline process against Mr van der Zanden.
>
> 14. The Respondent contends that it does have the power under the Act to continue the breach of discipline process against Mr van der Zanden."

119 In the proceedings at first instance, the respondent challenged the jurisdiction of the Arbitrator to hear the matter, on the ground that the claim was properly within the jurisdiction of the Public Service Appeal Board ("the Appeal Board") under s 80I(1)(a) of the Act. It was contended that relying upon a decision of the Full Bench of the Commission in *Ronald Thomas Bellamy v Chairman, Public Service Board* (1986) 66 WAIG 1579, the specific jurisdiction of the Appeal Board overrode the general jurisdiction of the Arbitrator as to the subject matter of the dispute, applying the *generalia specialibus* principle of statutory interpretation.

120 The Arbitrator upheld the respondent's submissions in relation to jurisdiction, and dismissed application at first instance. The Arbitrator concluded at par 39 of her reasons for decision that the jurisdiction of the Arbitrator was broad and whilst including the subject matter of the dispute before her, the narrow and specific nature of the Appeal Board's jurisdiction meant that the latter jurisdiction prevailed.

Grounds of Appeal

121 The two grounds of appeal essentially go to the same issue, that being the jurisdiction of the Appeal Board under s 80I(1)(a) to entertain the applicant's claim at first instance. It was contended that the Appeal Board's jurisdiction did not extend to a public service officer who ceased to be an employee and the relevant "conditions of service" referred to in s 80I(1)(a) of the Act do not include disciplinary matters under the PSM Act. The grounds of appeal allege that the *generalia specialibus* principle of interpretation did not apply as the dispute at first instance did not fall within the Appeal Board's jurisdiction. It was contended that the dispute fell fairly and squarely within the jurisdiction of the Arbitrator when read with the definition of "industrial matter" under s 7 of the Act.

Public Interest

122 It was also asserted in the notice of appeal, that the appeal lay to the Full Bench because the matter was of importance in the public interest for the purposes of s 49(2a) of the Act. However, it is clear that the order issued by the Arbitrator on 17 December 2009 finally determined the matter at first instance and thus was not an "finding" in respect of which s 49(2a) of the Act applies. It is not therefore necessary to deal with this matter.

The Issues

123 The questions to be addressed on this appeal appear to be as follows:

(a) whether the application at first instance was properly within the jurisdiction of the Appeal Board under s 80I (1)(a) of the Act;

(b) if so, whether the subject matter of the application was also within the jurisdiction of the Arbitrator under s 80E (1) of the Act; and

(c) if the answer to both (a) and (b) is yes, whether by the operation of the principle dealt with by the Full Bench in *Bellamy*, the jurisdiction of the Arbitrator was, as to that subject matter, ousted.

Scope of s 80I(1)(a) Act

124 Part IIA of the Act establishes the constituent authorities of the Commission which includes the Arbitrator, the Appeal Board and the Railways Classification Board. The jurisdiction of the Arbitrator and the Appeal Board is set out in Division 2. The Appeal Board is constituted under s 80H of the Act. The Appeal Board's jurisdiction, in terms of the nature of the appeals that may be made to it, are set out in s 80I (1) which relevantly provides as follows:

> **"80I. Appeals**
>
> (1) Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
>
> (b) an appeal by a government officer, who is the holder of an office included in the Special Division of the Public Service for the purposes of section 6(1) of the *Salaries and Allowances Act 1975*, under section 78 of the *Public Sector Management Act 1994* against a decision referred to in subsection (1)(b) of that section;
>
> (c) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary not lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed;
>
> (d) an appeal by a government officer, other than a person referred to in paragraph (b), under section 78 of the *Public Sector Management Act 1994* against a decision referred to in subsection (1) (b) of that section;
>
> (e) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d) and (e)."

125 Appeals may be instituted to the Appeal Board either by the relevant officer or by an organisation on his or her behalf under s 80(J) of the Act. Whilst similar to the jurisdiction of the Arbitrator, certain parts of Part II Division 2 of the Act as they apply to the Commission apply to the exercise of the jurisdiction of the Appeal Board, but not all such powers. For example, unlike the Arbitrator, the Appeal Board has no conciliation powers.

126 An appeal under s 80(I)(1)(a) is open to any "public service officer". By s 7 of the Act, a "public service officer" means a person so described within the meaning of PSM Act. By s 3 of the PSM Act, a "public service officer" "means executive officer, permanent officer or term officer employed in the Public Service under Part 3". It was common ground that Mr van der Zanden was appointed under s 64(1) of the PSM Act and was therefore a public service officer during his employment. Whether the jurisdiction of the Appeal Board can be invoked after the service of a public service officer ceases is a matter I consider later in these reasons.

127 It was also not in issue at first instance that the respondent was an "employing authority" for the purposes of s 5 of the PSM Act.

128 I accept, without necessarily deciding the matter, for present purposes, that the subject matter of the dispute at first instance, that being the respondent's continuation of disciplinary proceedings against Mr van den Zanden was a "decision" for the purposes of s 80I (1)(a) of the Act. That is, the respondent's continuation of the disciplinary process against Mr van der Zanden over the objection of the applicant, involved a conclusion or determination by the respondent to continue to proceed with the relevant investigation.

Conditions of Service

129 A central issue arising on the appeal is whether the disciplinary process as set out in the PSM Act, can be regarded as "conditions of service" for the purposes of s 80I(1)(a) of the Act.

130 The appellant in detailed submissions contended that the subject matter of discipline against public service officers, could not, on a proper construction of the legislation, be so described. The appellant set out the history of the PSM Act and its predecessors, and submitted that under predecessor legislation to the PSM Act, conditions of service such as leave entitlements, deductions from salary, retirement arrangements, and other matters, were, but are no longer, contained in legislation but rather, in various industrial instruments applicable to government officers generally.

131 The submission seemed to be therefore, that as such conditions of service are no longer prescribed in the PSM Act, then s 80I(1)(a) of the Act, has little or no work to do under the current legislation.

132 Whilst the respondent did not take issue with the submissions of the appellant in relation to the history of the PSM Act, it questioned the relevance of this statutory history to the contentions advanced on the appeal.

133 The Minister, who was invited to and is thereby taken to have been granted leave to intervene under s 30(1) of the Act, submitted that the disciplinary provisions contained in Part 5 of the PSM Act, can reasonably and properly be considered as part of a government officer's conditions of service, along with other conditions of service contained within the relevant industrial instruments and the officer's contract of employment.

134 An allied submission in relation to this issue by the appellant was "conditions of service" can only be reasonably construed as applying to a serving public service officer, as no conditions of service can have application after termination of employment. It was therefore contended that Mr van der Zanden could not bring an appeal before the Appeal Board once his employment with the respondent had ceased.

135 For the following reasons, I do not accept the appellant's submissions in relation to these issues.

136 In my view, there is no reason, on its ordinary and natural meaning, to give the phrase "conditions of service" a restricted meaning. In *Australian Tramway Employees Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680 Isaacs and Rich JJ said at 693:

> "the terms of employment are the stipulations agreed to or otherwise existing on both sides upon which the service is performed. The "conditions" of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment."

137 The width of expressions such as "terms and conditions of service", "conditions of service" and the like, have been repeatedly recognised: *The Queen v Booth; Ex Parte Administrative and Clerical Officers Association* (1978) 141 CLR 257; *The Queen v Findlay; Ex Parte Commonwealth Steamship Owners Association* (1953) 90 CLR 621; *Westwood v Lightly and Ors* (1984) 7 IR 104.

138 Accordingly, taking the phrase in its context, which I do not consider should be limited by the reference to "salaries and allowances" in s 80I(1)(a) of the Act, I see no basis to construe the phrase "conditions of service" in a limited fashion. A disciplinary process, to which an employee is subject in the workplace, is plainly a "circumstance affecting the employment" or part of the "environment" of the employment of public service officers under the PSM Act.

139 I now consider the submission that the reference to "conditions of service" cannot have application to an appellant who was formerly, but is no longer, a public service officer.

140 Whilst each of the types of appeals to the Appeal Board set out in s 80I(1) of the Act, must be considered to be separate heads of jurisdiction of the Appeal Board, it is plain by s 80I(1)(c) and (e), that former government officers who have been dismissed, are able to appeal against such decisions. Hence, the Appeal Board's jurisdiction extends to those persons whose employment as a government officer has ceased.

141 Whilst it may be, as the appellant's submissions infer, that in the current legislation, s 80I(1) (a) of the Act has little work to do, there are other parts of the legislation, other than those presently under consideration, where it may operate. For example, without expressing a concluded view on the matter, Part 6 of the PSM Act deals with redeployment and redundancy of employees. By s 94 of the PSM Act, the Governor may make regulations under s 108 prescribing arrangements for redeployment, retraining and redundancy for employees who are surplus to the requirements of any department or organisation and other circumstances.

142 It is quite conceivable that a public service officer who is aggrieved by a decision of an employing authority in relation to the operation of Part 6 and the relevant regulations, as to the circumstances of their redundancy, could, despite the terms of s 95 of the PSM Act, institute an appeal under s 80I(1)(a). Furthermore, a matter may conceivably arise under the terms of Part 8 Miscellaneous of the PSM Act, concerning a decision by an employing authority as to the interpretation of provisions of this Part in relation to a former employee.

143 I do not therefore think that it would have been the intention of the Parliament to exclude from the jurisdiction of the Appeal Board under s 80I(1)(a), such former employees. There may well be proper and legitimate issues concerning decisions in relation to the interpretation of the PSM Act and regulations, which such employees may wish to contest before the Appeal Board. In my view, to read the jurisdiction of the Appeal Board down to confine it only to serving public service officers would be inconsistent with the construction of the section within the context of the PSM Act as a whole.

144 On the basis of the foregoing analysis, I therefore accept that the decision of the respondent, in applying the terms of s 81 of the PSM Act, that the disciplinary process commenced against Mr van der Zanden, continue after the cessation of his employment, was amenable to an appeal by him against that decision under s 80I(1)(a) of the Act and was therefore within the jurisdiction of the Appeal Board.

Jurisdiction of the Arbitrator

145 It seemed to have been accepted at first instance that the appellant's application concerning Mr van der Zanden was within the jurisdiction of the Arbitrator. At pars 15-21 of her reasons for decision, the Arbitrator set out the relevant provisions of the Act in relation to the Arbitrator's jurisdiction and concluded at par 22 that "Therefore the Arbitrator has very wide powers to deal with the industrial matter for the purpose of its resolution. In any event, it is the respondent's contention that the Arbitrator would have jurisdiction but for it being ousted because the jurisdiction of the Board is more particular in this matter."

146 The Arbitrator then went on to consider the jurisdiction of the Appeal Board, and found that it, being more particular, overrode the Arbitrator's general jurisdiction in relation to the matter before her.

147 There does not appear to have been any detailed determination by the Arbitrator as to whether the application at first instance was within her jurisdiction, rather the focus from the reasons for decision, appears to have been on the nature of the Appeal Board's jurisdiction to entertain the appellant's claim.

148 Notwithstanding this, for the following reasons, briefly expressed, in my opinion the application at first instance fell within the jurisdiction of the Arbitrator.

149 As set out in the reasons for decision at first instance, the jurisdiction of the Arbitrator is prescribed under s 80E of the Act, which gives the Arbitrator "exclusive jurisdiction to inquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally." Thus it is plain that the jurisdiction of the Arbitrator is dependant upon the matter before it being an "industrial matter" as defined in s 7 of the Act.

150 There were a number of submissions made by the parties on the appeal in relation to this issue. In short, the appellant contended that the subject matter of the proceedings at first instance dealing with the discipline of Mr van der Zanden continuing after the termination of his employment, fell within the definition of "industrial matter" as "including conditions which are to take effect after the termination of employment;" This does not appear to have been challenged by the respondent in any substantive way.

151 The Minister on the other hand, contended that the subject matter of the dispute at first instance, properly characterised, did not concern conditions taking effect after the termination of employment, but rather, conditions which took affect whilst Mr van der Zanden was an employee employed as a public service officer. As Mr van der Zanden's employment had come to an end, at the time of the institution of the proceedings at first instance, there could no longer be an industrial matter in respect of which the Arbitrator could exercise jurisdiction. It was also submitted on behalf of the Minister that s 7(1a) of the Act, which extends the definition of industrial matter to include matters relating to the dismissal of an employee or a refusal or failure to allow an employee a benefit under a contract of employment, has no application to the present circumstances.

152 It was thus contended by the Minister, that the only jurisdiction available was that of the Appeal Board.

153 The meaning of "industrial matter" for the purposes of s 7 is very broad and should not be artificially read down or restrained. In par (i) of the definition of "industrial matter", by amendments to the Act made in 2002, the definition was extended to provide "and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute…"

154 It is not necessary that there be an employment relationship on foot, as a necessary element of an "industrial matter" within the extended definition. As long as the subject matter of the particular dispute has some industrial character, it can be properly described as having an "industrial nature": *The Director General of the Department of Justice v The Civil Service Association of Western Australia (Inc.)* (2004) 85 WAIG 629.

155 In my view, it is plain that a dispute about the application of disciplinary provisions to an existing and former employee of an employer is a matter that has an industrial character so as to bring it within the extended definition. Disciplinary provisions operate normally, on existing employment relationships and there have been many disputes before the Commission concerning such matters. Such matters do not loose their industrial character or flavour, simply because the particular dispute in issue concerns the application of disciplinary provisions after the employment relationship has come to an end.

156 In any event, it is reasonably clear, on authority in this jurisdiction, that a matter may remain an industrial matter, within the terms of the general definition in s 7 of the Act, after employment has come to an end: *Totalisator Agency Board v Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch* (1980) 60 WAIG 624.

Is the Jurisdiction of the Arbitrator Ousted?

157 The issue that then arises is whether, if the dispute at first instance falls within the jurisdiction of both the Arbitrator and the Appeal Board, the principles discussed and applied in *Bellamy* have application. *Bellamy*, the Full Bench held that the general jurisdiction of the Commission to enquire into and deal with an industrial matter under s 23 of the Act, concerning the dismissal of a government officer, was ousted by the specific jurisdiction of the Appeal Board to entertain appeals against the dismissal of government officers, applying the *generalia specialibus* principle.

158 For the purposes of the application of that principle, "repugnancy" does not necessarily involve a direct conflict between the relevant statutory provisions. As was said by Deane J in *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live Stock Corporation and Others* (1980) 29 ALR 333 at 347:

> "Repugnancy can be present in cases where there is no direct contradictions between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter."

159 There was a submission by the appellant that *Bellamy* is no longer good law as a consequence of amendments to the Act in 1987. These amendments included the insertion of s 44(6)(ba) and (bb) into the Act in relation to the Commission's conciliation powers. Having considered these matters, I do not regard them as relevant to the continuation of the authority of *Bellamy*.

160 In this case, the principles dealt with *Bellamy* have, in my view, equal application to the exercise of the jurisdiction of the Arbitrator and the Appeal Board, as to the exercise of jurisdiction by the Arbitrator and that of the Commission under s 23 of the Act, which was specifically considered in *Bellamy*.

161 I dealt with this issue in a somewhat different context, in *The Civil Service Association of Western Australia Incorporated v Chief Executive Officer Disability Services Commission* (2005) 85 WAIG 3082. In that case the issue was whether the Arbitrator had jurisdiction to make an interim reinstatement order, pending the hearing and determination of an appeal from such a dismissal to the Appeal Board. I concluded that the jurisdiction of the Arbitrator was excluded and I said as follows at pars 14-19 :

> "Therefore, the legislature in this State, has prescribed a specific jurisdiction under the Act for government officers, and within that jurisdiction, has also distinguished between appeals under s 80I to the Appeal Board, and the general jurisdiction of an Arbitrator under s 80E of the Act. The Arbitrator's "exclusive jurisdiction", must in my opinion, be read under the Act, as subject to the jurisdiction and powers of the Appeal Board in s 80I, otherwise the whole of the Appeal Board's jurisdiction and powers would be otiose.
>
> In Pearce and Geddes, the learned authors, in relation to the *generalia specialibus non derogant* principle observed as follows:
>
> > *"[4.30] The principle that provisions of general application give way to specific provision when in conflict is discussed fully in [7.18]-[7.21] relating to repealing Acts. But the approach is also applicable to the resolution of internal conflicts between sections within an Act: Perpetual Executors and Trustees Assoc of Australia Ltd v FCT (1948) 77 CLR 1 at 29. An Act may well contain provisions of a general nature and also provision relating to a particular subject matter. It is commonsense that the drafter will have intended the general provisions to give way should they be applicable to the same subject matter as is dealt with specifically: Refrigerated Express Lines (A' Asia) Pty Ltd v. Australian Meat and Live-stock Corp (1980) 29 ALR 333 at 347. A particular example of the approach in question was demonstrated in Commercial Radio Coffs Harbour Ltd v Fuller (1986) 66 ALR 217. Gibbs CJ and Brennan J at 219 ruled that a general provision making non-compliance with a provision of the Act an offence had to be read down if another law prohibited the activity that the Act required. See also Smith v R (1994) 125 ALR 385 at 391."*
>
> In dealing with the application of the principle within a particular Act, the learned authors further said at par 4.30:
>
> > "*The generalia specialibus rule should, it is suggested, be observed more strictly in the interpretation of provisions in a particular Act that in the case of the separate enactments. In the latter circumstance, it may well be that the drafter did not consider the effect of the competing Acts. When a single document is being considered, however, the drafter will be more likely to have relied on the rule. White v Mason [1958] VR 79 affords a good example of this. 'Licensed premises' were expressly excluded from the operation of a part of the Health Act 1956 that required the registration of premises selling food. Without such exclusion the part would normally have been taken to have applied to those premises. The Act also contained general catch-all provisions. Herring CJ considered that the express exclusion of licensed premises from the part of the Act that would otherwise specifically have applied to them indicated an intention that they should also be excluded from the general provisions of the Act."*
>
> It was this principle of statutory interpretation that the Full Bench relied upon in *Bellamy*.
>
> It is clear from the plain language of the relevant provisions of the Act, that the Appeal Board's jurisdiction is relatively narrow and specific to deal with appeals brought in respect of the matters set out in s 80I(1)(a) to (e) and it has the power is to "adjust all such matters". By contrast, the jurisdiction and powers of an Arbitrator under s 80E of the Act, are general and broad, and in my view, the remedies available under both s 80E(5) and under s 80I(1) are different. There may be some scope for conflict if there was to be concurrent jurisdiction.
>
> In my opinion, taking the legislation as a whole, applying the principle of interpretation referred to above, the draftsperson of Division 2 of Part IIA of the Act, did not intend there to be concurrent jurisdiction exercised by both the Arbitrator and the Appeal Board in relation to remedies for the dismissal of government officers. Government officers who are dismissed in the circumstances set out in s 80I(1) only have available to them the jurisdiction of the Appeal Board in respect of an appeal commenced under s 80I of the Act."

162 Having considered the submissions of the parties on the present appeal, there has been no basis put to cause me to depart from the views I expressed in *Disability Services Commission.* The principles applied in that case have equal application to the present circumstances in my opinion. Part IIA Division 2 of the Act makes special provision in s 80I for appeals against certain decisions of employing authorities under the PSM Act. One of those types of decisions is that which is the subject of

this appeal and s 80I(1)(a) provides for such appeals in specific terms. Those specific terms are an indication that the Parliament intended that the Appeal Board's jurisdiction be invoked in such cases, and not the general jurisdiction of the Arbitrator under s 80E(1) of the Act.

163 By s 80I(1) of the Act, the Appeal Board has the power to "adjust" all such matters as are referred to it in pars (a), (b), (c), (d) and (e). The power of the Appeal Board to "adjust" a decision is referable to the particular jurisdiction to the Appeal Board that is invoked. "Adjust" in context, includes the power to reform the particular decision under appeal in some way: *Johnson v State Government Insurance Commission* (1997) 77 WAIG 2619 per Anderson J. An obvious means of reforming the decision taken by the respondent at first instance would be to reverse it, to discontinue the disciplinary investigation into Mr van der Zanden. The scope of powers of the Appeal Board are not limited to a declaration following the interpretation of the relevant provisions of the PSM Act or regulations, as is the case under s 46 of the Act, involving the Commission's powers to interpret awards and industrial agreements.

Conclusion

164 For the foregoing reasons, in my view, the Appeal Board's jurisdiction ousted the jurisdiction of the Arbitrator in the circumstances of this case. I would therefore dismiss the appeal.

MAYMAN C:

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

2010 WAIRC 00207

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-and-
	DIRECTOR-GENERAL, DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
	-and-
	MINISTER FOR COMMERCE
	INTERVENER
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 15 APRIL 2010
FILE NO/S	FBA 1 OF 2010
CITATION NO.	2010 WAIRC 00207

Result	Order issued
Appearances	
Appellant	Ms S Bhar and with her Ms C Reid
Respondent	Mr E Rea and with him Ms M Ross
Intervener	Mr R Andretich (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 11 February 2010, and having heard Ms Bhar on behalf of the appellant, Mr Rea on behalf of the respondent and Mr Andretich (of counsel) on behalf of the intervener, and reasons for decision having been delivered on 15 April 2010, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Unions—Declarations made under Section 71—

2010 WAIRC 00115

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2010 WAIRC 00115
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER J L HARRISON
HEARD	**:**	MONDAY, 8 MARCH 2010
DELIVERED	**:**	TUESDAY, 16 MARCH 2010
FILE NO.	**:**	FBM 1 OF 2010
BETWEEN	**:**	THE BREWERIES & BOTTLEYARDS EMPLOYEES' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	**:**	*Industrial Law (WA) – Application pursuant to s 71 for a declaration relating to qualifications of persons for membership of a State Branch of a Federal organisation and offices which exist with the Branch – Application granted*.
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 71, s 71(1), s 71(2), s 71(3), s 71(4);
		Fair Work (Registered Organisations) Act 2009 (Cth) s 26(1).
Result	**:**	Declaration issued
Representation:		
Counsel:		
Applicant	**:**	Mr D H Schapper
Solicitors:		
Applicant	**:**	Derek Schapper – Barrister & Solicitors

Reasons for Decision

THE FULL BENCH:

1 This is an application made under s 71(2) of the *Industrial Relations Act 1979* (WA) (the Act) for a declaration that pursuant to s 71(2) of the Act the rules of the counterpart Federal body prescribing the offices which exist in the Branch are deemed to be the same as the rules prescribing the offices which exist in the State organisation in accordance with s 71(1) and s 71(4) of the Act.

2 Obtaining a declaration is the first step towards the applicant being able to obtain a s 71 certificate to enable the offices that exist in its rules to be held by persons holding corresponding offices in its counterpart Federal body. A certificate will also enable it to make an agreement with its Federal organisation relating to the management and control of funds.

3 The application was unopposed by any of the organisation's members. At the conclusion of the hearing on 8 March 2010, the Full Bench informed counsel for the applicant that the grounds of the application had been made out and that a declaration would be made. On 8 March 2010, a declaration was made in the following terms:

(a) The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia is the counterpart Federal body of The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia;

(b) The rules of the applicant and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same, in accordance with s 71(2) of the Act;

(c) The rules of the counterpart Federal body prescribing the offices which exist in the Branch are deemed to be the same as the rules of the applicant prescribing the offices which exist in the applicant, in accordance with s 71(4) of the Act.

4 The reasons for making the declaration are as follows.

5 The counterpart Federal body of the applicant is The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia. The counterpart Federal body was registered as an association of employees under s 26(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) on 1 February 2010. The counterpart Federal body's rules are essentially identical to the rules of the applicant. The counterpart Federal body only covers members who reside in the State of Western Australia.

6 Pursuant to s 71(1) of the Act a counterpart Federal body, in relation to a State organisation, means a Western Australian Branch of an organisation of employees registered under the Commonwealth Act the rules of which:

(a) relating to the qualifications of persons for membership; and

(b) prescribing the offices which shall exist within the Branch,

are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter;

7 By operation of s 71(2) of the Act the rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same. Further s 71(3) provides:

The Full Bench may form the opinion that the rules referred to in subsection (2) are substantially the same notwithstanding that a person who is —

(a) eligible to be a member of the State organisation is, by reason of his being a member of a particular class of persons, ineligible to be a member of that State organisation's counterpart Federal body; or

(b) eligible to be a member of the counterpart Federal body is, for the reason referred to in paragraph (a), ineligible to be a member of the State organisation.

8 When determining whether the offices that exist in the Branch are the same as the offices of the applicant, it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules: *Jones v Civil Service Association Inc* (2003) 84 WAIG 4 (Pullin J) [35].

9 The eligibility for membership rule in the counterpart Federal body is contained in r 3 – Constitution. It is identical to the eligibility for membership rule in r 3 – Constitution of the rules of the applicant. In addition, the offices that are prescribed to exist in r 10, r 11, r 12, r 13, r 14 and r 15 of the rules of the counterpart Federal body are identical to the offices that are prescribed to exist in r 10, r 11, r 12, r 13, r 14 and r 15 of the rules of the applicant. In light of these rules, we formed the view that a declaration should be granted. Whilst the rules are identical we formed the opinion that s 71(1) of the Act does not enable a declaration to be made that the rules in relation to membership and the prescription of offices are identical but simply that they are deemed to be the same.

2010 WAIRC 00107

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE BREWERIES & BOTTLEYARDS EMPLOYEES' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DATE	MONDAY, 8 MARCH 2010
FILE NO/S	FBM 1 OF 2010
CITATION NO.	2010 WAIRC 00107

Result	Declaration issued
Appearances	
Applicant	Mr D H Schapper (of counsel)

Declaration

This matter having come on for hearing before the Full Bench on Monday, 8 March 2010, and having heard Mr D H Schapper, of counsel, on behalf of the applicant, the Full Bench pursuant to its powers in s 71 of the *Industrial Relations Act 1979* (the Act), hereby declares that —

(a) The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia is the counterpart Federal body of The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia;

(b) The rules of the applicant and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same, in accordance with s 71(2) of the Act;

(c) The rules of the counterpart Federal body prescribing the offices which exist in the Branch are deemed to be the same as the rules of the applicant prescribing the offices which exist in the applicant, in accordance with s 71(4) of the Act.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Procedural Directions and Orders—

2010 WAIRC 00177

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN PRINCIPALS' FEDERATION

APPLICANT

-and-

STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA (INC)

JENNIFER BROZ

EDMUND FREDRICK

TREVOR VAUGHAN

OBJECTORS

CORAM FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

ACTING SENIOR COMMISSIONER P E SCOTT

COMMISSIONER S M MAYMAN

DATE THURSDAY, 1 APRIL 2010

FILE NO/S FBM 7 OF 2009

CITATION NO. 2010 WAIRC 00177

Result Order issued

Order

HAVING heard Mr Kemp (of counsel) on behalf of the applicant and Mr Millman (of counsel) on behalf of the objector State School Teachers' Union of Western Australia (Inc), and by consent, it is ordered that:—

1. Order 5 made by the Full Bench on 29 January 2010 be extended to 14 April 2010.
2. The matter be listed for further directions in the week commencing 19 April 2010.
3. The Directions Hearing listed for Thursday, 1 April 2010 be otherwise vacated.
4. There be liberty to apply.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2010 WAIRC 00176

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2010 WAIRC 00176
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	WEDNESDAY, 3 FEBRUARY 2010, THURSDAY, 4 FEBRUARY 2010
DELIVERED	**:**	THURSDAY, 1 APRIL 2010
FILE NO.	**:**	PRES 9 OF 2009
BETWEEN	**:**	ANTHONY D MULLEN, CHRISTOPHER C SHARPE
		Applicants
		AND
		ANNE GISBORNE, PRESIDENT OF THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA (INC)
		Respondent
		AND
		THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
		Intervener

CatchWords	**:**	Industrial Law (WA) – Application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) – Construction of the rules of an organisation – Nature of jurisdiction and powers of President under s 66 – Interpretation of rules of the Union – Whether an elected delegate to State Council who is an employee is required to resign employment from the Union – Declaration made that the true interpretation of r 25(f) is the term 'office' includes the office of delegate to State Council.
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 6(ab), s 6(f), s 7, s 7(1), s 26, s 27, s 27(1)(l), s 27(1)(v), s 62, s 62(2), s 66
Result	**:**	Declaration made
Representation:		
Counsel:		
Applicants	**:**	In person
Respondent	**:**	Ms N McGuiness (as agent)
Intervener	**:**	Mr R C Kenzie QC and Mr S Millman (of Counsel)

Reasons for Decision

Background

1 This is an application by Mr Anthony D Mullen and Mr Christopher C Sharpe. The applicants seek orders pursuant to s 66 of the *Industrial Relations Act 1979* (WA) (the Act) in relation to a dispute that arose in 2007 in relation to the interpretation of r 25(f) of the rules of The State School Teachers' Union of WA (Incorporated) (the Union).

2 This matter raises an interpretation of r 25(f) of the rules of the Union. In particular whether the terms of the sub-rule applies to the position of delegate to State Council or only to the 'offices' specifically referred to in r 25, that is whether the prohibition contained in r 25(f) applies only to the office and officers of President, Senior Vice-President, Ordinary members of the Executive, the Aboriginal or Torres Strait Islander representative and the General Secretary. Rule 25 provides:

25 - OFFICERS

(a) (i) Subject to the provision of sub-rules (b) and (c) of this rule, the Executive shall consist of the President of the Union, Senior Vice-President, Vice-President, and such other number of additional members to be known as Ordinary members, as determined from time to time by State Council.

(ii) There shall be a designated position on the Executive for an Aboriginal or Torres Strait Islander representative. This position shall be elected by and from the Aboriginal and Torres Strait Islander members of the Union.

(iii) The term of office of the President, Senior Vice President and Vice President and Executive Members shall be for a period of two years commencing on the first day of January in the year following the election.

(b) Should a member of Executive be an applicant for a position on the staff of the Union, that member of Executive shall not have the right to vote or discussion upon any resolution for the purpose of selecting such employee.

(c) The position of General Secretary shall be filled by an election of all members.

(d) The term of office of the General Secretary shall be for a period of four years.

(e) All full financial members shall be eligible to nominate for the position of General Secretary.

(f) Any employee of the SSTUWA who is elected to an office of the Union shall resign their employment with the Union by no later than the day that that person commences his or her term of office.

(g) Any elected Officer of the SSTUWA who is appointed as an employee of the Union shall cease to hold their position of Office on and from the day that that person commences employment with the Union.

3 The dispute arose in 2007 when the applicants who were at that time both employed by the Union were elected to positions as delegates to State Council. After the applicants attended and participated in one meeting of State Council, the Executive took steps to dismiss them from the positions as delegates to State Council.

4 The parties and the intervener filed a statement of agreed facts which records the following material facts:

1. In January 2007 nominations were called for district delegates to SSTUWA State Council and for various SSTUWA Committees.

2. On 2 March 2007 nominations closed for SSTUWA State Council and various SSTUWA Committees. Vacancies remained for some State Council districts, including the district of Perth.

3. In April 2007 Industrial Staff employee members of the SSTUWA Tony Mullen and Chris Sharpe nominated for two of the remaining vacancies as delegates for the Perth district to the SSTUWA State Council. The SSTUWA Returning Officer declared Tony Mullen and Chris Sharpe to be duly elected as delegates on 1 May 2007. A total of thirteen delegates were elected to represent the Perth district out of an entitlement of fifteen.

4. At this time, Tony Mullen and Chris Sharpe maintained their employment status with the SSTUWA.

5. The tenure of delegates under the Rules of the SSTUWA is twelve months, Customarily State Council meets in June and November of each year.

6. No objections were lodged following the declaration of State Council delegates by the Returning Officer.

7. On 31 July 2007 the SSTUWA President wrote letters to Tony Mullen and Chris Sharpe indicating his intention for SSTUWA Executive to consider dismissing them as State Council delegates and inviting them to respond. The President cited in particular Rule 25(f) as the basis for his intended action.

8. At its next meeting on 14 September 2007 the SSTUWA Executive resolved that Industrial Staff employee members Tony Mullen and Chris Sharpe were ineligible to hold office as district delegates to the SSTUWA State Council and dismissed them as delegates, The Executive directed the SSTUWA President to report this resolution to the next meeting of State Council in November 2007. The minutes record that debate and decisions on this matter were taken in camera, meaning that the employees in question were not able to participate in Executive's deliberations.

9. On 16 November 2007 the SSTUWA President wrote a letter to employee members Tony Mullen and Chris Sharpe advising them that as a result of the Executive decision of 14 September they were no longer State Council delegates and would not be recognized as such at the State Council meeting on 17 and 18 November.

10. On 17 November 2007, as the second item of business, SSTUWA State Council endorsed the SSTUWA Executive's decision dismissing employee members Tony Mullen and Chris Sharpe as delegates. The State Council decision was put into immediate effect and Tony Mullen and Chris Sharpe took no further part in proceedings.

11. Tony Mullen remains an employee of the SSTUWA and Chris Sharpe retired as an employee of the SSTUWA on 31 July 2009.

5 The orders sought by the applicants pursuant to s 66 of the Act are as follows:

1. That the true interpretation of the Rules of the SSTUWA being that Industrial Staff Employee members of the SSTUWA are eligible to be elected as delegates to the SSTUWA State Council, SSTUWA State Council is ordered to rescind the decision of 17 November 2007 (SC 2), namely,

'That the Executive decision be endorsed.'

2. That the true interpretation of the Rules of the SSTUWA being that Industrial Staff Employee members of the SSTUWA are eligible to be elected as delegates to the SSTUWA State Council, SSTUWA Executive is ordered to rescind the decision of 14 September 2007 (E 491), namely,

'That Executive

(a) notes that Chris Sharpe and Tony Mullen did not resign from their employment with the Union before the commencement of their terms of office as district delegates to State Council.

(b) find that under the rules of the Union that failure to so resign renders Chris Sharpe and Tony Mullen ineligible to hold office as district delegates to State Council.

(c) hereby dismisses Chris Sharpe from office as a district delegate to State Council.

(d) hereby dismisses Tony Mullen from office as a district delegate to State Council.

(e) directs the Union President to report this resolution to the next meeting of State Council.'

6 The central issue in this matter is whether the true interpretation of the rules of the Union is that employees of the Union who are members of the Union and elected as delegates to the State Council are able to continue to hold office as delegates of the State Council whilst they continue to be employed by the Union.

7 It is conceded by the respondent and the intervener that pursuant to the rules of the Union the applicants as employees of the Union were eligible to be elected as delegates to State Council but prior to commencing a term office in each case they were required to resign their employment.

8 Whilst the respondent was represented by counsel in this matter the intervener took up the running of the defence to the application, and the respondent adopted the submissions made on behalf of the intervener.

Relevant SSTU Rule Change Decisions

9 In these reasons for decision the following reasons for decision of the Full Bench which deal with relevant applications to register variations of the rules of the Union are considered and referred to as follows:

(a) *Re State School Teachers Union of WA (Inc)* (1993) 73 WAIG 1471 (*the 1993 Rule Change Case*).

(b) *Re State School Teachers Union of WA (Inc)* (1994) 74 WAIG 1731 (*the 1994 Rule Change Case*).

(c) *Re State School Teachers Union of WA (Inc)* (1998) 78 WAIG 1123 (*the 1998 Rule Change Case*).

10 These decisions deal with applications to register changes to the rules to allow employees of the Union to become members of the Union. Another application of relevance is APPL 409 of 1994 which was an application to the Registrar to register changes to the rules which once registered inserted r 19(h) and r 19(i) (which are now r 25(f) and r 25(g)) of the rules of the Union. After the evidence was heard in this matter, the Commission file containing APPL 409 of 1994 was made available to the parties and the intervener for inspection and the parties and the intervener were invited to make written submissions about documents contained on the file.

The Evidence

11 Anthony Mullen gave evidence on behalf of both of the applicants. Mr Mullen and the other witnesses who gave evidence, gave their evidence partly in writing in witness statements. They also gave oral evidence.

12 Mr Mullen has been a member of the Union since 1979. Since 1990 he has been employed by the Union continuously. During this time he has held appointed industrial staff positions. He is currently the Union's training officer which is a position he has held since 2005. From 1979 until 1990 he was a 'Full Member' of the Union. From 1990 to 1992 he was an 'Appointed Member' and from 1992 to 1998 he was an 'Associate Member'. In 1998 he again became a 'Full Member' as a result of a change to the rules of the Union.

13 In Mr Mullen's witness statement he set out the history of an alteration to the rules of the Union in 1998 which led to industrial officers employed by the Union being entitled to obtain full membership. In 1998 r 4(a)(vii) was made. Rule 4(a)(vii) states:

> The State School Teachers' Union of W.A. (Incorporated) shall consist of an unlimited number of persons employed or usually employed in the following categories:-
>
> (a) **FULL MEMBERS:**
>
> **…**
>
> (vii) Any employee of the SSTUWA (Inc) provided that such persons are not eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A., Clerical and Administrative Branch.

14 Mr Mullen pointed out that the new r 4(a)(vii) replaced the old r 5(g) which applied to Union members employed by the Union. Rule 5(g) stated:

> (g) Appointed members shall be entitled to all rights, privileges and benefits of membership of the Union, except
>
> (i) the right to attend State Council as a delegate, and
>
> (ii) the right to stand for office.

15 Mr Mullen says that this rule change was achieved after years of struggle by members of the Union and staff of the Union to have the rights of industrial staff employees restored as Full Members of the Union.

16 Since the time Mr Mullen has been a Full Member of the Union he has nominated for and been elected to various Union Committees, including Psychology Services, Editorial, UnionsWA/Trades and Labour Council as well as State Council. He also testified that other industrial staff employees of the Union have also nominated for and were elected to State Council since

1998. In particular, in 1999 Matt Farrell, who was an industrial advocate employed by the Union, was elected as a State Council delegate for the Perth District. He attended and participated fully in State Council meetings in June and November of that year. Mr Mullen also said there was another employee of the Union who participated fully as a State Council delegate without objection. In 2006, Lydia Cavallaro was elected as a State Council delegate for the Fremantle district. At that time she was employed as a teacher by the Department of Education and Training but was subsequently employed by the Union as an Organiser/Field Officer for three months from October to December 2006. Whilst employed by the Union she attended and participated fully in State Council as an elected delegate in November 2006.

17 Attached to Mr Mullen's witness statement are documents marked TM4, TM5 and TM 6. TM4 records that in 2003, four employees of the Union were members of Union Committees and eight employees were delegates to UnionsWA Council. TM5 records that in 2004, seven employees were members of Union Committees, 10 employees were Union delegates to UnionsWA Council and two employees were proxy delegates to UnionsWA Council. TM6 records that in 2007, seven employees were members of Union Committees and nine employees were delegates to UnionsWA Council.

18 In late January 2007, nominations were called for various Union Committees, namely Aboriginal Education Committee, B-Legits Committee, Country Matters Working Party Committee, International Committee, Psychology Services Committee and Women's Committee. Seven employee members nominated and were elected to those committees. Mr Mullen says that no objections were lodged following the declaration of the results by the Returning Officer in accordance with r 32(i) and (j).

19 In April 2007, Mr Mullen and Chris Sharpe nominated for two vacancies in State Council as delegates from the Perth District. They nominated after nominations had closed for State Council for that year because there were still vacancies for some State Council districts including the District of Perth and the Union Returning Officer had reopened nominations for these positions in accordance with r 32(m)(iv). On 1 May 2007 the Union Returning Officer declared Mr Mullen and Mr Sharpe to be duly elected as State Council delegates pursuant to r 32(j). A total of 13 delegates were elected in 2007 to represent the Perth District out of an entitlement of 15. Two delegate positions representing the Perth District remained unfilled and there were no nominations for the two alternate delegate positions from the Perth District. No objections were lodge under r 32(i) to either Mr Mullen or Mr Sharpe being elected as State Council delegates.

20 Prior to a meeting of the State Council on 16 and 17 June 2007, Mr Sharpe and Mr Mullen were named in the State Council agenda papers as being delegates representing the Perth District. The agenda papers were distributed to all branches and worksites about three weeks before the State Council meeting. Mr Sharpe and Mr Mullen attended the State Council on 16 and 17 June 2007 as delegates. No objection was raised during proceedings about their election or participation in the State Council. They both fully participated in that State Council meeting as delegates and the decisions of State Council were subsequently published by the Union with their participation recorded.

21 On 18 July 2007, Mr Sharpe and Mr Mullen received a generic letter addressed to all State Councillors signed by the then President of the Union, Mike Keely, Senior Vice President Anne Gisborne and Mr Kelly, the General Secretary. In the letter all Councillors were thanked for their participation in the June 2007 State Council.

22 Shortly after receipt of that letter the Executive deliberated on the issue whether the applicants were entitled to hold the office as delegate whilst employed by the Union. At that time the applicants were unaware that the issue was being considered by the Executive. At a meeting of the Executive on 3 and 4 August 2007 the Executive received a report which was titled 'Union Employees as Delegates to State Council'. The report stated as follows:

Background

1. Members of Executive will recall that, at the most recent meeting of State Council, two members of the union who are also members of the union's industrial staff, participated as district delegates to Council.

2. Questions have arisen as to the validity of those staff members serving the union in both capacities at the same time. Legal advice has been sought.

Advice

3. The advice that has been received concludes that the holding of an elected office in the union is incompatible with continuing service as an employee of the union.

4. This conclusion arises from rule 25(f), which states

> *Any employee of the SSTUWA who* is *elected to an office of the Union shall resign their employment with the Union by no later than the day that that person commences his or her term of office.*

5. We are advised that the effect of this rule is that it is permissible for a member of staff to nominate for election, and it is valid for a member of staff to be declared elected while remaining an employee. However, if the employee has not resigned such employment before commencing his or her term of office, then as soon as that term of office commences, the person concerned ceases to be eligible to hold that office.

   The rule does not affect the employment relationship. In other words, the election to office as a district delegate to Council does not, we are advised, operate to 'automatically' (or otherwise) terminate the employment relationship.

6. State Council has a power to dismiss from office any person elected to an office within the Union who has ceased according to the rules of the Union to be eligible to hold the office. That power comes from rule 23(b)(iv). We are advised that this power affords the appropriate remedy under the rules to deal with the present circumstance.

7. Executive has a general authority under the rules to exercise State Council's powers (with some exceptions, none of which are presently relevant). Executive's power in that regard comes from rules 24(a) and 24(d).

8. It follows that Executive has a power to dismiss from office any person elected to an office within the Union who has ceased according to the rules of the Union to be eligible to hold the office.

Correspondence

9. I have written to the two members concerned. Copies of those letters are attached to this report. In summary, I have drawn their attention to the issues discussed above, and informed them that I intended to raise the matter at Executive. The members were invited to provide a written submission that could be considered by Executive at the same time as it received this report.

10. [*say whether any response received, and if so, attach copy/copies]*

Options

11. There appear to be three options available to Executive:

(A) Resolve to dismiss the two members concerned from their offices as district delegates to State Council.

(B) Refer the matter to the next meeting of State Council for State Council to determine.

(C) Direct that draft rule changes be prepared which would authorise the simultaneous holding of

i. an elected office in the union (or at least, the office of district delegate to State Council); and

ii. a position of employment with the union.

Recommendation

12. Option (A) is recommended to Executive, and the following resolution is offered for consideration:

That Executive

(a) *notes that Chris Sharpe and Tony Mullen did not resign from their employment with the union before the commencement of their terms of office as district delegates to State Council;*

(b) *finds that under the rules of the union the failure to so resign renders Chris Sharpe and Tony Mullen ineligible to hold office as district delegates to State Council;*

(c) *hereby dismisses Chris Sharpe from office as a district delegate to State Council;*

(d) *hereby dismisses Tony Mullen from office as a district delegate to State Council; and*

(e) *directs the Union President to report this resolution to the next meeting of State Council.*

23 On 8 August 2007, four days after the Executive meeting on 3 and 4 August 2007, the President of the Union, Mr Keely delivered letters to Mr Sharpe and Mr Mullen raising this issue. The letters were dated 31 July 2007. Each letter stated as follows:

Re: Eligibility to hold office as delegate to State Council

I note that, in the most recent district elections for the office of delegates to State Council, you nominated for and were declared elected to the office of delegate to State Council for the Perth district. At all relevant times, you have been and remain an employee of the Union.

The position of delegate to State Council is an "office" of the Union within the meaning of rule *25*(f). By operation of that rule, you were required to resign from your employment with the Union before your term of office as State Council delegate commenced. You did not tender your resignation before your term commenced.

I have received advice to the effect that, in circumstances where rule 25(f) applies and you have not resigned from your employment, you ceased to be eligible to hold office as a State Council delegate from the day on which your term commenced.

State Council is empowered to dismiss from office any person who has ceased to be eligible to remain in that office under the rules of the Union. See rule 23(b)(iv). Executive is entitled to exercise that power, between meetings of State Council.

Please note that I intend to report the above circumstances to Executive at its meeting on 14 September 2007. Executive may, in its absolute discretion, resolve to dismiss you from your position as delegate to State Council pursuant to the powers noted above.

If you wish to make any submission in relation to the above matters which you would wish to have Executive take into account, please let me have those submissions prior to Executive by Friday 31st August 2007.

24 After the applicants received the letter they requested a copy of report provided to the Executive which dealt with this matter. A copy of the report was provided to them on 31 August 2007.

25 Both Mr Mullen and Mr Sharpe responded to the letters dated 31 July 2007 on 5 September 2007. In each letter they stated:

I am in receipt of your letter dated 31 July 2007, which you handed to me on 6 August, and a copy of the report you presented to the SSTUWA Executive titled 'Union Employees as Delegates to State Council' which you gave to me on 31 August 2007.

I am not, however, in receipt of a copy of the legal advice from Slater and Gordon commissioned by the SSTUWA, which I requested from you on 31 August 2007.

I note that the report refers to three options available to Executive and that you are intending to recommend Option A.

This is premised on Rule 25 and in particular Rule 25(f). Rule 25 relates to 'Officers' and defines these as the President of the Union, Senior Vice President, Vice President, General Secretary and ordinary members of Executive, including an Aboriginal & Torres Strait Islander representative. Rule 25(f) refers and applies solely to these Officers.

As such it is my view that this rule does not apply to me or my situation as a State Council delegate. Rather, Rule 25(f) applies to those Officers and Executive members specifically referred to in Rule 25 and as such requires those Officers and Executive members, upon their election, to resign from their employment with the Union prior to the commencement of their term of office.

It has been the practice of the SSTUWA in recent years when employees of the Union have been elected as State Council delegates for them to maintain their employment with the Union and be accredited as elected State Council delegates.

Given that there is clearly a dispute about the eligibility of Union employees to be State Council delegates and the interpretation of Rule 25, and that Rule 12 proposes that such disputes are referred to a Dispute Resolution Committee, I suggest this is the proper course of action in this circumstance. Under the provisions of Rule 12(a)(ii) I request that a Dispute Resolution Committee be convened to consider this matter and that Rule 11 be applied in respect to hearing the dispute.

In the event that you discuss this matter further with Executive I will be pleased to make a more detailed submission for Executive's consideration.

26 The matter was not referred to a Dispute Resolution Committee. At the next meeting of the Union Executive on 14 September 2007, the Executive passed the following resolution:

1. That the President report.
2. That the report be received.
3. That Executive
   - (a) notes that Chris Sharpe and Tony Mullen did not resign from their employment with the Union before the commencement of their terms of office as district delegates to State Council.
   - (b) find that under the rules of the Union that failure to so resign renders Chris Sharpe and Tony Mullen ineligible to hold office as district delegates to State Council.
   - (c) hereby dismisses Chris Sharpe from office as a district delegate to State Council.
   - (d) hereby dismisses Tony Mullen from office as a district delegate to State Council.
   - (e) directs the Union President to report this resolution to the next meeting of State Council.

27 The minutes of the Union Executive of 14 September 2007 record that debate and decisions on this issue were taken in camera.

28 Despite the fact that the Executive of the Union dismissed the applicants from office as district delegates to State Council in September 2007, three weeks prior to a State Council meeting planned for 17 and 18 November 2007, the Union distributed agenda papers to all branches and worksites which listed the names of the applicants as delegates for the Perth District.

29 The applicants were not informed of the decision of Executive until just before the meeting of State Council. On 16 November 2007, Mr Keely wrote letters to Mr Sharpe and Mr Mullen in which they were informed of the decision of Executive made on 14 September 2007. The letter also stated that they would not be recognised as State Council delegates at the State Council meeting on 17 and 18 November 2007.

30 Notwithstanding advice by Mr Keely, both Mr Sharpe and Mr Mullen registered as delegates to State Council on 17 November 2007 and took their places at the table with other delegates from the Perth District.

31 The dismissal of the applicants as delegates was dealt with as the second item of business. Following debate the State Council carried the following resolutions:

1. That a senior officer report.
2. That the report be received.
3. That the Executive decision be endorsed.

32 Mr Mullen gave evidence that they were not given an opportunity to address State Council about the issue before the matter was voted on. However, Mr Sharpe did address the State Council after the resolution was passed and thereafter Mr Sharpe and Mr Mullen took no further part in the proceedings of State Council as delegates.

33 The applicants contend that r 25 which provides that an employee of the Union is required to resign if they are elected to an office, only applies to an office of the Union that are specifically named in r 25, that is the offices that comprise the Union Executive, being the Union President, Senior Vice President, Vice President, ordinary Executive members, an Aboriginal or Torres Strait Islander representative and the General Secretary.

34 Mr Mullen raised a number of occasions since 1998 when the applicants say r 25(f) and r 25(g) have been invoked. In 1998 Mr Kelly, the present Union General Secretary, was employed as an Organiser by the Union. He relinquished his employment with the Union upon being elected as General Secretary at the beginning of 1999 as he was required to do so pursuant to r 25(f). There have been two occasions when r 25(g) has been properly invoked. In about 2004, Trevor Vaughan who was an elected Executive Officer of the Union was appointed to a position as an employee of the Union. He resigned his elected

position as an Officer of the Executive upon taking up employment. Sometime in 2007, Bronwyn Croghan who was an elected officer of the Executive was appointed to a position as an employee of the Union and she too resigned her elected position as an officer of the Executive upon taking up her employment.

35 Mr Mullen testified that when he participated in the State Council as a delegate in 2007 he participated in debates and moved a motion on the second day which he says would assist management in putting a view across to the members of State Council. He also pointed out that his dismissal as a delegate, created an extraordinary vacancy in the Perth District but no steps were taken to replace him.

36 When cross-examined Mr Mullen was asked to explain why he did not bring an application to the Commission immediately after he was dismissed as a delegate in November 2007. In response he said that in 2008 there was a major industrial campaign run by the Union which meant that they did not have any energy to take up the issue until 2009.

37 Mr Matt Farrell gave evidence on behalf of the applicants. He was a member of the Union from 1968 until his retirement in 2004. He is currently a member of the SSTUWA's Retired Teachers' Association. From 1996 until 2004 he was employed by the Union as an industrial advocate. Whilst employed he was a Full Member of the Union except for the period between 1996 and 1998 when he was an associate member. In 1999 he nominated for election as a delegate to State Council to represent the district of Perth. No objections were lodged in respect of his candidature and he was notified by the Union's Returning Officer that he had been duly elected. He participated fully in State Council meetings as a delegate without restriction in June 1999 and November 1999.

38 Mr Geoffrey Davis also gave evidence on behalf of the applicants. He has been the Returning Officer of the Union since 1999. Mr Davis conducts all internal elections in the Union including the annual election of delegates to State Council of the Union. He is a Life Member of the Union. He first joined the Union in February 1954 and served for a long period in various Union positions. He has held the positions of Branch Officer, Executive Member, delegate to conferences of the Australian Teachers' Federation and has represented the Union on such bodies as the Public Examinations Board of the University of WA and the Board of Secondary Education.

39 Mr Davis testified that nominations for delegates to State Council are called at the beginning of the school year through advertisements in the Union magazine, *The Western Teacher*. Nominations are made by the completion of a nomination form requiring a proposer and seconder as well as details of the nominee. All of whom must be from the same district. Nomination forms are checked to ensure that the nominee, the proposer and seconder are all from the appropriate district and are all financial members of the Union.

40 In April 2007, Mr Davis received nominations from Mr Mullen and Mr Sharpe to be delegates from the Perth District. He checked their nomination forms and found that they were Full Members of the Union and their proposers and seconders were all financial. He satisfied himself that the Union rules had been properly followed in respect to the election process and there had been no objections. He then declared Mr Mullen and Mr Sharpe duly elected as State Council delegates. Following publication of a list of delegates to State Council he met with Ms Anne Gisborne, the Acting President of the Union and the General Secretary, Mr Kelly and was asked to explain why he had accepted the nominations of Mr Mullen and Mr Sharpe. He explained that, in his view, r 5 entitled Mr Mullen and Mr Sharpe to be elected as they were Full Members of the Union. He says his explanation appeared to be accepted.

41 Some weeks before the November 2007 State Council meeting Mr Davis was advised by the President, Mr Michael Keely that the Union had had legal advice that Mr Mullen and Mr Sharpe were not eligible under r 25(f) to be delegates to State Council and that the Executive had decided to move a motion at the November Council meeting to remove them from their positions of delegates. When the matter came before the State Council in November 2007 Mr Davis explained his actions as Returning Officer in accepting the nominations.

The Intervener's Submissions

42 Senior Counsel on behalf of the intervener, Mr R C Kenzie QC points out that the central point in this case concerns the scope of r 25(f) of the Union rules which provides:

> Any employee of the SSTUWA who is elected to an office of the Union shall resign their employment with the Union by no later than the day that that person commences his or her term of office.

43 The intervener contends that at the time the Executive and State Council made the resolutions in question Mr Mullen and Mr Sharpe held the 'office' of delegate to State Council of the Union. The intervener also points out it is not disputed by the applicants that at all material times they were employees of the Union who had not resigned their employment by the day that they assumed the office of delegate to State Council.

44 The intervener says that this proceeding is of historical note. They say that the applicants did not have the energy to take this on in 2007. Consequently the application is moot. The intervener points out that pursuant to r 23(a)(xiii) the election of delegates to State Council is conducted annually. Accordingly, the issue raised by the applicants concerning the holding of an office is in relation to a term that has long since expired. In relation to the applicants' claim that they were denied natural justice, the intervener points out no remedy can be provided to them, even if their term of office was truncated by the dismissal, as any right to hold office has long since expired. The intervener also contends that in the absence of any suggestion that there is anyone currently purporting to occupy both the position of delegate to State Council and hold employment within their Union, the issues raised by the applicants are theoretical only and moot.

45 In addition they point out orders which are directed to the rectification of asserted historical breaches of rules which are not directed to secure the performance of an existing obligation are beyond the purview of s 66: *Stacey v Civil Service Association of Western Australia (Inc)* (2007) 87 WAIG 1229 [273] - [274], [291], [295] - [300], [302] - [303].

46 Consequently the intervener says that pursuant to s 27 of the Act the Commission should exercise its discretion to refrain from further determining this matter on grounds that further proceedings are not necessary or desirable in the public interest as the question before the Commission in this matter is hypothetical. The intervener says that for these reasons it is not appropriate to make an order that the decisions of the Union Executive and State Council be rescinded. However, it is conceded that if the Commission is of the view that the application should not be dismissed and if there is a finding made in favour of the applicants, then it would be open to the Commission to make a declaration declaring the true interpretation of r 25(f) where the Commission was satisfied that there was a need to do that for the purposes of resolving an active conflict in the organisation: *Stacey* [273] - [274].

47 The intervener points out that r 4(a) is a rule about acquiring membership of the Union. Pursuant to r 4(a)(vi) if the applicants resign whilst they are employees of the Union they would still be members of the Union because they would be a person elected to an office in the Union.

48 The central issue in this matter is what is encompassed by the prohibition in r 25(f) by the use of the word 'office'. It appears to be suggested by the applicants that there is some relation between r 25(f) and the nominated officers who appear specifically in r 25(a)(i). In response the intervener says it is manifest that r 25 is designed to embrace persons holding office other than those identified by r 25(a)(i). The provision contemplates other people who are not in those positions. In particular r 25(f) also deals with the aspects of the 'office' of General Secretary. They also say there is nothing within r 25(f) that confines its operation to the particular offices identified in r 25(a)(i). It would be paradoxical if r 25(f) covered only those offices identified in r 25(a)(i) and not the position of General Secretary. They also say that where the drafters had intended an aspect of r 25 to be confined in its operation to members of the Executive, this has been made clear (see, for example, r 25(b) which is specifically confined to the position of 'a member of the Executive'). Rule 25(b) stands in contrast in its operation to r 25(f).

49 It is submitted that it is clear that the term 'office' used in r 25(f) should be applied more broadly than the applicants contend and should be considered in the context of the rules as a whole. It is at least broad enough to embrace the position of any person who is elected as a delegate to State Council. There are many provisions within the rules that identify persons not included in r 25(a)(i) who are regarded as the holders of an 'office' – these include r 23(a)(xv) which specifically identifies 'the office of delegates to State Council'. This sub-rule is part of r 23 – State Council which, inter alia:

(a) constitutes the State Council as 'the governing body of the Union' and 'the supreme decision–making authority of the Union' subject to membership referendum;

(b) specifically provides that State Council consists of designated positions and delegates elected from each District, in accordance with the provision of the rules; and

(c) constitutes State Council as the body capable of making, amending or rescinding the rules and determining such other fundamental matters identified within r 23(b).

50 In construing r 25(f) the Commission should look at the way in which the rules as a composite whole use the term "office". In particular r 23(a)(xv) refers to the office of a delegate. Rule 23(a)(xv) provides:

> In the event of a casual or extraordinary vacancy arising in the office of delegate to State Council, the casual vacancy shall be filled by an election in as far as practicable the same mode as is prescribed by these rules for the election of that State Council delegate and any person so elected shall hold office for the unexpired portion of the term of the State Council delegate he or she is elected to replace.

51 The intervener contends that as the rules specifically identify in their text the position of delegate of State Council as an 'office', it is also important to have regard to the fact that State Council is the supreme decision-making body of the Union and it makes, and/or is capable of making all of the big decisions for the Union including decisions which obviously have the potential to come into conflict with the interests of employees of the Union. The rules also specifically provide that members of the Council be elected from the District in accordance with the rules that apply to the election of offices. Consequently it follows that the members of Council are elected to an 'office' pursuant to the provisions of the rules which provide for an election to office.

52 They also point out that in identifying the office of delegate to State Council in r 25(a)(xv), this is contrary to the process for taking up a position on the sub-committees identified in the applicants' evidence. For example, the sub-committees which relate to the Trades and Labor Council of WA, are positions not mandated to be elected under the rules. The intervener says that it is clear that r 25 is not confined in its operation to any particular office but should be construed to mean if you are elected to an office you have to give up your position as an employee. They say that r 25 is textually designed to address the potential for conflict which exists in relation to delegates to State Council just as much as it does to any position in the Executive because decisions that can be made by State Council are as fundamental as any decision that can be made by the Executive.

53 The interveners say that the definition of 'office' in s 7(1) of the Act is not relevantly controlling in this matter. Section 7(1) of the Act defines 'office' in relation to an organisation as meaning, inter alia:

(a) the office of a member of the committee of management of the organisation;

…

(d) an office within the organisation for the filling of which an election is conducted within the organisation; and

…

but does not include the office of any person who is an employee of the organisation and who does not have a vote on the committee of management of the organisation;

54 Whilst the intervener acknowledges that in *Dornan v State School Teachers Union of WA (Inc)* (1991) 72 WAIG 998, Sharkey P approached the matter before the Commission on the basis that the rules of the Union should not be read to conflict with the meaning of 'office' in s 7 of the Act, it is clear that the rules must be given their full effect according to their terms.

55 The intervener says that you should not read the definition of 'office' into the rules of an organisation like r 25(f), as to do so would require every reference to the word 'office' in an organisation's rules to read as referring only to an 'office' as defined in s 7 of the Act. There are many Federal and State decisions that demonstrate that the notion of what is an 'office' within an organisation is not straightforward. Nor is an issue that is able to be addressed simply by identification of the title of an office or indeed whether the office is one that requires the holding of an election. In *Landeryou v Taylor* (1969) 15 FLR 147 (154-157) (applied in *The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v BHP Iron Ore Limited* [2001] WAIRC 3420; (2001) 81 WAIG 2633.[20] and *Burswood Resort (Management) Limited v Federated Liquor and Allied Industries Employees' Union of Australia, West Australian Branch, Union of Workers* (1999) 80 WAIG 308), the Federal Court made it plain that the definition of an 'office' or an 'officer' in a statute did not assist in determining whether a holder of the particular position in an organisation was the holder of an 'office'. The task of a court of a tribunal is to construe the rules of the organisation and that the statutory provisions must be read in light of the ordinary meaning of the word 'office'. The mere holding of an election is not an absolute test, the position must carry with it some administrative or executive duties or some substantial degree of responsibility: *Landeryou* at 154. Whether a person can be so described as an officer or a holder of an office is dependent on the duties and responsibilities of the position held: see *Australian Workers' Union, West Australian Branch, Industrial Union of Workers* [20] and the cases therein.

56 In this matter the rules specifically identify that a delegate to State Council is the holder of an office (r 23(a)(xv)). The rules are to be considered in context and the reference in a rule such as r 25(f) to an 'office' is to be read in a manner consistent with the entire rules of the Union, including r 23(a)(xv). Similarly, the concept of 'office' in the rules plainly applies to positions other than those identified in r 25: see r 20(c), r 32(a)(ii) referring to 'any office to be filled by election', r 32(e)(vi) and r 32(k)(ii). Rules 23(a)(xv) and 25(f) are to be read in context and consistently. They are not to be read on the basis that the concept of 'office' is different as between the two sub-rules. If the draftsman has determined that, for the purposes of the rule, a delegate to State Council is identified as the holder of an office, r 25(f) is not to be approached on the basis that the word 'office' is artificially to be determined simply by reference to its statutory meaning.

57 Consequently the intervener argues that in the face of r 23(a)(xv) the question of whether a delegate to State Council is the holder of an 'office' within the meaning of r 25(f) is not dependent on a finding that the definition of 'office' in s 7 of the Act is attracted. In particular, it is not dependent on a determination that a delegate to State Council is a 'member of the committee of management of the organisation' within the meaning of the definition of subparagraph (a) of the definition of 'office' in s 7(1). It may be noted that a delegate to State Council is a holder of an office within the organisation 'for the filling of which an election is conducted within the organisation'. The question of whether the exclusion within s 7 of the Act providing that the definition of 'office' does not include the office of any person who is an employee of the organisation and who does not have a vote on the committee of management of the organisation, is not in point.

58 The intervener says their submissions are consistent with the decision of the Full Bench in *the 1998 Rule Change Case*. In a dissenting judgment, Sharkey P specifically construed r 25 (which was then r 26) as requiring a person elected as a delegate and a member of State Council to resign. President Sharkey set out the history of the two previous applications to alter the rules of the applicant organisation to allow employees of the Union to be eligible for membership, which were *the 1993 Rule Change Case* and *the 1994 Rule Change Case*. Sharkey P had regard to the concerns raised about conflicts of interest in *the 1993 Rule Change Case*. In particular he said (1126):

> In the first case, the Full Bench observed that it would be contrary to the democratic control of the applicant organisation by its members to permit their employees to be eligible for membership (per Sharkey P at page 1475). The Full Bench also observed that the independence of the union's Executive would be potentially compromised by persons attempting to be both master and servant with the resultant legal and operating difficulties (per Fielding C (as he then was) at page 1476).

59 His Honour, Sharkey P then went on to observe that even if he was to allow the change in rules that (1127):

> If rule 4 is authorised to be altered in terms of the application herein, then an employee will be able to hold office and will be able to be an officer if elected as a delegate and a member of State Council, the governing body of the applicant organisation, provided that he/she resigns if elected (see rule 26).

60 The intervener contends there is nothing to suggest that the majority considered that Sharkey P's construction of the rule was erroneous. The intervener argues that Fielding SC (with whom Parks C agreed), confined his comments about the effect of r 26(f) (now r 25(f)) to the potential for conflict involving the person who was both an employee and a member of the management committee of the Union and that it is open to draw this conclusion from the opening paragraph from Fielding SC's reasons for decision in which he said:

> I have had the advantage of reading in draft form the reasons for decision prepared by the President in this matter. The nature of the application and the supporting arguments and counter-arguments are set out in those reasons. No useful purpose is to be gained from repeating them again.
>
> Not without some diffidence I have come to the view that the application should, on this occasion, be granted in its amended terms. I confess that there is much to be said for the arguments advanced by the President for rejecting the application. In particular, I consider it important that a person should not be both an employee and a member of the management committee of the union. The potential for conflict of interest in such circumstances is obvious. In this respect the formula adopted in the membership rule of the Civil Service Association approved by the Full Bench in *The Civil Service Association of Western Australia v The Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch* (1971) 71 WAIG 1780 has much to commend it.

However, in this case if the application is granted in its amended form, the rules of the Applicant will operate in much the same way as do those of the Civil Service Association and prevent a member from being both an employee and an executive officer of the union. Sub-rules 26(f) and 26(g) of the Applicant's rules require an employee to resign no later than the date on which he or she takes up office as a member of the executive committee and vice versa. Thus, the position is unlikely to arise where there is a conflict of interest of the kind which the Full Bench has said on a number of occasions, most notably in *Re an application by the State School Teacher's Union of WA (Inc)* (1993) 73 WAIG 1471, is undesirable (1127).

61 The intervener says there is nothing in Fielding SC's judgment to suggest that he was expressing a view contrary to Sharkey P about the effect of r 26(f) and r 26(g) (now r 25(f) and r 25(g)). What Fielding SC was saying was that the rule change can be made because there is no problem with conflict. One of the alterations to the rules that was requested in that matter was the deletion of r 5(g) which applied to employees of the Union who were at that time Appointed Members. Rule 5(g) provided: 'Appointed Members shall be entitled to all rights, privileges and benefits of membership of this Union, except (i) the right to attend State Council as a delegate, and (ii) the right to stand for office.' This provision was deleted in 1998 by the decision of the majority in *the 1998 Rule Change Case*. The impact of the deletion of that provision is that the right to stand for office was given but no right to attend State Council was provided by the removal of r 5(g) because of the command in r 25(f) that requires a person who is elected to an office to resign their employment with the Union.

62 The intervener says that it is important to contrast the effect of r 25(f) and r 25(g). In contrast to r 25(g), r 25(f) is constituted as a command and does not stipulate the consequences of a failure to comply. Rule 25(g) makes it clear that, if an officer of the Union is appointed as an employee, they will cease to hold their position on and from the date of commencement of employment. Obviously, r 25(f) is not to be read as impacting on employment in the event of an election to office. Both provisions are part of a scheme designed to avoid the incompatibility of holding office with employment. The provisions introduce notions designed to deal with incompatibility of a nature seen in cases such as *Egan v Maher (No 2)* (1978) 35 FLR 252, 258, 260, 262, - 264; *Mellor v Horn* (1988) 25 IR 157, 160 -161 and *Johnson v Beitseen* (1989) FCA 80 [44]-[46].

63 In the event of a refusal to resign by an officer who is an employee, the effect of r 25(f) is that the holding of the office is impliedly terminated ipso facto because the rules say that the existence of employment and the holding of an office is incompatible. Alternatively, the intervener contends the person holding the office is rendered ineligible to continue to hold the office, opening the way for the Executive or State Council to make a decision to that effect. The intervener says that it does not matter which construction is accepted, if at the end of the day the Executive acts to dismiss the person in question from office. It is said that there can not be any doubt that the Executive was empowered to act pursuant to r 23(b)(iv), as the Executive has power to dismiss from office any person elected to an office within the Union who has ceased according to the rules of the Union to be eligible to hold office.

64 The intervener also contends that the applicants' complaint that they were denied procedural fairness cannot be made out. The applicants complain that they were not able to participate in the deliberations of Executive at the meeting of Executive on 3 and 4 August 2007. The intervener relevantly points out that no decision was made in relation to the termination of the holding of office by either applicant at that meeting. The applicants were provided with a letter addressing the issue to the Executive and afforded an opportunity to advance submissions as to why they did not fall foul of r 25(f) prior to the Executive making a decision to dismiss them from office. The applicants clearly availed themselves that opportunity and made written submissions.

65 The applicants also complain that the debate and the decision of the Executive was taken in camera so that the applicants were unable to participate. The applicants were, however, not members of the Executive and in circumstances where they were invited to provide written submissions in relation to that matter and did so, there can be no suggestion that procedural fairness was lacking.

66 As to the State Council's endorsement in November 2007 of the decision to dismiss, the evidence of Mr Mullen establishes that the issue was debated by State Council and an opportunity was given for State Council to be addressed by the applicants in relation to the issue. Mr Sharpe availed himself of this opportunity but there is no evidence that Mr Mullen was denied such an opportunity.

67 The fact that the Union did not accede to request to have the matter dealt with by a dispute resolution committee is entirely irrelevant. The question was one of compliance with the rules. An organisation cannot be called to account for taking action required by its rules on the basis that some other course of action might be considered appropriate.

The Applicants' Submissions

(a) The Applicants' Oral Submissions

68 At the conclusion of the evidence both applicants made oral submissions in this matter. Mr Mullen on behalf of the applicants made an opening submission in which he addressed a number of rules of the Union which the applicants say are of some importance in interpreting r 25(f) of the Union's rules. The applicants contend that r 3(a) is arguably is the most important objective which states that it is an object of the Union to watch over and protect the interests of its members without reservation or exclusion.

69 Mr Mullen stated without objection that the Union is made up of approximately 14,500 members and those members form branches. The branches are usually elected in February of each year and at any one time there can be up to 700 branches within the Union. Each branch usually consists of a Convener, Secretary, Treasurer, Union Representative, Women's Contact Officer, other Deputies and other positions. Each Branch is based at a worksite. The Branches are divided into geographical districts and each Branch has one delegate to their local District Council. District Councils meet twice a year in terms 1 and 3. In 2009 there were 16 District Councils. Members of Executive are elected by the entire membership for a two-year term.

Elections take place in about October. Any financial member can nominate and the Executive consists of three senior officers, 14 ordinary members and one Aboriginal and Torres Strait Islander member, who is elected from amongst Aboriginal and Torres Strait Islander members. Nominations open in February each year for State Council. Any member can nominate and elections are conducted within the districts only. Delegates are elected within each district to State Council. In 2009 the State Council consisted of approximately 138 delegates and a total of 19 officers. The Executive consists of 18 officers which consists of the three senior officers, 14 ordinary members and one Aboriginal and Torres Strait Islander member. In addition, there is the General Secretary who is not a member of the Executive. The position of General Secretary is an elected position. The holder of that office is elected for a four-year period. The Executive constitutes the committee of management within the meaning of the definition of 'office' in s 7 of the Act. The Executive is elected across the membership by a process involving the Australian Electoral Commission, whereas any other election for any office in the Union is conducted by the Union's Returning Officer.

70 The applicants point out that they are enrolled as Full Members of the Union under r 4(a)(vii). Pursuant to r 4(a)(vii) any employee of the Union is entitled to enrol as a Full Member provided they are not eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA, Clerical and Administrative Branch. The effect of this rule is that the industrial employees of the Union as opposed to clerical and administrative employees are eligible to be Full Members of the Union. Mr Mullen also stated without objection that there are currently 19 industrial employees of the Union. In 1998 there was a change in the rules to enable industrial employees of the Union to enrol as Full Members of the Union. Prior to this rule change, industrial employees were eligible to enrol as Appointed Members. Since 1998 when the rule change came into effect, industrial employees have as Full Members paid the same scale of membership fees as other Full Members. The applicants argue because r 5(a) provides that Full Members shall be entitled to all rights, privileges and benefits of membership of the Union, the effect of the decisions of the Executive in September 2007 and State Council in November 2007 to dismiss the applicants as delegates to State Council is to deny all rights, privileges and benefits of membership of the Union within the meaning of r 5(a).

71 Rule 11 – Breach of Rules provides for the procedure for breaches of rules and creates offences with which a member may be charged. Pursuant to r 11(a)(ii), it is an offence if a member breaches or fails to comply with any provision of the rules. Further, under r 11(a)(v) it is an offence if a member wrongly holds out as occupying any office or position in the Union or as being entitled to represent the Union in any capacity (to which charge it shall be a defence that the member believed bona fide and on reasonable grounds that she/he was entitled to act). The applicants point out that no allegation of a breach of rules against either of them has been made in relation to their status as State Council delegates and employees.

72 The applicants also say that r 12 – Dispute Resolution Committee is relevant to this matter. Rule 12 establishes a Dispute Resolution Committee, whereby under r 12(a)(ii) a Dispute Resolution Committee consisting of three members is empowered to consider and to make recommendations to the Executive in relation to any dispute a member or members may have concerning the application or interpretation of any rule. The applicants point out that no Dispute Resolution Committee was convened as requested by the applicants to deal with the issue in dispute.

73 Both Mr Mullen and Mr Sharpe contend that they should have been given an opportunity to participate in the Executive's deliberations about their status as State Council delegates. They say that they were not afforded natural justice, as they were not allowed to participate in the deliberations. They also say that in failing to do so the Union breached its Administrative Instruction 800.33 which is titled 'Union as a Model Employer'. Administrative Instruction 800.33 provides:

> That the SSTU act as a model employer and exemplar with the SSTU management body ensuring that all staff are treated professionally, with respect and that the SSTU Code of Ethics and democratic decision making processes are acted upon, namely:
>
> (iii) that when decisions are being made those parties who will be affected be directly involved.

74 Rule 23 establishes the State Council. The applicants say that throughout r 23 the term 'delegates' is used consistently and can be distinguished as being separate from 'officers' and 'offices' of the Union. The applicants point out that r 23(a)(iii) defines the composition of State Council as the President, Senior Vice President, Vice President, Ordinary Executive Members, General Secretary and delegates elected from each district, in accordance with the provisions of r 23 and r 32 – Elections for Office. The applicants say that there is a distinction between officers who are elected members of the Executive and delegates to State Council who are elected within a district. Delegates from districts have a one–year tenure on State Council. Officers who are elected to the Executive have a two–year tenure on State Council, whilst the officer elected as General Secretary has a tenure of four years on State Council.

75 The applicants point out that there is no requirement in r 23 for employee members of the Union who are elected as delegates to State Council to resign their employment with the Union. This they say is in clear contrast to the provision of r 25 which deals with 'officers'. Rule 23(b)(iv) gives State Council the power to dismiss any State Council delegate who has been found guilty in accordance with the rules of the Union or who has ceased according to the rules of the Union to be eligible to hold office. The Executive in this matter found no guilt on behalf of the applicants as no allegations were made against them under r 11 and there was no Dispute Resolution Committee convened under r 12. The Executive determined that the applicants ceased to be eligible to hold office because they failed to resign from their employment with the Union. They say if they had resigned their employment with the Union they would have ceased to be eligible to be members of the Union under r 4 as they would have been unemployed and ineligible to retain their membership as they would not be officers and they would not be able to rely upon the proviso in r 4(a)(viii) which provides that:

> (viii) … Notwithstanding the above, any person who is not registered with the relevant employer as available for work, and has not worked as a teacher for at least two years and who no longer has a contract of employment with the relevant employer shall not be eligible for membership under this subrule.

Hence they say they would have been ineligible to be delegates at State Council to represent the Perth district in 2007 if they resigned from their employment.

76 The applicants argue that the State Council meeting in November 2007 assumed without proper justification that it had the power to endorse the dismissal of the applicants by the Executive. The State Council acted without finding if the applicants were guilty of any substantial breach of the rules of the Union and without proving that the applicants had ceased being eligible to hold 'office' according to the rules of the Union.

77 The applicants point out that pursuant to r 24(a) and r 24(b) the Executive has power to control the affairs of the Union between meetings of State Council. The Executive assumed on 14 September 2007 it could exercise the power of State Council to dismiss from office any person elected to an office within the Union who have ceased according to the rules of the Union to be eligible to hold office. The minutes of that meeting indicate the decisions were made in camera. Consequently the applicants say it follows therefore no process employing natural justice was used to assist the decision-making.

78 The applicants made a submission that their dismissal from office constituted an irregularity in the election process. During the course of proceedings I informed the applicants that I did not see that this was a matter that could be properly raised as it is not in dispute that they were entitled to stand for and be elected as delegates to State Council.

79 The applicants argue that the restrictions in r 25(f) and r 25(g) are solely confined to members of the Executive and the General Secretary is supported by custom and practice in relation to employees of the Union who have been elected to the position of General Secretary or as State Council delegates. They point to the evidence given by Mr Farrell and by Mr Mullen which establishes that Mr Farrell whilst an employee of the Union was elected a delegate to State Council in 1999 and Ms Cavallaro attended State Council as a delegate in November 2006 when she was an employee of the Union. On neither of those occasions was any issue raised with those persons participating in State Council meetings as a duly elected delegate. The applicants also point to the fact that the current General Secretary who was employed as an organiser by the Union in 1998 stood for the elected position of General Secretary in January 1999 and upon being elected to office, resigned as an employee of the Union in accordance with the requirements of r 25(g) of the rules.

80 The applicants also make a submission that their application is supported by a number of provisions in the Act including the objects in s 6(ab) and s 6(f) of the Act. They rely upon s 26 of the Act which requires the Commission to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms and have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole. The applicants also rely upon s 27(1)(l) and s 27(1)(v) of the Act which enable the Commission to amend applications and give directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.

81 The applicants say that the construction of the rules of an organisation should be construed in according to the principles discussed by Ritter AP in *Stacey* at [93]. The applicants' view of the rules of the Union is that the document is essentially evolutionary. They contend the rules have internal inconsistencies but it is notable that there is a requirement of the rules that any changes be endorsed by members. Consequently they say the rules are very much the manifestation of the wishes of the members. They say the rules should be read as they stand and are designed to provide direction in relation to regulation of discrete areas of the operation of the organisation. The applicants also point out in *Stacey* at [331] and [332] Ritter AP adopted the principle that the rules of the Union cannot be supplemented by implied terms as distinct from permitting the ascertainment of the meaning of the rules upon their true construction. Consequently the applicants argue that where rules state matters expressly that should determine the application of those rules.

82 The applicants say the most significant decision that the Commission must consider in this matter is *the 1998 Rule Change Case*. They say that the reasons for decision of Fielding SC with whom Parks C agreed, was the view of the majority which at the end of the day prevails over the views of Sharkey P. However the applicants say they acknowledge that the views of Sharkey P are nevertheless important and significant because he was a member of the Full Bench. Mr Sharpe who made submissions on behalf of both of the applicants in respect of this issue conceded that the principles or notion of conflict of interest or undue power and influence are matters which properly occupied the mind of the Full Bench in *the 1998 Rule Change Case*.

83 The applicants say that the reasons for decision of Fielding SC with whom Parks C agreed, were distinguishable to the reasons for decision given by Sharkey P. They point out at page 1127 Sharkey P made the following observation:

> If rule 4 is authorised to be altered in terms of the application herein, then an employee will be able to hold office and will be able to be an officer if elected as a delegate and a member of State Council, the governing body of the applicant organisation, provided that he/she resigns if elected (see rule 26).

84 The applicants say that when one analyses the language used by Fielding SC in his decision he used quite different language, in particular he said that it is important that a person should not be both an employee and a member of the management committee of the Union. He did not use the words "governing body" which was the term used by Sharkey P. At pages 1127-1128 Fielding SC stated:

> Not without some diffidence I have come to the view that the application should, on this occasion, be granted in its amended terms. I confess that there is much to be said for the arguments advanced by the President for rejecting the application. In particular, I consider it important that a person should not be both an employee and a member of the management committee of the union. The potential for conflict of interest in such circumstances is obvious. In this respect the formula adopted in the membership rule of the Civil Service Association approved by the Full Bench in *The Civil Service Association of Western Australia v. The Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch (1991) 71 WAIG 1780* has much to commend it. However, in this case if the application is granted in its

amended form, the rules of the Applicant will operate in much the same way as do those of the Civil Service Association and prevent a member from being both an employee and an executive officer of the union. Sub-rules 26(f) and 26(g) of the Applicant's rules require an employee to resign no later than the date on which he or she takes up office as a member of the executive committee and vice versa. Thus, the position is unlikely to arise where there is a conflict of interest of the kind which the Full Bench has said on a number of occasions, most notably in *Re an application by the State School Teacher's Union of WA (Inc) (1993) 73 WAIG 1471*, is undesirable.

85 The State Council is not the management committee of the Union. The State Council comprises 157 members and is a State Council. It only meets twice a year. The applicants point out that Fielding SC talks about his reservations about employees being members of the management committee of the Union and that the potential for conflict of interest in such circumstances is obvious. They say in this respect Fielding SC agreed with Sharkey P, but significantly, it must be assumed that Fielding SC's choice of words was deliberate. Senior Commissioner Fielding was concerned about a conflict of interest arising where a person was a member to the committee of management and an employee. He did not raise any issue of conflict in relation to State Council and he could have done so. He could have talked about governing bodies plural, as Sharkey P had done. The applicants point out that Fielding SC then goes on to discuss if the application is granted the rules of the Union will operate much the same way as do those of the Civil Service Association Incorporated Western Australia and prevent a member from being both an employee and an executive officer of the Union and to r 26(f) and r 26(g) will establish a prohibition on being both an employee and a member of the Executive.

86 The applicants say the plain interpretation of the findings made by Fielding SC is that the provisions of r 25 (which was r 26) prevent a person from being both a member of the management committee and an employee, but not a member of the governing body, the State Council. They contend r 25 is solely focussed on a prohibition on members of the Executive and the Secretary of the Union. They also say there is no need to make a reference to State Council in r 25 because there is nothing in the rule that establishes State Council prevent or limit employees being delegates to State Council in the same way that r 25 does in respect of the Executive and there is nothing in relation to any of the other rules that establish the representative bodies of the Branches, District Councils, State Councils, and Committees in relation to which all of those positions require elections which prevents employees from nominating for those positions and being elected to them.

87 The applicants agree with the argument put forward on behalf of the intervener that the definition of 'office' in s 7 of the Act does not have any application in this matter as that statutory provision is not consistent with the use of the word 'office' in the rules of the Union.

(b) The Applicants' Written Submissions

88 The applicants filed written submissions in reply to the intervener's submissions on 25 February 2010. In their written submissions they also made submissions about the effect of APPL 409 of 1994 which was an application by the Union to the Registrar to register variations to the rules of Union to create the State Council as a body and insert r 19(f) and r 19(g) (now r 25(f) and r 25(g)) into the rules. The applicants say that notwithstanding their contention that the rules of the Union should be read as a whole, r 25 only applies to specified designated 'officers' of the Union. These are the 'officers' that comprise the Union Executive, that is the President, Senior Vice President, Vice President, and Ordinary members, including an Aboriginal and Torres Strait Islander representative and the General Secretary who is not a member of the management committee, the Executive, but is specifically mentioned in r 25.

89 The applicants also say that r 25(f) and r 25(g) safeguard against an employee being a member of the Union's management committee, the Executive, and address a concern that was repeatedly expressed by the Full Bench on several occasions during the 1990s. Rule 25(f) is express in requiring an employee who is elected as an officer of the Executive or General Secretary to resign his or her employment with the Union and r 25(g) is express in requiring an officer of the Executive or General Secretary who is appointed as an employee to resign as officer of the Executive or General Secretary. The action required of an employee by r 25(f) in resigning his or her employment before taking up an elected officer position on the Executive or General Secretary position is mandatory and the action required of an officer of the Executive or General Secretary by r 25(g) in resigning prior to taking up employment with the Union is also mandatory.

90 The applicants submit that this construction is consistent with the discussion of the meaning of 'officer' in *Landeryou*. Spicer CJ observed at page 148: "True it is that the words 'office' and 'officer' are words of indefinite content, but they do, I think, indicate a position or the holder of a position which carries with it some administrative or executive duties or some substantial degree of responsibility." Dunphy and Joske JJ said at page 154: "'The word office is of indefinite content', but as the most relevant for the purposes of this case the following – 'A position or place to which certain duties are attached especially one of a more or less public character'." The applicants submit these observations are consistent with the intent and purpose of r 25 - Officers as the officers expressly referred to in r 25 have administrative and executive duties which carry substantial authority and represent the public face of the Union to members and the wider community. In contrast they say that other Union positions, such as each Branch, District Council, State Council and other Union committees and representative bodies do not carry the same weight of responsibility, authority and profile that the designated officers referred to in r 25 do.

91 In response to the issue raised on behalf of the intervener that there are many provisions within the rules of the Union that identify persons not included in r 25 as 'officers' and that r 23(a)(xv) uses the term 'the office of delegate to State Council', the applicants say that the term 'office of delegate to State Council' is used just once (in r 23(a)(xv)). The dominant term used in r 23(a) is 'delegate(s) to State Council' which is used seven times. In addition derivative terms such as 'State Council delegate' and 'district delegate to State Council' are also used in r 23(a). These are the terms which are consistently used in r 23(a), rather than the aberration 'office of delegate to State Council' which appears in the final and most recently added, sub-rule of r 23(a).

92 The term 'office' occurs at various places in the rules of the Union. Rule 32 - Elections for Office refers to the various offices of the Union for which elections are conducted internally by the Union Returning Officer and that the offices in r 32(a)(i), are listed as being its Branches (r 21), District Council (r 22), State Council (r 23) and committees and bodies that are filled for a one-year term. The applicants contend these 'offices' should be contrasted with the term 'officers' defined in and covered by the provisions of r 25 and which are elected positions for terms of between two and four years for which elections are conducted externally by the Electoral Commission Western Australia.

93 The applicants agree with the intervener's submission that through r 23(a)(i), that State Council is 'the governing body of the Union'. They also agree that State Council pursuant to r 23(a)(iii), consists of two categories of members, they are those that make up the Union Executive Committee and the General Secretary referred to in r 25 and delegates elected from each district referred to in r 23. Whilst employees are expressly prohibited from holding elected officer positions designated in r 25 whilst maintaining their employment, the applicants say there is no such express or implied prohibition in r 23 or in any other rule.

94 The applicants submit that the meaning of r 25 and the past practice of:

(a) allowing employees to carry out the duties and functions as delegates to State Council;

(b) only requiring employees to resign when elected to an Executive position or the position of General Secretary; and

(c) requiring a person who is an Executive officer to resign from office when taking up a position as an employee;

is consistent with the 'doctrine of incompatible offices' referred to by the intervener and considered in *Egan v Maher (No 2)*; *Mellor v Horn* and *Beitseen v Johnson* (1989) 29 IR 336, 336 - 338.

95 The applicants submit the doctrine of incompatible offices was addressed under r 19 in 1994 (currently r 25). That is, there is a conflict of interest between duties as an employee and duties as an Executive member. Rule 19 (currently r 25) is explicit about incompatible offices. The incompatible offices are President, Senior Vice-President, Vice-President, Ordinary Executive members, including an Aboriginal or Torres Strait Islander representative, General Secretary and employees of the Union who are eligible to be members. Should any member holding one of these 'offices' be elected or appointed to another of these 'offices', that member is required to vacate the first by resignation. That is the scope of r 25 and it is the result of careful and deliberate amendments to the rules overwhelmingly supported by Union members.

96 The applicants say that when the history of amendments made to the rules since 1994 is examined there is no mention in any of the proposed and actual rule changes or reasons for amendment that the position of elected delegate to State Council is incompatible with the position of an appointed employee. The applicants also make a submission without objection, that like all delegates to State Council, employee delegates to State Council attend State Council outside normal work hours and conduct their duties as delegates as unpaid volunteers. They also contend that like all delegates to State Council, employee delegates to State Council perform duties which are not incompatible with their paid work. Consequently, they say that the scope of r 25 does not extend to, nor include State Council delegates.

97 In relation to the submission made on behalf of the intervener that the application is of historical interest only and has no currency at the present time the applicants say that submission has been overtaken by the fact that Mr Mullen has recently nominated for election as a delegate to State Council in 2010 prior to the close of nominations on 26 February 2010. The applicants say that given that this matter raises a current controversy the Commission is required to make a determination on the true interpretation of relevant rules in this matter.

98 The applicants point out that the intervener's submissions make no objection to an employee nominating for an office within the Union, including Branch positions, delegates to District Council, delegates to State Council and membership of Union committees and other representative bodies, on the basis that the employee is required to resign his or her employment upon being elected. Such a requirement, the applicants submit, would be patently absurd and would be a breach of s 6(f) of the Act which has as one of its objects to encourage the democratic control of registered unions and the full participation by members of such a union in the affairs of a union.

99 The applicants say that the net effect of the intervener's position is that an employee who did nominate and became elected to a Branch position, or delegate to District Council, or delegate to State Council, or member of a Union committee and other representative body would have to resign his or her employment with the Union. In the event the employee was to resign, he or she would, on the face of it, no longer be eligible for membership of the Union, and would, therefore, not be eligible to take up the elected position. This proposition, the applicants say is patently not supported by the rules of the Union, save and except for the express requirement that an employee cannot be elected as an officer on the Union's management committee, (the Executive), or to the officer position of General Secretary and maintain his or her employment at the same time, and vice versa, under the provisions of r 25(f) and r 25(g).

100 APPL 409 of 1994 was an application by the Union to register changes to a large number of rules of the Union which were considered and endorsed by the SSTUWA Conference in 1993. The rule changes brought about major changes to the Union's democratic and decision making processes and structures; the most significant of which was the replacement of the annual conference by the bi-annual State Council.

101 In a document attached to APPL 409 of 1994 and titled 'The 95th Annual Conference Decisions' published in *The WA Teachers' Journal* in December 1993 the amendments to the rules were explained.

(a) Under the title 'WHY THE CHANGE?' at page 222:

> Delegates to Conference will appreciate that over the years Conference has increasingly been unable to complete its business. In 1991, for instance, Conference failed to address more than half the business on its agenda. What is more unfortunate is that most of the items not considered were branch initiated.

Clearly this does little for engendering interest at rank and file level.

There are a number of reasons why this might be the case. Not the least of these is the unwieldy size of Conference. Conference generally has about 400 delegates in attendance out of a potential 700. It meets only once a year which also makes it impossible to be as responsive from a policy position as the Union should be.

It means, in fact, that members have very little say in what actually occurs in our Union and how it should be run.

As a result, last year's Conference resolved that 1992 should see a trial of a Council structure, once in Term 2 and once in Term 3.

The Council structure to be trialled is different to previous trials. Its clear intent is to democratise the Union in both its structure and processes. If successful it will make the Union more responsive, more pro-active and, above all, more accessible to the members.

(b) Under the title 'TRIAL STRUCTURE' the Council structure is described at page 222:

State Council will meet twice a year, rather than the current only once a year for Conference. It will also be smaller than Conference, comprising about 150 delegates.

Delegates will be district delegates. Anyone can nominate to be a delegate from their district.

(c) Under the title 'COUNCIL STRUCTURE' on page 221:

Following on from the Council Structure report to the 1992 Conference (attached as Background Paper 1), work continued on the further development and trialling of the proposed structure. This included direct membership input to formulation of the Council Structure as articulated in the proposed new Rules 17, 18 and 19, the input being provided at both District and State Council levels.

(d) Under the title 'STATE COUNCIL' on page 224:

5.1 That State Council consist of the Executive and elected Delegates from each district.

5.2 The Delegates to State Council be elected by and from the members in the District to which the Delegate's Branch is aligned.

102 The applicants submit that the development of the State Council structure was supported by members of the Union in the interest of facilitating and promoting the democratic processes of the Union and to provide a forum where all members were entitled to have a voice through their respective districts and branches. A number of related rule changes were endorsed to enable the intent to be reflected in practice.

103 Two rule changes endorsed with the requisite two-thirds majority and a quorum present at the 1993 Conference were also published in *The WA Teachers' Journal* in December 1993 and were in respect to r 19 titled 'Officers'. Rule 19 is now r 25. At page 127 of the document titled 'The 95th Annual Conference Decisions' it was stated:

PROPOSED AMENDMENT:

That Rule 19 – OFFICERS – be amended by the addition of a new paragraph (h) as follows:

(h) Notwithstanding the provisions of any other rule, the persons eligible to nominate for the position of General Secretary shall be:

(i) all financial Members, and/or

(ii) any employee of the SSTUWA, and /or

(iii) for the purposes of the first such election only, the person holding the appointed position of the General Secretary immediately prior to that election.

REASON OR [sic] AMENDMENT:

Paragraph (h) permits all financial members and employees of the SSTUWA to stand for election for the position of General Secretary and also gives the incumbent General Secretary the right to stand for election for that position.

This amendment will assist in providing the best possible field of candidates for the position of General Secretary.

104 The applicants point out that the effect of this amendment was to make the previously appointed General Secretary's position an elected position, with the first election being held in 1994 and the elected officer commencing his four-year term of office at the beginning of 1995.

105 The second change sought to r 19 was to add two new paragraphs (h) and (i) as follows:

(h) Any employee of the SSTUWA who is elected to an office of the Union shall resign their employment with the Union by no later than the day that that person commences his or her term of office.

(i) Any elected Officer of the SSTUWA who is appointed as an employee of the Union shall cease to hold their position of Office on and from the day that that person commences employment with the Union.

106 Under the heading 'REASON FOR AMENDMENT', at page 127-128 of the document titled 'The 95th Annual Conference Decisions' it was stated:

Executive wishes to ensure that any appointed employee who nominates for Executive office and (vice-versa) does not face a conflict of interest between their duties as an employee and their duties as an Executive member.

107 The applicants submit the intention of members of the Union in supporting the amendment to r 19 by adding paragraphs (h) and (i) was clear, namely that the Union was anxious to ensure that any conflict of interest that would likely result from employees being officers of the Executive at the same time would not be able to arise by virtue of employees not being permitted to be Executive officers and Executive officers not being permitted to be Union employees. They contend that this is consistent with the discussion by Full Benches of the Commission in respect to applications made by the Union in *the 1993 Rule Change Case* and in *the 1994 Rule Change Case* which in each matter the Union sought to amend the rules of the Union to enable Union employees to be Full Members of the Union.

108 In June 1996 the Union in *The WA Teachers' Journal* published a document titled 'CONSTITUTIONAL AMENDMENTS PASSED AT JUNE 1996 STATE COUNCIL' which stated as follows:

> SC.15 Rule 4 – Membership
>
> PROPOSED AMENDMENT:
>
> That Rule 4 – MEMBERSHIP – be amended by the deletion of paragraph (g) and the insertion of a new paragraph (a)(vi) as follows:
>
> (a) (vi) Any employee of the SSTUWA (inc.) provided that such persons are not eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employee, W.A., Clerical and Administrative Branch.
>
> REASONS FOR AMENDMENT:
>
> This amendment permits employees of the SSTUWA (inc.), other than those eligible to be members of the other Union identified, to become full members.
>
> The provision of full membership rights to employees of the SSTUWA (inc.) is believed to be a desirable Union objective. It will permit the full participation of those employees in the affairs of the Union, thereby eliminating the current restrictions that apply.

109 The Full Bench in *the 1998 Rule Change Case* removed any potential conflict of interest by inserting provisions in the rules of the Union similar to those in the rules of The Civil Service Association of Western Australia Incorporated which made it impossible for employees of the Union to be Executive officers and vice versa. The applicants also contend that the inclusion of parts (h) and (i) above in r 19 (subsequently re-numbered r 25(f) and r 25(g)) were sufficient for the majority in the Full Bench decision in *the 1998 Rule Change Case* to be satisfied that any potential conflict of interest had been successfully addressed and to approve the amendment to the rules of the Union to permit industrial employees to be eligible to be Full Members of the Union.

110 The applicants say that the intention of the changes to the rules approved by the majority of the Full Bench in 1998 was (with the exception of the restrictions set out in r 25(f) and r 25(g) which prevented employees from holding Executive office), to enable the full and equal participation of employees in the affairs of the Union. That as Full Members, employees of the Union were entitled to all rights, privileges and benefits of membership of the Union (r 5(a)).

111 The applicants in their written submission filed on 25 February 2010 also sought to provide a document signed by the General Secretary of the Union and dated 15 February 2010. The document sets out allegations in relation to an act of suspected misconduct by Mr Mullen. Having reviewed the document I am of the opinion that the matters stated therein are not relevant to this application before the Commission.

The Intervener's Further Submissions

112 The intervener filed its submissions in respect of the significance of the contents of the application made by the Union in APPL 409 of 1994 on 10 March 2009. This was the application that resulted in the insertion of parts (h) and (i) of the rule that was subsequently renumbered as r 25(f) and r 25(g).

113 The intervener accepts that extrinsic material may assist in relation to the interpretation of rules of an organisation where necessary to remove ambiguities. However, they say the authorities emphasise that great care must be taken in relation to the use of extrinsic material and that the weight which can properly be attached to it depends on its nature: *Electrical Trades Union of Australia v Waterside Workers' Federation of Australia [No 2]* (1982) 59 FLR 78 (83). The views of persons drafting an application as to the intentions of members, or the reasons why such changes were advanced are not in the same category as considered decisions of industrial tribunals as to the meaning of rules: *Electrical Trades Union of Australia* (83). The intervener contends evidence as to what the drafters of the application considered to be 'the intention of the members' in advancing an amendment to the rules, or what was published in the Union journal, are not probative and certainly not a substitute for the text of the rule considered in the context of the rules as a whole. If any significance at all is to be placed on the nature and text of APPL 409 of 1994, it is submitted that what is significant is that the relevant sub-rules were inserted as part of a complex of rules which saw the insertion of a State Council structure on a trial basis for the first time.

114 The intervener submits that the materials in question provide absolutely no basis for drawing a distinction, for the purposes of r 25(f), between members of the State Council who make up the Union Executive Committee (together with the General Secretary) and other members of State Council who are elected as delegates pursuant to r 23. All of these persons, regardless of whether they are on State Council by virtue of r 23 or r 25, are members of 'the governing body of the Union' and the supreme decision-making body of the Union.

115 They also contend that the text of the application provides absolutely no basis for a departure from an interpretation of the rules based on their text - a text which must accommodate the reference to officers in r 25(f) and the acknowledgment that a delegate to State Council is an officer as stipulated in r 23(a)(xv).

116 In response to the applicants' advice that Mr Mullen has nominated for the State Council in 2010 and that he has no intention of resigning his employment in order to participate as a delegate, the intervener says it does not resile from its submissions that in reliance on *Stacey*, s 66 is not a vehicle for adjudicating on matters which are only of historical significance within a union. The intervener also submits that, even if the applicants' new assertion as to Mr Mullen's nomination and intentions is taken into account to substantiate the proposition that the interpretation of r 25(f) is of more than historical interest, it provides absolutely no foundation for the claim for relief in respect of the rescission of decisions taken in respect of office holding that has been overtaken by subsequent elections.

Conclusion and Findings

(a) Structure of the SSTUWA

117 Pursuant to r 23 – State Council of the rules of the Union, the supreme governing body of the Union is the State Council (r 23(a)(i)). Under r 23(a)(ii) subject to any referendum of members, State Council is the supreme decision-making authority of the Union and policy directives issued by State Council are required to be adhered to by all members. State Council consists of the President, Senior Vice President, Vice President, ordinary Executive Members, General Secretary and delegates elected from each District, in accordance with the provisions of r 23 and r 32 – Elections for Office (r 23(a)(iii)). State Council is required to meet at least twice per year as determined by the Executive (r 23(a)(xiv)). The powers of State Council are set out under r 23(b) which provides as follows:

> State Council shall have power to control and manage the business and affairs of the Union subject always to these Rules and without limiting the generality of this power shall have power to:
>
> (i) Subject to the requirements of these rules, make, amend or rescind these rules.
>
> (ii) Determine entrance fees and subscriptions for members and persons eligible to be members of the Union and impose levies on such members.
>
> (iii) Appoint or remove a qualified auditor, for any purpose for which an audit is required in connection with the accounts of the Union.
>
> (iv) Dismiss from office any person elected to an office within the Union who has been found guilty in accordance with the Rules of the Union of misappropriation of the funds of the Union, a substantial breach of the Rules of the Union, serious and wilful misconduct or gross neglect of duty in relation to his/her office or who has ceased according to the rules of the Union to be eligible to hold the office.
>
> (v) Refer any question to a referendum of members of the Union. The decision of a referendum is binding on State Council.
>
> (vi) Do all things necessary or convenient to the exercise of the foregoing power or any powers conferred by the rules of the Union.

118 Between meetings of State Council, the Executive exercises all powers of the State Council subject to a number of conditions. This was provided for in r 24 – Powers of Executive. Rule 24(a), r 24(b) and r 24(d) provides as follows (now r 24(a) and r 24(b):

> (a) Subject to sub-rule (b) of this Rule the Executive shall control the affairs of the Union in accordance with this Constitution.
>
> (b) (i) Executive shall abide by and conform to all decisions and directions of State Council.
>
> (ii) That should any circumstances arise in the post-State Council period which, in the opinion of Executive, may have resulted in a State Council Decision other than that arrived at, a Referendum of the full Union membership must be held before the original State Council Decision can be varied.
>
> …
>
> (d) Between meetings of the State Council, the management of the Union shall be vested in the Executive which shall have all the powers necessary to administer the Union including the authority to transfer funds from one Union account to another. No power to impose a levy, or determine entrance fees and subscriptions [excepting as provided in Rule 7(iv)], or expressly reserved for itself by State Council, shall be exercised by the Executive.

119 Under r 25 – Officers, the Executive is composed of the President of the Union, Senior Vice-President, Vice-President, and another number of additional members to be known as Ordinary members, as determined from time to time by State Council (r 25(a)(i)).

120 As set out in r 23, State Council is composed of a number of delegates from each District. Pursuant to r 22 – Districts/District Council, the State is divided into Districts as determined by State Council. Each District also comprises a number of Branches (r 22(a)).

121 At a level below Districts are Branches. Pursuant to r 21 – Branches, members of each worksite constitutes a Branch (r 21(a)). Each Branch has a committee.

122 Rule 4 – Membership, provides for the categories of persons who are eligible to be members of Union. Pursuant to r 4(a)(vii) employees of the Union are entitled to be members provided that they are not eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A., Clerical and Administrative Branch. There are other categories of members under r 4 which are Honorary Life Members, Honorary Members, Special Category Membership, Retired Teachers Members and Associate Members. The entitlement of each of the categories of members is provided for in r 5 – Entitlements. Rule 5(a) provides in respect of Full Members that they are entitled to all rights, privileges and benefits of

membership of the Union. It is notable that r 5 expressly provides that Honorary Life Members are also entitled to all rights, privileges and benefits available to Full Members except that they shall not stand for office. Honorary Members are also entitled to the same rights and privileges as Full Members except they are not entitled to be represented at State Council or to hold Union office or to vote in elections for Union office. Special Category Members also have the same rights and privileges as Full Members except that they are not entitled to form a Branch, hold Union office, or vote at elections for a Union office. Retired Teacher Members are not eligible to stand for election to any office of the Union or to vote at such an election but shall be entitled to all other rights, privileges and benefits of membership except as otherwise provided by the rules and provided that the use of the facilities at Union headquarters shall be by decision of the Executive. In relation to Associate Members, they are not entitled to be represented at conference, nor be eligible to stand for election to an office of the Union, nor to vote at such elections, nor receive industrial assistance but shall be entitled to use the facilities at Union headquarters and have other social benefits as decided by Executive from time to time.

123 Pursuant to r 27 – Duties of President, Senior Vice-President and Vice-President, the President and Senior Vice-President are full-time paid officers of the Union.

124 It is also notable that pursuant to r 32 – Elections for Office, nominations for all offices of the Union, its Branches, delegates to District Council and State Council are required to be in writing, signed by the nominee and endorsed by two financial members proposing and seconding the nomination (r 32(a)(i)). Rule 32 also deals with the election of offices in the Branches and District Council.

(b) Is the application moot?

125 The extent of its jurisdiction and powers of the President under s 66 of the Act was reviewed and considered at length by Ritter AP in *Stacey*. In *Stacey* his Honour had regard to two cases which considered the question whether s 66 can be used to secure performance of making orders for the purpose of remedying past breaches of rules. The first was *WALEDFCU v Schmid* (1996) 76 WAIG 639. In that matter an order had been made pursuant to s 66 that the union through its general committee order the trustees to institute legal proceedings to recover sums paid by the respondent to a number of officers of the union in previous years. It was submitted in an appeal to the Industrial Appeal Court against that decision that the order was beyond the power of the President when exercising jurisdiction under s 66 of the Act as the power to compel observance of rules could only be exercised to secure performance of existing obligations under the rules of a union and did not extend to the making of orders for the purpose of remedying past breaches of the rules. The Industrial Appeal Court found that the relevant rule of the organisation did impose a continuing obligation upon the general committee of the union generally to protect its property and funds from misappropriation and specifically to direct the general trustees to take legal proceedings against any officer or member of the union guilty of misappropriating any of its funds. Consequently the order was within power conferred by the President by s 66(2) of the Act. The second case was a decision of Sharkey P in *Luby v Secretary, The Australian Nursing Federation, Industrial Union of Workers, Perth* (2002) 82 WAIG 2124. In that matter Sharkey P expressed an opinion that orders can be made relating to past non-observance of a rule where the purpose is to secure the performance of an existing obligation. In *Stacey*, Ritter AP had regard to these decisions and concluded 'that the purpose of s 66 is not to correct long ago breaches which now have no relevance to how an organisation is running' [274].

126 In *Stacey* [279] Ritter AP also set out the relevant principles that can be distilled from the authorities in respect of the nature of the jurisdiction and the type of orders that can be made under s 62(2) of the Act:

(a) An order for the purposes of the section must involve a command to someone to do something. (*CMEWUA v UFTIU* (1991) 71 WAIG 563)

(b) Section 66(2)(d) empowers the President to interpret a rule for the purpose of deciding whether to make an order or direction (*UFTIU* at page 569*)*. Further or alternatively in the case of controversy an interested party may seek a declaration about the true interpretation of a rule. (*Robertson re CSA* (2003) 83 WAIG 3938; [2003] WASCA 284 at paragraph [54])

(c) The President may exercise jurisdiction under s66 where there has been an improper exercise of powers, contrary to the rules. (*Carter v Drake (*1991) 72 WAIG 2501 at 2504)

(d) Sections 66(2)(e) and (f) contain the only powers which the President may exercise under s66 in connection with election irregularities. (*Harken v Dornan and Others* (1992) 72 WAIG 1727)

(e) Declarations about the validity of meetings by an organisation are outside the power of the President under s66 unless as a matter of law the meetings were invalid. (*Carter v Drake* (1993) 73 WAIG 3308 at 3311, and see below). Therefore the President may declare invalid resolutions passed at meetings where the meetings were conducted in breach of the rules and the breach had the legal effect of invalidity. (*WALEDFCU v Schmid* (1996) 76 WAIG 3380 at 3382)

(f) An order for the purpose of requiring an organisation to act in accordance with its rules is within power. (*WALEDFCU v Schmid* (1996) 76 WAIG 639)

(g) If the grounds have been established for the making of an order under s66, the President does not have a discretion to refuse to make such an order. (*Robertson*)

(h) The purpose of the power given in s66(2) is to ensure that the persons identified in s66(1) have a means of enforcing the rules of an organisation. (*Robertson*)

(i) Due to s26(2) the President in considering what order to make under a s66 application is not restricted to the specific claim made. (*Robertson*)

127 When regard is had to these principles, even if a finding is made that the applicants were eligible to hold office as district delegates to State Council in 2007, it is clear that it is not open under s 66 to make the orders in the form sought by the applicants as the breaches of the rules of the Union relate to events which have long passed and the terms of office have long expired. However, the President in considering what order to make under a s 66 application is not restricted to the specific claim made. As Mr Mullen has sought nomination to be elected as a delegate to State Council in 2010, I do not agree the subject matter of the application is moot as there is presently a live controversy as to whether Mr Mullen can hold office as a delegate to State Council whilst he is employed by the Union. Consequently it is open in this matter to make a declaration of a true interpretation of the rules of the Union, in particular whether r 25(f) applies to an employee of the Union who is elected to the position of delegate to State Council.

(c) Interpretation of Rules

128 It is established at law that the rules of an organisation should not be interpreted strictly and literally but broadly. In *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Minister for Health* (1981) 61 WAIG 616, Brinsden J said:

> The rules of a registered union of workers can only be changed in the manner prescribed by the statute, and the rules as registered from time to time are final and the only expression of them. That seems to me to be the only point in the case. It says nothing about the necessity to interpret the rules of a union strictly and literally but simply makes the point that the rules alone are to be looked at and not any collateral undertaking. Subsequent conduct of the parties may only be considered if such rules are in truth ambiguous and then only to resolve the ambiguity.
>
> Generally speaking the correct approach to the interpretation of a union rule is to interpret it in the same manner as any otherr [sic] document. It must be remembered however that union rules are not necessarily drafted by skilled draftsmen. It is therefore necessary I think in construing a union rule not to place too literal adherence to the strict technical meaning of words but to view the matter broadly in an endeavour to give it a meaning consistent with the intention of the draftsman of the rule. This approach has been endorsed in relation to awards: see Geo A. Bond & Co. Ltd. (In Liq.) v. McKenzie (1929) A.R. 499 at 503-4 referred to in Federal Industrial Law by Mills and Sorrell 5th Ed at p.522. I also said much the same thing in the unreported decision of Bradley v. The Homes of Peace 1005/1978, judgment delivered 21st December, 1978 at p.13-14 (618).

129 Whilst Brinsden J made these observations in 1981, the approach to the interpretation of rules of registered organisations has remained unchanged. In *Stacey*, Ritter AP observed [92] – [93]:

> A similar approach has been adopted by the High Court in the construction of union eligibility rules. In *Re Anti-Cancer Council of Victoria; Ex Parte State Public Services Federation* (1992) 175 CLR 442 at 448, Mason CJ, Brennan and Gaudron JJ said it '*is well settled that union eligibility rules are to be interpreted liberally and according to their ordinary and popular meaning*'. Their Honours cited a number of decisions in support of this proposition including *The Queen v Isaac*; *Ex Parte Transport Workers' Union* (1985) 159 CLR 323 decision, where Wilson J at 340 said:-
>
> > '*In construing the eligibility clause in the constitution of an organization, it is necessary to bear in mind the nature of the instrument in which the words appear and the purposes that it is intended to serve. The rule now in question bears ample indication on its face that it has been prepared without the assistance of a skilled draftsman. It has been amended from time to time, probably in response to the exigencies attending the industrial affairs of the union and without regard to the effect of the amendment on the internal consistency of the clause as a whole. It follows that the words of the rule should be given a wide meaning and interpreted according to their ordinary or popular denotation rather than by reference to some narrow or formal construction: Reg. v Cohen; Ex parte Motor Accidents Insurance Board ; Reg. v McKenzie; Ex parte Actors and Announcers Equity. Nevertheless, notwithstanding this generosity of approach, the meaning of the words remains a legal question to be determined by the application of the ordinary rules which govern the construction of written documents: Reg. v Aird; Ex parte Australian Workers' Union; McKenzie.*' (Footnotes omitted)
>
> French J in *Re Election for Office in Transport Workers' Union of Australia, Western Australian Branch* (1992) 40 IR 245 at 253 said that the "*preferred approach to the construction of union rules which requires them to be construed not technically or narrowly but broadly and liberally and not "subjected to the same meticulous scrutiny as a deed carefully prepared by lawyers.*"". His Honour cited *R v Holmes*; *Ex Parte Public Service Association (NSW)* (1977) 140 CLR 63 per Gibbs J at 73 and *Re An Election in the Australian Collieries Staff Association (NSW Branch)* (1990) 26 FCR 499 per Lockhart J at 502. The reasons of French J were cited with approval by Mansfield J in *Thomas v Hanson* [2001] FCA 539 at [20]. Authorities cited by the applicant set out a similar method of approach. (*Delron Cleaning Pty Ltd T/A Delron Hospitality Management* (2004) 84 WAIG 2527 at [40] and *FMWU v GW Smith and KJ Rose* (1988) 68 WAIG 1010.

130 In construing the rules of a union a Court or Tribunal may have regard to prior amendments to the rules. In *Community and Public Sector Union v EDS Australia* (2003) 129 IR 7 it was accepted that the words of an eligibility clause should be given a wide meaning, being interpreted to the ordinary and popular denotation and for regard being had to the history of amendments to a rules [62]; [74] (see the discussion in *Electrical Trades Union of Australia* (Bowen CJ, Evatt and Deane JJ) (82 - 83)). Notwithstanding that it is permissible to have regard to any relevant history of amendments to the rules of an organisation and to the fact that the rules are usually drawn by union officials who are not trained in the drafting of legal instruments, the question of the meaning of the terms used in a rule remains a legal question (*R v Aird; ex parte Australian Workers' Union* (1973) 129 CLR 654, 659 (Barwick CJ).

(d) The Scope of Rule 25(f)

131 A submission is made by the applicants that if during 2007 they had resigned their employment they would not be entitled to retain membership of the Union and thus retain their positions as delegates. If the position of delegate to State Council can be regarded as an 'office' within the meaning of r 4(a)(vi) then their contention is not correct. Once elected to a position as a delegate to State Council each would be regarded as a 'person elected to an office in the State School Teachers' Union of Western Australia' within the meaning of that phrase in r 4(a)(v) and as such would retain their rights as a Full Member of the Union pursuant to r 4(a)(v) and r 5(a) of the rules of the Union. It is clear that the proviso to r 4(a) would not apply to employees of the Union or to persons holding 'office' in the Union as it is apparent from the terms of the proviso that it is intended to apply to persons who are registered for work with the Department of Education and Training or any other institution referred to in r 4(a)(i). In addition, if the proviso was to be construed to apply to r 4(a)(vi) it would mean that only employees of the Union who are registered with the Union for work are eligible to be members which would have the effect that members of the Executive would not be eligible to be members of the Union.

132 The central question in this application is quite simple and it is whether the requirement in r 25(f) that a person who is an employee of the Union who is elected to an office of the Union is required to resign their employment with the Union before commencing the term of office applies only to the Executive and the General Secretary of the Union or whether it extends to other persons who are elected to an office of the Union. In determining this issue the first and perhaps most important or determinative issue that must be considered is the meaning of the word 'office of the Union'. The parties agree that the definition of 'office' in s 7 of the Act should not be applied to ascertaining the meaning of the term 'office' in r 25(f) of the rules. It is clear to me that proposition is correct. Under s 7 of the Act offices of an organisation covered by the definition of 'office' in s 7 of the Act are subject to specific statutory duties which are imposed on industrial organisations under Division 4 of Part 2 of the Act. For example, elections must be conducted in accordance with the provisions of the Act only in relation to an 'office' as defined in s 7 of the Act. In my opinion the decision of Sharkey P in *Dornan* is distinguishable as the issue considered in 1992 in that matter was whether the General Secretary of the Union was eligible to be a member of the Union, which turned on whether he was elected or appointed to an office in the Union. In making the finding the General Secretary was not the holder of an 'office' within the meaning of the rules and s 7 of the Act of the Union Sharkey P had regard to the fact that at that time the position of General Secretary was not a position filled by election.

133 It is apparent when regard is had to the rules of the Union in their entirety that many 'offices' are created in the rules beyond the 'offices' and 'officers' that form part of the committee of management of the Union (the Executive). It is only 'offices' that form part of a committee of management of an organisation that are regulated by the Division 4 of Part 2 of the Act.

134 Rule 23(a) establishes the constitution of State Council. The applicants' contention that a State Council delegate is referred to holding an 'office' only once in r 23(a) is not correct. In fact the reference to holding 'office' occurs in two sub-rules. Rule 23(a)(iii) refers to delegates holding office until successors are re-elected. Rule 23(a)(xv) also has a similar requirement in relation to a casual vacancy. Whilst a State Council delegate is referred to as the holder of an 'office' twice in these clauses, I do not consider this to be material. However, it is material that r 23(a)(iii) requires that delegates to State Council be elected in accordance with the provisions of r 23 and r 32 – Elections for Office. Whilst it could be said that under r 32(a)(i) that there is a distinction between 'offices of the Union' and 'delegates to District Council and State Council and other committees or bodies as require elections', it is plain that pursuant to r 32 the nomination for election to the position of a delegate to State Council is regarded as an election to an office within the meaning of an election to an office within r 32. For example, r 32(a)(ii) provides:

> (ii) Subject to Rule 21 - Branches, Rule 22 - Districts/District Council and Rule 23 - State Council all financial members of the Union shall be eligible to nominate for any Office to be filled by election.

135 Similar references to nominating for an 'office' in r 32(a)(iii), (iv) and (v) also apply to delegates to State Council. In addition the process to be adopted for the election of delegates to State Council, r 32(e)(iii) requires that the ballot paper is to list the title of the office for which an election is to be held and following each title shall list the names of candidates in sequence determined by lot by the Returning Officer.

136 There are also other references in the rules of the Union to rights and obligations in respect of an 'office' of the Union which clearly would cover the position of delegate to State Council. This includes r 5 and the entitlements of Honorary Life Members, Honorary Members, Special Category Members, Retired Teacher Members and Associate Members. In relation to each of those categories, none are entitled to stand for office or hold office. The wording in relation to each of those categories is not exactly the same. For example, Honorary Life Members are prohibited from standing for office, whereas Honorary Members are not entitled to be represented at State Council or to hold Union office or to vote in elections for Union office. Special Category Members are prohibited from holding Union office or voting at elections for a Union office. Retired Teacher Members are not eligible to stand for election to any office of the Union or to vote at such an election. Associate Members are not entitled to be represented at conference nor are they eligible to stand for election to an office of the Union or vote at such elections.

137 When the duties and powers of State Council under r 23 are analysed it is clear that duties of a delegate to State Council carries a substantial degree of responsibility. The duties and powers are not diluted by the fact that State Council only meets twice a year or by the fact that there are a large number of delegates to State Council. State Council is a body that is not only the supreme decision making authority of the Union but also has a specific power to make decisions and give directions to the Executive. Pursuant to r 24 – Powers of Executive the Executive is required under r 24(b)(i) to abide by and conform to all decisions and directions of the State Council. State Council under r 23(b) has the power to control and manage the business and affairs of the Union. In participating as a member of State Council a delegate as part of State Council, has the power to exercise collectively with other delegates and other members of State Council significant powers. In contrast, there are no

provisions of the rules of the Union that expressly use the term 'office' as referring only to a member of the Executive or to the General Secretary. From these provisions a strong inference can be drawn that a delegate to State Council can be described as the holder of an 'office'. In considering this issue it is also of assistance to have regard to the history of the making of r 25(f) and r 25(g) together with the making of r 4(a)(vi).

138 Prior to the making of r 19(h) and (i) (which is now r 25(f) and r 25(g)) in 1994 an alteration to the rules of the Union was endorsed at the Union's annual conference in 1991 to create a special category of membership for employees called 'Appointed Members'. Appointed Members included those who were employed by the Union but who were restricted from being able to attend conferences, to become delegates or from being allowed to stand for office. In *the 1993 Rule Change Case*, the Union sought to register an alteration to the rules to delete the Appointed Members clause which would have the effect of giving full membership rights to persons employed by the Union as a General Secretary, an advocate, an organiser, a research officer, a librarian or a women's officer. When this application was considered by the Full Bench r 19(h) and r 19(i) had not been registered. The Full Bench in *the 1993 Rule Change Case* refused the application to delete the Appointed Members clause. Commissioner Fielding observed that one of the reasons for refusing the application was that the proposed change gave rise to the potential for a conflict of interest. In particular he said:

> Rule 28 of the Applicant's Rules effectively gives the General Secretary responsibility, 'subject to the authority of Executive', to manage the day to day affairs of the Applicant, including the right to appoint and dismiss employees, other than those appointed by conference or elected by the membership. If, as seems possible, the General Secretary and certain other employees, some of whom by virtue of their job have a high profile in the Union, could theoretically form the majority of the Executive, there could well be difficulties in managing properly the affairs of the Applicant. As the Objector puts it, 'the independence of the Union's Executive will be potentially compromised by persons attempting to be both master and servant with resultant legal and operating difficulties' for the Applicant (1476).

139 In *the 1993 Rule Change Case* the Full Bench rejected the application because there were no safeguards to protect the Union from being controlled by the employees; that Full Member entitlement would extend only to a few selected employees; and there was potential for membership overlapping with other organisations. The following year the Union brought a second application to amend the rules in a similar, but not identical, vein. In *the 1994 Rule Change Case*, the Union sought to register a variation to the rules of the Union that would delete the Appointed Members clause and to exclude from membership those employees eligible for membership of the Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch. The application failed on procedural grounds as the Full Bench was not satisfied that the application was authorised in accordance with the rules of the Union.

140 On 12 August 1994, a Deputy Registrar of the Commission registered alterations to the rules pursuant to s 62 of the Act in APPL 409 of 1994. Among the alterations registered were the additions to the rules in r 19(h) and r 19(i) and the creation of State Council.

141 It is notable that at the time r 19(h) and r 19(i) were made employees of the Union could not stand for office as a member of the Executive or State Council because at that time Appointed Members were defined under r 4 of the rules as 'any employee of the SSTUWA appointed to a position as General Secretary, Industrial Advocate, Industrial Organiser, Librarian, Industrial Research Officer or Women's Officer'. Pursuant to r 5(g) – Entitlements, Appointed Members whilst entitled to all the rights, privileges and benefits of the membership of the Union had no right to attend State Council as a delegate or to stand for office. At that time no employees of the Union could stand for office as a member the Executive as the only employees of the Union who were able to be members of the Union were Appointed Members. When r 19(h) and r 19(i) came into effect in 1994, the only office for which an Appointed Member could nominate would have been the position of General Secretary because at that time r 26(e) expressly provided:

> Notwithstanding the provisions of any other rule, the persons eligible to nominate for the position of General Secretary shall be:
>
> (i) all financial Members, and/or
>
> (ii) any employee of the SSTUWA, and/or
>
> (iii) for the purposes of the first such election only, the person holding the appointed position of the General Secretary immediately prior to that election.

142 As set out in the applicants' submissions this sub-rule of r 26 was created by the registration of the amendments of the rules in APPL 409 of 1994. Importantly, this amendment was made at the same time as the alterations to the rule which brought into effect r 19(h) and r 19(i) (now r 25(f) and r 25(g)). It is of interest that the reason given for the creation of r 19(h) and r 19(i) was that the Executive wished to ensure that any employee who nominated for Executive office and vice versa could not face a conflict of interest between their duties as an employee and their duties as an Executive member. A General Secretary is not a member of the Executive and was not a member of an Executive at that time. Consequently, the reasons given to the annual conference in 1993 did not with respect make a great deal of sense because at that time r 5(g) prohibited employees of the Union who were members of the Union, to stand for office. Consequently, it could not be said that r 19(h) would operate in the way contemplated in the reasons given to the membership when those amendments were considered by the members of the Union. For this reason the stated reasons for the amendment to create r 19(h) and r 19(i) are not of assistance in this matter.

143 It is also notable that in *the 1994 Rule Change Case* the Full Bench had regard to the application before the Registrar in APPL 409 of 1994. At page 1731 of *the 1994 Rule Change Case* the Full Bench observed that an application had been made to the Registrar to vary r 19 which governs the rights and obligations of officers so as to stipulate that an officer of the Union cannot also be an employee of the Union. In respect of that proposed change to r 19, the Full Bench whilst it rejected the application to register the amendments to delete the category of Appointed Members, observed in relation to the proposed changes to r 19:

Although we continue to doubt the wisdom of members of a union being employees of that union, the Full Bench in *The Civil Service Association of Western Australia Incorporated v. Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch and Another* (1991) 71 WAIG 1780 sanctioned such an arrangement with safeguards of the kind now proposed and in the interests of consistency the Full Bench should not, without good reason, adopt a different course on this occasion. The proposed change to Rule 19 would, if made, effectively achieve the same safeguards, albeit it somewhat obtusely, as those found to be acceptable by the Full Bench in *The Civil Service Association of Western Australia Incorporated v. Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch and Another* (supra). Thus if and when the Registrar registered the alterations to Rule 19, the grounds of the objection based on employees holding office in the Union would lose its force (1732).

144 The decision given by the Full Bench in *The Civil Service Association of Western Australia Incorporated v Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch* (1991) 71 WAIG 1780 is not of assistance in this matter. When the reasons of the Full Bench are reviewed it appears the Full Bench did not deal with or consider whether employees could hold any office in the Civil Service Association of Western Australia Incorporated other than President, Senior Vice President, Junior Vice President, Honorary Treasurer or Executive Committee member. The objection made in that case and the issue of concern discussed in that matter was whether an employee could interfere in an election as an employee.

145 In *the 1998 Rule Change Case*, Sharkey P, who was in the minority, considered the history of the applications made by the Union to alter the rules to allow for employees of the Union to become Full Members. After considering the passage referred to by the Full Bench in *the 1994 Rule Change Case*, Sharkey P observed:

By virtue of rule 4(g), any employee of the applicant organisation who is appointed to a position as general secretary, industrial advocate, industrial organiser, librarian, industrial research officer or women's officer becomes an appointed member of the applicant organisation.

By virtue of rule 5(g), there is no limitation on the rights, privileges and benefits of that membership, except that they have no right to attend State Council as a delegate, and they have no right to stand for office.

Those rules are in conflict with rule 26(f) and (g). Under rule 26(f), an employee who is elected to an office of the "union" is required to resign his/her employment by no later than the day that that person commences his/her term of office. However, as rule 4(g) reads, an employee cannot stand for office. By virtue of rule 26(g), any elected officer of the "union" who is appointed as an employee ceases automatically to hold office on and from the day when he/she commences that employment. Again, the sub-rule has no effect currently because an employee cannot stand for office, let alone occupy office.

If rule 4 is authorised to be altered in terms of the application herein, then an employee will be able to hold office and will be able to be an officer if elected as a delegate and a member of State Council, the governing body of the applicant organisation, provided that he/she resigns if elected (see rule 26).

However, employees would also remain as appointed members with the restrictions placed on that membership until rule 4(g) and/or rule 5(g) are altered. That by itself is an unsatisfactory state of affairs causing uncertainty and ambiguity which militate against me finding for the applicant organisation.

I am persuaded that weight should be attached, as it was in Re an application by the CSA (op cit) (FB), and as it was expressed in Re an application by the SSTUWA 73 WAIG 1471 at 1475-1476 (FB), to the undesirability of employees as distinct from officers being made ineligible for membership. The misgivings expressed in those cases by the Full Bench arise from the facts similar to those in this case. I do not think that it contributes to the democratic control of the applicant organisation that employees should be able to find a path in their employment to office in the applicant organisation, nor that they should have any role but to serve the applicant organisation. There are undesirable potential conflicts for employees who might be eligible for and might be intent on seeking office. Having the employees as members of the State Council, which they are bound to serve, is illustrative of this. That this problem was recognised by the Full Bench in Re an application by the CSA (op cit) (FB) is significant. Nothing was said to distinguish that decision from this as a matter of principle, or to persuade me that it should not be applied.

Not all sets of rules to which I have referred or been referred provide for the organisation's employee membership is of interest. Indeed, some are more exclusive of the membership of employees than the current rules of the applicant organisation. That the applicant organisation has been pursuing this alteration consistently is relevant, but not significant in the light of the factors to which I refer. The number of employees involved presently does not detract from the obvious significance of organisers and advocates as employees in the scheme of things, and the potential influence which such employees can wield.

The current rules, unaltered, enable employees to enjoy the benefits of membership now. Employees are precluded from standing for office. However, there is nothing to prevent their resigning, becoming full members, and being elected to office. (That situation is a situation which I said might obtain) (see Re an application by the SSTUWA 73 WAIG 1471 at 1475 (FB)). The status quo is not unfavourable to employees. They have a right to vote in elections, for example.

I am not, having regard, as I do, to all of the evidence, all of the submissions and all of the authorities, and having regard to s.6(a), (c), (e) and (f) of the Act, including the welfare of the applicant organisation from the direct evidence and the inferences which I have drawn, persuaded by the applicant organisation that its case for alteration, by the insertion of the new rule 4(a)(vi), is made out.

I am satisfied that an appropriate form of membership for employees is that which is contained in the CSA's rules and which in another and similar form seems to be contained in the applicant organisation's rules. I would, for those reasons, dismiss the application (1127).

146 The essence of Sharkey P's reasons for decision seems to be that he was of the view that it was undesirable that employees of the Union have a career path which took them from being employees to being an officer of the Union. This was not an issue that Fielding SC was concerned with. Senior Commissioner Fielding took a different view in his reasons which formed the majority view of the Full Bench as Parks C agreed with the reasons given by Fielding SC. Senior Commissioner Fielding was concerned as to whether it was important that a person should not be both an employee and a member for management committee of the Union as a potential for conflict of interest in such circumstances was obvious. He was of the opinion that r 26(f) and r 26(g) of the rules made it plain that a conflict of interest that the Full Bench had been concerned with previously would not arise. Whilst Fielding SC made observations about r 26(f) and r 26(g) in respect of prohibition in respect of becoming a member of the Executive committee and vice versa, he did not consider the position of whether an employee would be prohibited from holding office as a delegate to State Council whilst being an employee. Senior Commissioner Fielding's reasons for decision were largely concerned with the desirability of whether employees of the Union should be able to join and become members of the Union who is their employer. For this reason I am of the view that the reasoning of Fielding SC in *the 1998 Rule Change Case* can be confined to a finding that r 25(f) only applies to employees of the Union who stand for and are elected to office as members of the Executive and did not consider the issue whether r 26(f) (now r 25(f)) requires an employee elected to the position of delegate to State Council to resign by no later than the day that person commences his or her term of office.

147 What, however, is the effect of the amendments made in *the 1998 Rule Change Case*? Is it open in any event to infer from the effect of the amendments made by the registration or the alterations of rules in *the 1998 Rule Change Case* that r 25(f) only applies to the Executive and to the General Secretary? After carefully considering the whole of the rules of the Union together with the history of amendments to r 25 and r 4, I have concluded that the answer to that question is no. I am not persuaded that the applicants' contention that r 25(f) should be construed as confined to the 'offices' of the Executive and the General Secretary. Whilst it is agreed that each holder of a position in the Executive and the General Secretary is the holder of an 'office' within the meaning of r 25(f) it is clear that r 25(f) is not restricted in application to these 'offices'. If it were otherwise r 25(f) could have been expressed to say so in the same way that the prohibition in r 25(b) is expressed only to apply to the member of the Executive. Rule 25 is not a rule that can be said in any sense to establish and deal with all of the rights and duties of the Executive and the General Secretary. Their powers and duties are contained in a number of rules outside of r 25.

148 When regard is had to the whole of the rules of the Union, I am satisfied that the position of delegate to State can be characterised at common law as an 'office'. The applicants' contention that State Council delegates do not carry the weight of responsibility, authority and profile that members of the Executive and the General Secretary do, may be correct in one sense, in that the Executive is a smaller body that meets more often than State Council. However, it does not follow that members of State Council do not have a substantial degree of responsibility. A State Council as a body is able to direct the members of the Executive and the members of the Executive are required by the rules to carry out those directions. Consequently a conflict of interest is likely to arise if an employee of the Union is able as part of a collective body to direct the management body of the Union. In such a capacity the employee delegate to State Council would be both employer as part of a collective body and employee.

149 The application of r 5(a) – Entitlements of Full Members does not assist the applicants' argument as the 'rights, privileges and benefits of membership' is subject to the conditions set out in the rules that attach to those rights, privileges and benefits. Rule 25(e) and r 25(f) applies to all Full Members and is a condition to a right of all Full Members to hold office, or to become an employee of the Union.

150 By deleting r 5(g) – Appointed Members in 1998, employees of the Union gained the right to stand for office but they did not obtain the right to attend State Council as a delegate whilst they remained an employee because of the operation of r 25(f).

151 It is also apparent the rules should not be read in the manner contended by the applicants as such a narrow construction would lead to an odd construction of r 23(b)(iv), if pursuant to r 23(b)(iv) State Council could only dismiss persons elected to office as a member of the Executive and the General Secretary and not delegates to State Council. To construe the rules to read the term 'office' as not applying to delegates to State Council would mean that State Council and the Executive acting through r 24(d) (now r 24(b)) could not dismiss a delegate to State Council where that delegate had been found guilty of misappropriation of the funds of the Union, or a substantial breach of the rules of the Union, or a serious and wilful misconduct or neglect of duty.

152 It is immaterial that employees of the Union had attended State Council as delegates without objection prior to 2007, as past practice cannot stand as a bar to the plain and ordinary meaning of a rule. There is no provision in the rules from which an inference can be drawn that the concept of 'office' in r 25(f) is to be read more narrowly than the concept of 'office' in r 32(a)(ii) as r 32(a)(ii) applies to the office of State delegate. There is nothing in this sub-rule or in r 25 or any other rule of the Union that expresses an intention that the meaning of the word 'office' in r 25(f) should be different to the meaning of the word 'office' in r 32(a)(ii).

153 In addition it is not material that this dispute was not referred to a Dispute Resolution Committee convened under r 12 of the rules of the Union as there is a specific power in r 23(b)(iv) and r 24(d) (now r 24(b)) to dismiss a person from office where that person is not eligible to hold office.

154 Sections 6(ab) and s 6(f) of the Act do not assist the applicants in their argument as s 6(ab) and s 6(f) can not be construed to entitle employees of an organisation to participate in decisions of decision-making bodies of an organisation without regard to the principles that apply to conflicts of interest.

155 Given that little if any evidence was given about the duties and functions of the positions that constitute various committees of the Union, it is not open in these proceedings to determine whether the holder of any of these positions on the various committees could be considered to be a holder of an 'office' within the meaning of the rules.

(e) Procedural Fairness

156 The minutes of the meeting of the Executive on 3 and 4 August 2007 record that the Executive received the report which set out a summary of advice about holding of an elected office by an employee. It is apparent from the minutes and from the evidence given in these proceedings that no decision was made at that meeting other than to receive the report as the interest of the applicants were not affected by the mere provision of the report.

157 In these circumstances, it is not until a decision maker proposes to act on the report that a duty to provide procedural fairness arises. The applicants were provided with a copy of the report prior to the Executive making a decision about the matters raised in the report. The applicants were also provided with an opportunity to provide a written submission to the Executive prior to the Executive making its decision which they took up and provided a written submission to the Secretary by letter dated 5 September 2007 (Exhibit 4, document TM14).

158 A duty to act fairly does not extend to any duty to allow the applicants to participate in any meeting of the Executive, only to allow the applicants to be heard. At common law a duty to be heard can be satisfied by an opportunity to provide a written submission. The SSTUWA Administrative Instruction 800.33 does not extend the duty to act fairly and be heard, as a right to be directly involved in a decision, to participating in the making of a decision by the Executive. In any event the SSTUWA Administrative Instruction 800.33 arguably did not apply to the decision made by the Executive, as the Instruction only applies to the organisation in its capacity as an employer. The decision in question was not a dismissal of an employee by an employer.

159 The applicants also take issue with the decision made by State Council to endorse the decision made by the Executive on grounds of a failure to accord procedural fairness. This argument with respect is also groundless as the decision made by the Executive to dismiss the applicants from office by its terms took effect on 14 September 2007. All that occurred at the November meeting of State Council in 2007 was that State Council received a report that the decision had been made. The fact that State Council passed a resolution to endorse the decision of the Executive had no effect in law as the Executive was expressly empowered by r 24(d) and r 23(b)(iv) of the rules of the Union to exercise the power of State Council to dismiss the applicants from office.

160 For these reasons I will make a declaration that the true interpretation of r 25(f) is that the word 'office' includes the office of delegate to State Council.

2010 WAIRC 00179

ALLEGED BREACH OF UNION RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY D MULLEN, CHRISTOPHER C SHARPE
	APPLICANTS
	AND
	ANNE GISBORNE, PRESIDENT OF THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA (INC)
	RESPONDENT
	AND
	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	INTERVENER
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	1 APRIL 2010 (CORRIGENDUM WEDNESDAY, 7 APRIL 2010)
FILE NO/S	PRES 9 OF 2009
CITATION NO.	2010 WAIRC 00179

CORRIGENDUM

1. In the second line of [148] of the Reasons for Decision of 1 April 2010 after the words "delegate to State " insert the word "Council ".

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

Dated: Thursday, 7 April 2010

2010 WAIRC 00182

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY D MULLEN, CHRISTOPHER C SHARPE
	APPLICANT
	-and-
	ANNE GISBORNE, PRESIDENT OF THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA (INC.)
	RESPONDENT
	-and-
	THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA (INC)
	INTERVENER
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	WEDNESDAY, 7 APRIL 2010
FILE NO/S	PRES 9 OF 2009
CITATION NO.	2010 WAIRC 00182

Result	Declaration and Order made
Appearances	
Applicants	In person
Respondent	Ms N McGuiness (as agent)
Intervener	Mr R C Kenzie QC and Mr S Millman (of counsel)

Declaration and Order

This matter having come on for hearing before me on Wednesday, 3 February 2010 and Thursday, 4 February 2010, and having heard the applicants in person, Ms N McGuiness (as agent), on behalf of the respondent and Mr R C Kenzie QC and Mr S Millman (of counsel), on behalf of the intervener, and reasons for decision having been delivered on Friday, 1 April 2010, pursuant to the powers conferred on the President by the *Industrial Relations Act 1979* hereby —

1. DECLARES that the true interpretation of r 25(f) of the rules of The State School Teachers' Union of W.A. (Incorporated) is that the word office in this sub-rule includes the office of delegate to State Council; and
2. ORDERS that the application is otherwise dismissed.

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

2010 WAIRC 00116

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR REVELI KEITH AFFLECK
	APPLICANT
	-and-
	AUSTRALIAN MANUFACTURING WORKERS UNION
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 16 MARCH 2010
FILE NO/S	PRES 2 OF 2010
CITATION NO.	2010 WAIRC 00116

Result	Order made
Appearances	
Applicant	In person
Respondent	Mr R F Humphreys (of counsel)

Order

This matter having come on for a directions hearing before me on Tuesday, 9 March 2010, and having heard the applicant and Mr R F Humphreys, of counsel, on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. Paragraphs 2, 3 and 4 of the Statement of Claim are withdrawn;
2. The applicant in paragraph 1 of the Statement of Claim seeks a declaration of the true interpretation of rule 2(4) of the rules of The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch as it relates to the applicant's claim in paragraph 1 of the Statement of Claim;
3. The respondent file and serve its response to the applicant's application by 4:00 pm on Tuesday, 23 March 2010 by post and by email;
4. The application be adjourned to a directions hearing at 111 St Georges Terrace, Perth in Court 3 (Level 18) on Thursday, 25 March 2010 at 9:30 o'clock in the forenoon.

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

2010 WAIRC 00168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR REVELI KEITH AFFLECK
	APPLICANT
	-and-
	AUSTRALIAN MANUFACTURING WORKERS UNION
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	WEDNESDAY, 31 MARCH 2010
FILE NO/S	PRES 2 OF 2010
CITATION NO.	2010 WAIRC 00168

Result	Order made
Appearances	
Applicant	In person
Respondent	Mr R F Humphreys (of counsel)

Order

This matter having come on for a directions hearing before me on Thursday, 25 March 2010, and having heard Mr R K Affleck on his own behalf as applicant, and Mr R F Humphreys, of counsel, on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. The applicant by 4:00 pm on Monday, 12 April 2010, to file and serve an outline of his facts and contentions relied on by him specifying but not limited to:
   (a) the business, trade, manufacture, undertaking, calling or service of any employer who has employed him in an occupation specified in r 2.4 of the rules of the respondent;
   (b) his usual occupation;
   (c) his history of employment in the printing industry; and
   (d) whether he holds any qualification in the printing industry.
2. The respondent by 4:00 pm on Monday, 19 April 2010, to file and serve its outline of facts and contentions relied upon by it in support of its contention that the applicant is not eligible for membership of the respondent.
3. The applicant by 4:00 pm on Monday, 12 April 2010, to provide a list of documents of all documents relevant to the issue of his eligibility for membership of the respondent, including but not limited to:

(a) his current contract of employment;

(b) his occupational history;

(c) evidence of the identity of his employer and his employer's business activities; and

(d) evidence of his trade qualifications.

4. The respondent by 4:00 pm on Monday, 19 April 2010, to provide a list of documents of all documents relevant to the issue of the applicant's eligibility for membership, including but not limited to:

(a) any applications for membership completed by the applicant;

(b) membership records relating to the applicant; and

(c) correspondence between the parties.

5. The matter be set down for hearing for a day on Thursday, 29 April 2010 at 9:30 am in Court 2 on the 18th Floor, 111 St Georges Terrace, Perth.

6. There be liberty to apply.

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

2010 WAIRC 00202

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	APPLICANT
	-and-
	THE DISABLED WORKERS' UNION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 13 APRIL 2010
FILE NO/S	PRES 1 OF 2009
CITATION NO.	2010 WAIRC 00202

Result	Order made
Appearances	
Applicant	Mr R Andretich (of counsel)
Respondent	Mr K Trainer, as agent

Order

This matter having come on for a directions hearing before me on 23 March 2010, and having heard Mr R Andretich (of counsel) on behalf of the applicant, and Mr Trainer, as agent on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

The application be adjourned to a directions hearing at 111 St Georges Terrace, Perth in Court 3 (Level 18) on Tuesday, 22 June 2010 at 9:30 o'clock in the forenoon.

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

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2010 WAIRC 00122

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 19 MARCH 2010
FILE NO	P 19 OF 2007
CITATION NO.	2010 WAIRC 00122

Result	Application Dismissed
Representation	
	Ms C Holmes, for Department of Commerce
	Ms J O'Keefe, for The Civil Service Association of Western Australia Incorporated

Order

HAVING heard Ms C Holmes on behalf of the Department of Commerce and Ms J O'Keefe on behalf of The Civil Service Association of Western Australia Incorporated, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00118

STOREMEN (GOVERNMENT) CONSOLIDATED AWARD 1979

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION
	APPLICANT
	-v-
	THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 16 MARCH 2010
FILE NO/S	APPL 822 OF 2005
CITATION NO.	2010 WAIRC 00118

Result	Discontinued

Order

WHEREAS this is an application to vary the *Storemen (Government) Consolidated Award 1979*; and

WHEREAS the Commission contacted the applicant on a number of occasions requesting advice as to its intentions in relation to this matter; and

WHEREAS on 28 October 2009 the applicant advised the Commission that it no longer wished to proceed with this application and would be discontinuing this application; and

WHEREAS on 15 December 2009 the applicant filed a Notice of Withdrawal or Discontinuance form 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.) J L HARRISON,
[L.S.] Commissioner.

2010 WAIRC 00123

PUBLIC SERVICE AWARD 1992

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 19 MARCH 2010
FILE NO	P 21 OF 2007
CITATION NO.	2010 WAIRC 00123

Result	Application Dismissed
Representation	
	Ms C Holmes, for Department of Commerce
	Ms J O'Keefe, for The Civil Service Association of Western Australia Incorporated

Order

HAVING heard Ms C Holmes on behalf of the Department of Commerce and Ms J O'Keefe on behalf of The Civil Service Association of Western Australia Incorporated, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00124

WA HEALTH - HSU AWARD 2006

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 19 MARCH 2010
FILE NO	P 22 OF 2007
CITATION NO.	2010 WAIRC 00124

Result	Application Dismissed
Representation	
	Ms C Holmes, for Department of Commerce
	Mr J Ross, for Department of Health
	Mr D Ellis, for the Health Services Union of Western Australia (Union of Workers)

Order

HAVING heard Ms C Holmes on behalf of the Department of Commerce; Mr J Ross on behalf of the Department of Health and Mr D Ellis on behalf of the Health Services Union of Western Australia (Union of Workers), the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

AGREEMENTS—Industrial—Retirement from—

2010 WAIRC 00157

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. P 13 of 2010

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Director General, Department of Culture and the Arts will cease to be a party to the Ministry for Culture & the Arts – Art Gallery of Western Australia Enterprise Bargaining Agreement 1996, No PSAAG 5 of 1997 on and from the 25th day of April 2010.

DATED THIS 29th DAY OF MARCH 2010.

(Sgd.) J SPURLING,
[L.S.] Registrar.

2010 WAIRC 00158

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. P 12 of 2010

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Director General, Department of Culture and the Arts will cease to be a party to the Ministry for Culture & the Arts – ArtsWA Division (Enterprise Bargaining) Agreement, No PSAAG 6 of 1997 on and from the 25th day of April 2010.

DATED THIS 29th DAY OF MARCH 2010.

(Sgd.) J SPURLING,
[L.S.] Registrar.

2010 WAIRC 00159

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. P 15 of 2010

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Director General, Department of Culture and the Arts will cease to be a party to the Ministry for Culture & the Arts, LISWA Service Division Enterprise Bargaining Agreement 1997, No PSGAG 6 of 1997 on and from the 25th day of April 2010.

DATED THIS 29th DAY OF MARCH 2010.

(Sgd.) J SPURLING,
[L.S.] Registrar.

2010 WAIRC 00160

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. P 11 of 2010

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Director General, Department of Culture and the Arts will cease to be a party to the Ministry for Culture & the Arts (Perth Theatre Trust) Enterprise Bargaining Agreement – 1997, No PSGAG 4 of 1997 on and from the 25th day of April 2010.

DATED THIS 29th DAY OF MARCH 2010.

(Sgd.) J SPURLING,
[L.S.] Registrar.

2010 WAIRC 00161

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. P 14 of 2010

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Director General, Department of Culture and the Arts will cease to be a party to the Ministry for Culture & the Arts – (Western Australian Museum Division) Enterprise Bargaining Agreement, No PSGAG 5 of 1997 on and from the

25th day of April 2010.

DATED THIS 29th DAY OF MARCH 2010.

(Sgd.) J SPURLING,
[L.S.] Registrar.

CANCELLATION OF—Awards/Agreements/Respondents—

2010 WAIRC 00200

S.47 CANCELLATION OF THE JENNY CRAIG EMPLOYEES AWARD, 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATOINS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
HEARD	MONDAY, 27 AUGUST 2007, WEDNESDAY, 5 DECEMBER 2007, FRIDAY, 16 OCTOBER 2009, WRITTEN SUBMISSIONS - TUESDAY, 16 FEBRUARY 2010
DELIVERED	MONDAY, 12 APRIL 2010
FILE NO.	APPL 50 OF 2007
CITATION NO.	2010 WAIRC 00200

CatchWords	Award - Award applies to single employer - Employer constitutional corporation - Effect of Fair Work Act 2009 on award - Whether there is an employee to whom the award applies - Award cancelled - Industrial Relations Act 1979 (WA) s 47(1); Fair Work Act 2009 (Cth) s 26(1), 26(2), 26(2)(), 27(1), 27(2)
Result	Award cancelled
Representation	Mr D Jones, Chamber of Commerce and Industry, WA, on behalf of the employer
	Ms J O'Keefe and later Mr J Nicholas and latrer Mr K Sneddon and later Ms S Holt, on behalf of the Liquor, Hospitality and Miscellaneous Union
	Mr D Robinson and later Mr D Ellis and later Ms S McGurk, on behalf of the Trades and Labor Council of WA

Reasons for Decision

Background

1 This is the unanimous decision of the Commission in Court Session. This is an application to cancel the Jenny Craig Employees' Award, 1995 ("the Award"). Although written final submissions were received on 16 February 2010, the application has a considerable history. It was made on the Commission's own motion on 17 May 2007 in response to a letter from the Chamber of Commerce and Industry WA ("CCIWA") on behalf of the employer Jenny Craig Weight Loss Centres Pty Ltd requesting that the Award be cancelled.

2 At the direction of the Chief Commissioner pursuant to s 47(3) of *Industrial Relations Act, 1979* (WA) ("the Act"), the Registrar made enquiries on the matters raised by the employer and reported to the Chief Commissioner. A Notice of intention to cancel the Award was published in the Western Australian Industrial Gazette on 27 June 2007. Notices of Objection were filed by the Trades and Labor Council of WA ("TLC") and the Liquor, Hospitality and Miscellaneous Union ("LHMU") on 27 July 2007. On 6 August 2007, the application was listed for hearing for 27 August 2007 and a Directions order was issued on 29 August 2007 setting dates for submissions and dates of hearing of 4 and 5 December 2007. Notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) were sent to the Attorneys General by CCIWA on 7 September 2007.

3 All submissions were received by 23 November 2007 but on 29 November 2007 CCIWA requested an adjournment of the December hearing dates and new hearing dates were set for 5 and 6 February 2008. On 4 January 2008, CCIWA requested an adjournment of these dates, and this was granted by an order issuing on 4 February 2008.

4 On 16 July 2009, CCIWA requested that the Commission continue its investigation to have the Award cancelled. The request was heard on 16 October 2009 and concluded on the basis that CCIWA would file written submissions which were received on 16 February 2010. The LHMU was given the opportunity to comment on the submissions but advised that it did not wish to do so and the LHMU indicated that it did not oppose the cancellation of the Award. The TLC no longer objected to the cancellation of the Award.

The Award

5 Although the application to cancel the Award pre-dates the coming into effect of the *Fair Work Act 2009* ("FW Act"), it must now be considered in the context of that Act. The effect on the Award of the "Work Choices" amendments to the *Workplace Relations Act 1996* (Cth) ("WR Act") on 27 March 2006, with the corresponding creation of the "Notional Agreements Preserving State Awards" ("NAPSAs"), only forms part of the background. What this decision concerns is the Award made by the Commission under the Act which, by virtue of s 37(4) of the Act, remains in force until it is cancelled, suspended, or replaced under the Act.

6 The scope clause of the Award (1995) 75 WAIG 2746 at 2750 is as follows:

4. - SCOPE

> This Award shall apply to all employees of Jenny Craig Weight Loss Centres Pty Ltd employed in the callings contained in Clause 11. - Wages of this Award.

The Employer Party to the Award

7 The Award expressly provides that it applies only to employees of Jenny Craig Weight Loss Centres Pty Ltd and Schedule B of the Award lists only one respondent to it, that being Jenny Craig Weight Loss Centres Pty Ltd ((1995) 75 WAIG 2746 at 2762). The Award therefore is not a common rule award which extends to and binds all employees employed in any calling mentioned in the Award in the industry or industries to which the Award applies.

8 The parties agree that the employer is a constitutional corporation. We think that is clearly so, given its corporate structure and we accept the submission that it earns its income from its trading activities (submission from CCIWA at [1.8] and see too *Aboriginal Legal Service of WA Inc v Lawrence* [2008] WASCA 254; (2008) 89 WAIG 243; 178 IR 168, per Steytler P at [39] and following). We therefore find that the employer is a trading corporation and the employer is thus a "national system employer" as defined in s 14(a) of the FW Act.

The Effect of s 26 of the *Fair Work Act 2009* on the Award

9 The issue to be considered is not the effect of the FW Act upon the jurisdiction of the Commission to enquire into and deal with an industrial matter relating to a "national system employer" as defined in s 14(a) of the FW Act, as it is clear that the Commission does not have that jurisdiction for the reasons set out in *Aboriginal Legal Service* referred to above and later in the decision of the Full Bench of the Commission in *Krysti Guest v Kimberley Land Council* (2009) 89 WAIG 2063 at [52] – [69]; [2009] WAIRC 00668 (and see *Endeavour Coal Pty Limited v Construction, Forestry, Mining and Energy Union* [2007] FCAFC 177, (2007) 173 IR 276; *Tristar Steering and Suspension Ltd v IRC of NSW* [2007] FCAFC 50, (2007) 161 IR 469). Although those decisions all relate to the WR Act we consider the reasoning contained therein is applicable to the corresponding effect of the FW Act.

10 Rather, the issue is whether as a result of the operation of the FW Act, there is no longer an employee to whom the Award applies. Mr Jones, who appears for the employer, has drawn attention to s 26(1) and (2) of the FW Act which provide as follows:

> 26 Act excludes State or Territory industrial laws
>
> (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.
>
> (2) A State or Territory industrial law is:
>
> (a) a general State industrial law; or
>
> (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
>
> (i) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);
>
> (ii) providing for the establishment or enforcement of terms and conditions of employment;
>
> (iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;
>
> (iv) prohibiting conduct relating to a person's membership or non membership of an industrial association;
>
> (v) providing for rights and remedies connected with the termination of employment;
>
> (vi) providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or
>
> (c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or
>
> (d) a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal or comparable value; or
>
> (e) a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or
>
> (f) a law of a State or Territory that entitles a representative of a trade union to enter premises; or
>
> (g) an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or

(h) either of the following:

(i) a law that is a law of a State or Territory;

(ii) an instrument of a legislative character made under such a law;

that is prescribed by the regulations.

11 A combination of s 26(1), (2)(a) and (3)(c) of the FW Act identifies the Act as a State industrial law. Accordingly, subject to s 27, the FW Act is intended to apply to the exclusion of the Act so far as the Act would otherwise apply in relation to a national system employee or employer.

12 Relevantly, we note s 26(2)(g) of the FW Act which includes in the definition of a "State or Territory industrial law" an instrument made under the Act so far as the instrument is of a legislative character. Is the Award an instrument made under the Act which is of a legislative character? The Award is made under the Act and it is therefore an instrument made under a law described in s 26(2)(g) of the FW Act.

13 The Act defines an award in s 7(1) as an award made by the Commission under the Act. An award is also described as an "industrial instrument" for the purposes of s 29AA(5) of the Act which is as follows:

(5) In this section —

industrial instrument means —

(a) an award;

(b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section;

(c) an industrial agreement; or

(d) an employer-employee agreement.

This definition is repeated for the purposes of s 49D of the Act and an "instrument" for the purposes of ss 83 and 98 also includes an award. Describing an award as an "instrument" is consistent with the ordinary meaning of the word which includes a "formal legal document, as a contract, promissory note, deed, grant etc." (Macquarie Dictionary, Third edition, page 1105).

14 When making an Award the Commission exercises a legislative function as Smith C (as she then was) observed in *The Chief Executive Officer, Public Transport Authority v. The Australian Rail, Tram And Bus Industry Union Of Employees, West Australian Branch* [2006] WAIRC 03455, (2006) 86 WAIG 74 at [19] and see too *Summit Constructions and Others v. The Association of Draughting, Supervisory and Technical Employees, Western Australian Branch* (1991) 71 WAIG 3136 at 3137.

15 Section 26(2)(g) of the FW Act includes as a State industrial law an instrument made under a State industrial law which has a legislative character and given the normal meanings of the words "instrument" and "legislative" in s 26(2)(g) of the FW Act this leads us to conclude that the Award is an instrument made under the Act which is of a legislative character.

Conclusion Regarding the Effect of s 26 of the *Fair Work Act 2009* on the Award

16 We find that the FW Act applies to a national system employer or employee to the exclusion of the State or Territory industrial laws referred to in s 26(1) and (2) of the FW Act, and that the State or Territory industrial laws referred to for the purposes of this matter include both the Act and, by virtue of s 26(2)(g) of the FW Act, the Award. We conclude that the operation of s 26 of the FW Act means that the Award and any amendment or variation made to it can have no application to any employee whose conditions of employment would otherwise be covered by it. To put it another way, even if the employer employs an employee who would *prima facie* be covered by the Award, s 26 of the FW Act means that it does not and cannot apply to that employee and any future amendment or variation made to the Award under the Act can therefore have no effect upon such an employee.

17 This conclusion is consistent with the conclusion of the Federal Court in the *Endeavour Coal* case referred to above in relation to the corresponding effect of the WR Act. In that matter, the Full Court at [58] referred to the scheme of industrial regulation provided for in the WR Act and held at [59] that a feature of that scheme was to limit the role of State legislatures in prescribing legislatively, and of State industrial tribunals in prescribing by instruments they make or approve, the wages or salaries and the terms and conditions of employment of employees of constitutional corporations. Applying that reasoning to the effect of s 26 of the FW Act upon the Act and the Award leads us to the conclusion that there is no employee to whom the Award applies.

The Effect of s 27 of the *Fair Work Act 2009* on the Award

18 Relevantly, s 27(1)(c) of the FW Act provides that s 26 does not apply to a law of a State or Territory so far as the law deals with any non-excluded matters. The non-excluded matters are set out in s 27(2). For present purposes we draw attention to the following non-excluded matters:

- Superannuation (s 27(2)(a)).
- Long service leave (s 27(2)(g)).
- Declaration, prescription or substitution of public holidays, except in relation to the rights and obligations of an employee or employer in relation to public holidays (s 27(2)(j)).

19 The Award contains clauses with respect to each of these matters in clauses 15 – Public Holidays, 19 – Long Service Leave and 24 – Superannuation (see (1995) 75 WAIG 2746 at 2753, 2754 and 2760). We raised with the parties whether s 27(2) of the FW Act operates such that those clauses continue to have application to constitutional corporations to the extent that they fit within the description of the non-excluded matters in s 27(2)(a), (g) and (j) respectively.

20 We agree with the written submission of Mr Jones that s 27(1) and (2) operate in respect of a law of a State or Territory so far as the law deals with any non-excluded matter. If, as we have found, the Award is a "State or Territory industrial law" in s 26 of the FW Act, is the Award a "law of a State or Territory" so far as it deals with any non-excluded matter?

21 We conclude that it is not for the following reasons. The meaning of the words "State and Territory laws" in s 27 can be illustrated by reference to the laws contained in s 27(1A). They are Acts of the respective State or Territory Parliaments. The Award is not an Act of Parliament, neither is it a law as such; it was held by the Supreme Court of WA that an award is not equivalent, in itself, to a law of the State in *White and Company v. Coastal District Committee, Amalgamated Society of Engineers* (1922) 25 WALR 88 where Draper J concluded at 95:

> "It is clear from this that an award itself is not a law, but merely the determination of a tribunal, which, when taken in conjunction with the Arbitration Act, has the force of law".

22 The FW Act does not regard an award as a law of a State or Territory. It specifically includes an instrument made under a State industrial law as part of the description in s 26 of the State or Territory industrial laws which are to be excluded by the FW Act but that does not elevate an award to a law of a State or Territory as referred to in s 27 of the FW Act. Section 27 refers to "a law of a State or Territory"; not to a "State or Territory industrial law".

23 We conclude that the Award itself is not "a law of a State or Territory" for the purposes of s 27(1) and (2) of the FW Act, and therefore neither are clauses 15, 19 and 24 within it which make provision for long service leave, public holidays and superannuation respectively. In reaching this conclusion we take into account the conclusion of the Federal Court in the *Endeavour Coal* matter (referred to above) at [70] that the general award-making power conferred upon the Industrial Relations Commission of NSW by ss 10 and 11 of the *Industrial Relations Act, 1996* (NSW) did not give that Commission the power to make an award binding a constitutional corporation in relation to long service leave. In our view that conclusion applies to the circumstances before us: the operation of ss 26 and 27 of the FW Act would mean that this Commission would not have the power to make an award in relation to superannuation, long service leave, or the declaration, prescription or substitution of public holidays binding upon a constitutional corporation.

24 Correspondingly, whatever may have been the effect of State awards being transmogrified (as referred to in passing in *Endeavour Coal* at [68]) into NAPSAs for the purposes of the *WR Act*, we are satisfied that s 26 of the FW Act means that the Award now does not apply to employees of an employer which is a constitutional corporation and that s 27 does not condition that conclusion.

Section 47(1) of the Act and Conclusion

25 As a result, we are of the opinion that there is no employee to whom the Award applies. The Act makes specific provision for such a situation by conferring power on the Commission to cancel an award. Section 47(1) of the Act provides as follows:

> (1) Subject to subsections (3), (4) and (5), where, in the opinion of the Commission, there is no employee to whom an award or industrial agreement applies, the Commission may on its own motion, by order, cancel that award or industrial agreement.

26 We consider that subsections 47(3) and (4) of the Act have been complied with: the Registrar was directed on 18 January 2007 to make enquiries following the request from the CCIWA and reported in writing on 17 May 2007 (s 47(3)(a)); the Registrar was required to give general notice on 27 June 2007 and did so including by service of a copy of the notice upon the named parties to the Award (s 47(3)(b)); notices of objection were received within 30 days of the publication of the notice (s 47(4)).

27 There is no submission before us not to cancel the Award and any suggestion that its cancellation would be premature was an earlier suggestion made in the context of the March 2006 "Work Choices" amendments to the WR Act and if made now would not be valid. We are unable to see any detriment arising from its cancellation. Moreover, there is a definite advantage accruing from the removal of an award which is clearly redundant: while it remains, there is likely to be a presumption of validity and to be attempts to vary it to ensure its currency; these are to be avoided and will be avoided by its cancellation.

The Order to Issue

28 Accordingly, we will order that the Award be cancelled.

2010 WAIRC 00199

S.47 CANCELLATION OF THE JENNY CRAIG EMPLOYEES AWARD, 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	MONDAY, 12 APRIL 2010
FILE NO/S	APPL 50 OF 2007
CITATION NO.	2010 WAIRC 00199

Result	Award cancelled

Order

HAVING HEARD Mr D Jones, Chamber of Commerce and Industry, WA, on behalf of the employer; Ms J O'Keefe and later Mr J Nicholas and later Mr K Sneddon and later Ms S Holt, on behalf of the Liquor, Hospitality and Miscellaneous Union; and Mr D Robinson and later Mr D Ellis and later Ms S McGurk, on behalf of the Trades and Labor Council of WA;

NOW THEREFORE, the Commission in Court Session, pursuant to the powers conferred by s 47(1) of the *Industrial Relations Act 1979*, does hereby order:

THAT the following award be cancelled:

JENNY CRAIG EMPLOYEES AWARD, 1995

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

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2009 WAIRC 01285

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AM
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
HEARD	MONDAY, 4 MAY 2009, WEDNESDAY, 12 AUGUST 2009, THURSDAY, 8 OCTOBER 2009, THURSDAY, 12 NOVEMBER 2009
DELIVERED	FRIDAY, 4 DECEMBER 2009
FILE NO.	APPL 8 OF 2008
CITATION NO.	2009 WAIRC 01285

CatchWords	Removal of Police Officer - Loss of confidence by Commissioner of Police - Officer convicted of criminal offence - Conviction overturned on appeal - Whether removal harsh, oppressive or unfair - Police Act 1892 (WA) s 33L(1), (5)(a), s 33P, s 33Q(4), s 33R, s 33R(8), s 33R(10)(b), s 33Us, s 33W, s 33XU
Result	Removal was harsh, oppressive or unfair and removal from office is and is to be taken to have always been of no effect
Representation	
Appellant	Ms K Vernon, of counsel
Respondent	Mr R Andretich, of counsel

Reasons for Decision

BEECH CC:

1 This is an appeal pursuant to s 33P of the *Police Act 1892* ("the Police Act"). By that Act a member of the Police Force who has been removed from office may appeal on the ground that the decision of the Commissioner of Police to take removal action relating to the member was harsh, oppressive or unfair.

Background

2 On 15 May 2006, the Commissioner of Police issued a Notice of Intention to Remove AM from the Police Force. The Notice stated that the Commissioner of Police had lost confidence in AM's suitability having regard to the matter set out in an attached Summary of Investigation, as well as statements obtained, which suggested that between 1 September 2001 and 31 October 2001 at Kalgoorlie, he sexually penetrated a person without her consent in a circumstance of aggravation in that at the time she was over the age of 13 years and under the age of 16 years (Tab 6 of Commissioner of Police's Documents). AM had

been a member of the Police Force for a period of approximately 12 months prior to being served with the Notice of Intention to Remove and at the time of the alleged incident giving rise to the loss of confidence nomination he was not a member of the Police Force.

3 AM's Response to the Commissioner's Loss of Confidence notice is dated 7 June 2006 (Tab 5). He emphatically denied the allegation and noted that he had been charged with a criminal offence arising from the alleged incident, that he had entered a plea of not guilty and continued to maintain his innocence. His submission was that the allegation had no substance or foundation and would be defended before a jury which would assess the evidence which is an advantage that the Commissioner of Police did not have. Further, the Commissioner of Police's loss of confidence was based upon untested statements of individuals. AM submitted (at [23]) that bearing in mind the presumption of innocence and the fact that it is equally in the public interest that the Police Force be seen to uphold such fundamental principles, public confidence is best served by the loss of confidence process being held in abeyance pending the disposition of the criminal charge.

4 On 31 July 2006, the Acting Commissioner of Police advised AM that he was prepared not to take removal action pending the outcome of the criminal trial in relation to the charges preferred against him under s 326 of the Criminal Code (Tab 2). AM was then stood down on full pay pending the outcome.

5 On 12 February 2008, following a trial in the District Court of Western Australia before a Judge alone, AM was convicted of the charge of sexual penetration without consent of a child over the age of 13 years and under the age of 16 years ([2008] WADC 20) and was imprisoned. On that same day, the Commissioner of Police informed AM that, further to the Notice of Intention to Remove of 17 May 2006, the Minister for Police approved his removal from the Police Force on 12 February 2008 (Tab 1).

6 AM appealed against his conviction and on 6 March 2008, AM also appealed to the WAIRC against his removal. As he had appealed against his conviction, and pursuant to s 33T of the Police Act, his appeal to the WAIRC was adjourned pending the outcome of the appeal against his conviction ((2008) 88 WAIG 203; 2299 and (2009) 89 WAIG 380). On 26 September 2008, the Court of Appeal (WA) allowed the appeal and ordered a retrial ([2008] WASCA 196). Subsequently the Director of Public Prosecutions ("DPP") discontinued the proceedings against AM with the result that there was not, and will not be, a retrial.

7 For the purposes of his appeal to the WAIRC, leave was granted at a hearing on 12 August 2009 to AM to tender as new evidence pursuant to s 33R of the Police Act a copy of the judgment of the Court of Appeal and a copy of the DPP's notice of the discontinuance of proceedings against AM. As a consequence of the tendering of new evidence, and pursuant to s 33R(8) of the Police Act, on 11 September 2009 the Commissioner of Police filed reformulated reasons for the removal of AM from the Police Force and also tendered as new evidence a copy of the decision of the District Court of Western Australia.

The Appeal -

The Case Presented by the Commissioner of Police

8 The Commissioner of Police's reformulated reasons for removing AM note (at [5]) that he had been prepared to accede to AM's request to defer a final decision in his case principally because the allegation was of an extremely serious nature and all of the evidence was at that time untested. As AM had been convicted, he removed him from the Police Force and the mere fact that he had been convicted, together with the fact of his imprisonment, made this necessary and he saw no need to revisit his reasons for requiring AM to show cause prior to removing him from office (at [7]).

9 The Commissioner of Police stated that as AM's conviction has now been quashed it is no longer appropriate to rely solely on the fact of the conviction as providing a sufficient basis for his removal and he considered whether on the material available to him he had cause to lose confidence in AM's suitability to remain as a Police Officer. The Commissioner referred to the District Court trial noting that the District Court Judge accepted the complainant's evidence (i.e. the person allegedly sexually penetrated) as truthful and reliable, and did not consider AM's evidence to be persuasive and that "it did not have a ring of truth about it". The Commissioner of Police referred to what he described as the long standing principle of a trial judge enjoying the advantage of hearing and observing the demeanour of witnesses in assessing their credibility.

10 The Commissioner of Police noted that AM's appeal to the Court of Appeal was on four grounds. The first challenged the admissibility of TL's evidence; the second challenged the weight accorded to TL's evidence by the District Court Judge; the third challenged the sufficiency of the *Longman* direction (*Longman v. The Queen* (1989) 168 CLR 79) given by the judge while the fourth ground of appeal contended that the verdict was not reasonably open and was unsafe and unsatisfactory. The Commissioner noted that AM had been successful on the third ground of appeal only. The Commissioner of Police considered that, having regard to the nature of the power afforded to him to remove a Police Officer in whom he has lost confidence, even if the District Court Judge had given herself the appropriate *Longman* direction and had been unable to satisfy herself as to AM's guilt, it would still be open to the Commissioner of Police to have regard to the Judge's observations about AM's evidence and that of the complainant. Given the advantage the trial judge had in hearing and observing the demeanour of witnesses and assessing their credibility, the Commissioner of Police believed that the District Court Judge's observations regarding the truthfulness of the complainant's evidence, in contrast to the unpersuasive nature of AM's evidence was sufficiently compelling to give rise to a significant doubt in the mind of the Commissioner of Police as to the suitability of AM to be a Police Officer having regard to his conduct, honesty and integrity (at [21]).

11 The Commissioner of Police stated that the fact that all three Judges of the Court of Appeal dismissed the fourth ground of appeal which related to the verdict of guilty not being reasonably open to the trial judge, and instead considered that there was ample evidence to support the verdict of guilty, thus fortifying his doubts about the suitability of AM to remain as a Police Officer. The Commissioner of Police set out (at [22]) each of the comments of the trial judges to which he was there referring.

12 The Commissioner of Police maintains that it is enough that in good faith he considers that the officer is not fit to occupy the office of constable or that there was real doubt about the officer's suitability to be a member of the Police Force (at [23]). He concluded that having regard to the observations of the District Court Judge and the decision of the Court of Appeal on the fourth ground of appeal, he was satisfied that there was sufficient doubt about AM's suitability to be a Police Officer having regard to his honesty, integrity and conduct.

13 The reformulated reasons (at [25]) states that the Commissioner of Police relies upon the Summary of Facts and Issues of Law, and the matters set out in reply, which are in his response of 30 June 2009. For completeness, that response refers to s 33W of the Police Act which provides:

> **33W. Effect of charge for an offence or an acquittal**
>
> To avoid doubt, it is declared that if a member —
>
> (a) has been charged with committing an offence; or
>
> (b) has been acquitted of an offence,
>
> that charge, the existence of proceedings relating to that charge or the acquittal does not preclude the Commissioner of Police from taking any action under this Part in relation to any matter, act or omission relating to or being an element of the offence.

14 In the submissions made in support of the reformulated reasons, Mr Andretich, who appeared for the Commissioner of Police, maintained that not only was the Court of Appeal unanimous in rejecting the fourth ground of appeal that the District Court Judge's verdict on the evidence was not available and unsafe, but there was also no criticism of the District Court Judge's determinations as to the credit of witnesses. Therefore, the Commissioner of Police was entitled to find that there was sufficient credible evidence to reasonably suspect, or find that the offence was committed by AM such that he no longer had confidence in him serving as a Police Officer.

The Case Presented by AM

15 AM's amended grounds of appeal are as follows:

> "1. The Notice of Removal dated 12 February 2008 and served on 13 February 2008 provides no detail of why removal action was effected, however it is assumed the only reason was the Appellant's conviction for the offence of sexual penetration without consent in the District Court of Western Australia on 12 February 2008.
>
> 2. As at the date of the Removal, the disposition of the criminal charge preferred against the Appellant had not been finally determined.
>
> 3. When the Court of Appeal quashed the Appellant's conviction and ordered a retrial on 26 September 2008, and the Director of Public Prosecutions subsequently discontinued the charge on 5 February 2009, the reason for the Removal on the basis of criminal conviction alone became invalid."

16 In support of Ground 1, AM claims that as the Commissioner of Police's Notice of 12 February 2008 removing him from office (Tab 1) does not give reasons for the decision to remove him it is a breach of s 33L(5)(a) of the Police Act which says:

> (a.) the notice under subsection (3)(b) shall advise the member of the reasons for the decision;

17 Ms Vernon submitted that the requirement to give reasons is a fundamental component of natural justice and the failure of the Commissioner of Police to do so is therefore a substantive breach. This is significant because the provisions of s 33X of the Police Act would only excuse this failure on the part of the Commissioner of Police if the failure to give reasons is not substantive.

18 In relation to Ground 2, it is argued on behalf of AM, that although s 33W means that the Commissioner of Police is not precluded from acting to remove AM, he had decided to wait for the outcome of the criminal trial in relation to the charges preferred against AM. Referring to the wording in s 33T of the Police Act, Ms Vernon submitted that a criminal charge is not "finally determined" until there has been a finding of a court that is no longer subject to a statutory right of appeal. The criminal charge had not been finally determined at the time the removal took effect because the time for AM to lodge an appeal against his conviction had not expired and in that respect, the action of the Commissioner of Police deprived AM of his right to be able to demonstrate his innocence to the Commissioner of Police.

19 In relation to Ground 3, Ms Vernon submitted that the Commissioner of Police's reliance on the decision of the Court of Appeal that the appeal would not be upheld on the fourth ground cannot be elevated above the ultimate finding of the Court of Appeal which overturned AM's conviction. Ms Vernon submitted that the Commissioner of Police had relied upon selected sections of the judgments, however a reading of the reasons of the three Judges show that the facts which constituted the foundation for the conviction had ceased to exist. Ms Vernon referred in detail to the comments of the three Judges of the Court of Appeal which led them to allowing the appeal.

20 On behalf of AM, Ms Vernon submitted that the Court of Appeal could have chosen not to overturn the conviction and could still have dismissed the appeal if it considered that no substantial miscarriage of justice had occurred. Even though the Court of Appeal ordered a retrial, AM's conviction does not stand which means that the facts which formed the foundation for the conviction were therefore overturned and the retrial would mean that there would have to be a redetermination of the facts, as that redetermination of the facts may have led to a conviction or it may have resulted in an acquittal. This gives back to AM

the presumption of innocence until such time as a retrial reaches a conclusion that he is guilty. In essence the Court of Appeal had set aside the conviction of AM and as a result this set aside everything that resulted in AM's conviction, and the overturning of the conviction nullified the findings of the District Court Judge regarding the credibility of the complainant and of the witness and of AM. Specifically, the District Court Judge found that AM was guilty based in part upon her observations of the witnesses and findings as to credibility. The ordering of a retrial would not mean that it would be heard before the same Judge.

The Commissioner of Police's Response

21 On behalf of the Commissioner of Police, Mr Andretich submitted that in relation to the Notice of Removal (Tab 1) and whether it contained the reasons for the removal, circumstances had moved beyond it with the reformulated reasons dated 11 September 2009. The Commissioner had deferred his consideration of the removal but acted when AM was convicted, and AM's conviction demonstrated his unsuitability to remain within the Police Force. The trial process had then been completed and he submitted that AM had not suffered any prejudice as a result of his removal at that time. Furthermore, there was no obligation on the Commissioner of Police to wait for the expiry of the appeal period.

22 Mr Andretich further submitted that the substantial matter was whether there was sufficient material before the Commissioner of Police to allow him to reach the decision which he reached. In Mr Andretich's submission, the judgments of the District Court Judge and the Appeal Justices formed the material which the Commissioner of Police could have, and should have, taken into account in the decision he reached, and the material and the judgments upon which the Commissioner of Police relied are not dissimilar to the material contained in the summary of investigation. His reliance on the Court of Appeal judgment was informed by the comments of caution made by the Judges. The Commissioner could be heartened that the evidence before him had been tested and had been pronounced upon by a judicial officer.

Consideration – Ground 1

23 In relation to Ground 1 of the Appeal, in my view the Notice of Removal given to AM on 12 February 2008 (Tab 1) does not comply with s 33L(5) of the Police Act. Section 33L(5) requires the Notice of Removal to advise the reasons for the decision to take removal action. The Notice given to AM commences with the words "Further to the Notice of Intention to Remove from the Police Force of Western Australia dated 17 May 2006, …" but provides no reasons for the decision to take removal action. In the absence of words such as "For the reasons set out in the Notice of Intention to Remove…", the reasons for the Commissioner's removal need to be assumed to be the same as the reasons set out in the Notice of Intention to Remove, even if it be an assumption made with confidence.

24 The significant point is that a member of the Police Force who has been removed should not have to assume what the reasons are for his or her removal. They may not be the same as the reasons set out in the Notice of Intention to Remove. The Notice of Intention to Remove may, depending on the circumstances, contain a number of reasons why the Commissioner has lost confidence in an officer's suitability to remain a member of the Police Force. Pursuant to s 33L(2) of the Police Act, the officer may within 21 days make a written submission to the Commissioner of Police in respect of those reasons. Pursuant to s 33L(3) the Commissioner of Police is then to decide whether or not to take removal action and in so doing take into account any written submissions received from the officer. Therefore the reasons for the Commissioner of Police deciding to remove an officer may be all or only some of the reasons set out in the Notice of Intention to Remove.

25 It is for that reason, I suspect, that the Police Act requires separately in s 33L(1) that the Commissioner of Police's written Notice of Intention to Remove set out the grounds upon which the Commissioner of Police does not have confidence in the member's suitability to continue as a member, and in s 33L(5)(a) that the Commissioner advise the member of the reasons for the decision to take removal action. This recognises that the eventual reasons for deciding to remove a member may differ from the grounds for intending to remove the member. Therefore, a mere reference in the Notice of Removal to the earlier Notice of Intention to Remove does not satisfy the requirement to give reasons for the decision to remove the member.

26 The failure of the Commissioner of Police to comply with the procedure described under Division 2, which includes s 33L of the Police Act, shall not be invalid or called into question if the failure is not substantive (s 33X of the Police Act). Ordinarily, a failure to provide reasons for decision where an officer is removed from office might materially affect the right of the officer to appeal his or her removal under s 33P of the Police Act. This is because the officer would not know the basis upon which the decision to remove had been made. Therefore, the requirement on the Commissioner of Police in s 33L(5)(a) to provide reasons for the decision to remove an officer is a substantive, and not procedural, requirement.

27 In the context of this matter, it is pertinent to consider whether any prejudice was occasioned to AM by the failure of the Notice of Removal to contain the reasons for the decision to remove him. It was not submitted on behalf of AM that he had suffered any prejudice directly from the failure of the notice to contain the reasons (transcript page 20). I do not think AM has suffered any prejudice. The Notice of Intention to Remove (Tab 6) contains only one reason why the Commissioner of Police lost confidence in AM's suitability to continue as a member of the Police Force, that is, statements obtained by the Commissioner of Police suggesting that AM sexually penetrated a person without her consent in circumstances of aggravation. Where only one reason, albeit a most serious accusation, forms the basis for the Commissioner's loss of confidence in AM, it is not unreasonable to argue, as Mr Andretich submitted, that the reference in the Notice of Removal to the Notice of Intention to Remove makes it plain that the reasons for the Commissioner's decision to remove AM are the reasons set out in the Notice of Intention to Remove.

28 Further, I consider the failure to provide the reasons for removing AM is overtaken by the subsequent granting of leave to AM to tender new evidence and, as a consequence, the Commissioner of Police reformulating his reasons for not having confidence in AM's suitability to continue as a member. Section 33R(10)(b) obliges us to consider the reformulated reasons as if they had been reasons given to AM under s 33L(5)(a) of the Police Act. In effect, the reformulated reasons replace the original Notice

of Removal. Importantly, AM amended his grounds of appeal subsequent to the reformulated reasons and I consider that by the time of the hearing of his appeal, any prejudice to AM from the original Notice would have been overcome by these later events. Therefore, despite the Notice of Removal not containing the reasons for the Commissioner's decision to remove AM, I would not uphold the appeal on this ground.

Ground 2

29 In relation to Ground 2, AM submits that at the date of his removal the disposition of the criminal charge against him had not been finally determined. The point being made, as I understand it, is that the Commissioner of Police ought to have waited until the appeal period against AM's conviction had expired, a period we are informed of 21 days, particularly given his earlier decision not to proceed with the removal pending the outcome of the criminal charge against AM. In response, the Commissioner of Police submits that there is no obligation upon him to wait for that appeal period to expire. I agree with this submission in part, because of the terms of s 33W which I have set out earlier in these reasons.

30 The Commissioner of Police states (in the reformulated reasons at [7]) that AM's conviction served to reinforce his concern about AM's suitability to remain a member of Police Force and as he had been convicted, the Commissioner of Police proceeded to remove him; the mere fact that AM had been convicted, together with the fact of his imprisonment, made it necessary in the view of the Commissioner of Police. In my view, the Commissioner of Police has a discretion to wait for the expiry of an appeal period before removing an officer who has been convicted of an offence, however each case will need to be looked at on its merits. Notwithstanding that discretion, I consider that the criminal proceedings had concluded with the decision of the District Court, not 21 days after that decision. The lodging of an appeal by AM means that decision may or may not be overturned, however until it was overturned the decision of the District Court stood and AM was convicted and in custody. It was not harsh, oppressive or unfair, in the context of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force, that the Commissioner of Police proceeded to remove him at that precise point in time. For those reasons, Ground 2 is not made out.

Ground 3

31 In Ground 3, AM argues that the quashing of his conviction and the ordering of a retrial, and the DPP's subsequent discontinuance of the proceedings against him, means that the reason for his removal on the basis of the criminal conviction alone became invalid. As Ms Vernon in these proceedings emphasises, the three Judges of the Court of Appeal upheld the appeal against the decision of the District Court Judge on the basis that there had been a substantial miscarriage of justice.

32 In my view, this ground requires a consideration of the Commissioner of Police's reformulated reasons because the Commissioner of Police states in them at [8] that as AM's conviction has now been quashed it is no longer appropriate to rely solely on the fact of the conviction as providing a sufficient basis for his removal and he considered whether on the material available to him he had cause to lose confidence in AM's suitability to remain a Police Officer.

33 As I have set out earlier, the Commissioner of Police relies upon the District Court Judge's decision where Her Honour found the complainant's evidence truthful and reliable ([2008] WADC 20 at [33]) and did not consider AM's evidence to be persuasive, and that all three judges of the Court of Appeal dismissed the fourth ground of appeal that the verdict was not reasonably open to the trial judge. The Commissioner of Police was therefore satisfied that there was sufficient doubt about AM's suitability to be a Police Officer.

34 This reliance requires a careful examination of the judgments of the Court of Appeal. When assessing the impact of the District Court Judge's failure to correctly apply the appropriate *Longman* direction, Steytler P held at [17] that a substantial delay in making a complaint will ordinarily have a number of consequences including that "[t]he evidence of the complainant cannot be adequately tested, making it dangerous to convict on that evidence alone, although the trier of fact can convict on that evidence alone if satisfied of its truth and accuracy". He noted that in the present case the District Court Judge had concluded that any prejudice to AM from the delay was minimal and there were no real dangers arising from the delay. Steytler P stated at [20] that there were material shortcomings from this analysis in that there had been real prejudice to AM and, at [21], the acceptance of TL's evidence did not overcome the dangers arising from the delay. These errors were central to the decision of the District Court Judge that it was safe to convict essentially on the strength of the complainant's evidence.

35 In other words, in my view, His Honour is saying that it was not safe to convict AM essentially on the strength of the complainant's evidence because there had been real prejudice to AM arising from the delay, and the acceptance of TL's evidence did not overcome those dangers. This must call into question the weight which now can be attached to the District Court Judge's observation that the complainant's evidence was truthful and reliable, because as Steytler P has said "[t]he evidence of the complainant cannot be adequately tested, making it dangerous to convict on that evidence alone…". The balance of his Honour's sentence, "although the trier of fact can convict on that evidence alone if satisfied of its truth and accuracy", did not change this finding; it led to the conclusion that there should be a retrial.

36 The conclusion that there should be a retrial is most important: although Steytler P states at [23] that this is a case in which it would be open to a trier of fact to convict and like Miller JA held that nothing raised in Ground 4 would inevitably make it unreasonable, insupportable or dangerous to convict AM, a retrial necessarily carries with it the presumption that AM is innocent of the charge laid against him. It will be up to the prosecution in another trial to prove AM's guilt beyond reasonable doubt and unless and until that occurs, AM remains innocent of the charge. If the charge against AM remains unproven, the issue for the WAIRC becomes whether his removal in these circumstances is harsh, oppressive or unfair. I shall return to this issue subsequently.

37 Miller JA dismissed the fourth ground of appeal. His Honour at [187] found that there was ample evidence to support the verdict of guilty and that once the evidence of the complainant was accepted as credible and persuasive and the evidence of AM was rejected, it was necessary only for the trial judge to carefully scrutinise the evidence of the complainant before acting upon it. It could not be said that a verdict of guilty was unreasonable, incapable of being supported having regard to the

evidence or in any way unsafe or unsatisfactory. However, Miller JA held earlier at [146] that an error had been made by the District Court Judge in that what was missing from the *Longman* direction given by her was a direction that the delay had in fact made it difficult to test the complainant's evidence; the delay had caused actual prejudice to AM, rather than possible prejudice. A second error (see [147] – [149]) was that the District Court Judge had elevated the evidence of TL to that of a confession such that any prejudice to AM occasioned by the delay in being charged was minimal.

38 At [150] and following, Miller JA then noted that that under s 30(4) of the *Criminal Appeals Act 2004* (WA) even if a ground of appeal might be decided in favour of AM, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. He did not dismiss the appeal, holding that the District Court Judge's failure to properly direct herself in accordance with the *Longman* direction (that is, as he had earlier stated, that the delay had in fact made it difficult to test the complainant's evidence and the evidence of TL did not make minimal any prejudice to AM occasioned by the delay in being charged) constituted "a serious breach of the presuppositions of the trial process" which denied the application of s 30(4). His Honour concluded that it is impossible to assess the impact of the irregularity on the fairness of the trial.

39 Murray AJA at [190] agreed with both Steytler P and Miller JA that the appeal should be allowed and a new trial ordered. In relation to the fourth ground, at [196] he agreed with them both that the proposition that the verdict and decision of the District Court Judge was unreasonable or cannot be supported, having regard to the evidence, is not made good.

40 It is Murray AJA's consideration of the applicability of the *Longman* direction to which I draw particular attention. His Honour stated at [202] that the need for the *Longman* direction arises "where, for any reason, the reliability of a witness, upon the acceptance of whose evidence the prosecution case solely or substantially relies, comes into question...". His Honour at [204] agreed with both Steytler P and Miller JA that the lapse of time between the alleged commission of the offence and AM being charged and the trial, meant that there was an incapacity for either side to gather evidence which might enable the credibility of the complainant to be thoroughly examined in the context of a body of evidence concerned with the events of the night in question.

41 Murray AJA noted at [205] that the District Court Judge spoke approvingly of the complainant as witness and then referred to matters arising from the *Longman* direction. At [206] his Honour stated:

> 206 Her Honour then referred to matters under the heading 'Longman warning'. In other words, it seems to me that her Honour reversed the appropriate order of consideration of the issues. Before considering the extent to which she needed to carefully scrutinise the evidence of the complainant, having regard to the various challenges made to its reliability, her Honour had already expressed the view that she accepted the complainant's evidence as being truthful and reliable. In my view, her Honour was in error in that regard.

42 His Honour found at [207] that the District Court Judge thereby reversed the appropriate order of consideration of the issues and was thereby in error. I set out his Honour's conclusions (omitting references):

> 210 The evidence of TL was certainly important in the case. If accepted, as it was, the appellant had made statements contradicting his evidence and that of his mother that he had no opportunity to commit the offence. But that evidence, relevant only in that way and having no probative value to support the complainant's evidence that the appellant did commit the offence in the circumstances she alleged, was not material to the process of carefully scrutinising the complainant's evidence, having regard to the matters of forensic disadvantage which the case raised, before the complainant was accepted as a truthful witness.
>
> 211 Rather, what the trial judge did in this case, it seems to me, was that, having already accepted the complainant as a truthful witness, her Honour did not adequately and appropriately evaluate the reliability of her evidence, having regard to the obvious elements of forensic disadvantage which the case threw up.
>
> 212 That error having been made, there has been a substantial miscarriage of justice because the appellant has been deprived of a trial in which the complainant's evidence, upon which the case against him so substantially depended, was appropriately and thoroughly tested for its reliability before it was accepted as evidence of truth.
>
> 213 For those reasons, I concur in the view that it would be appropriate in this case to allow the appeal, quash the conviction and order a retrial.

43 In the reformulated reasons at [19] the Commissioner of Police states:

> As I understand the point of the Court of Appeal's decision, while it may be unsafe to convict the appellant in the absence of an appropriate warning as to the disadvantage caused by the delay, it does not mean Her Honour was not entitled to find that the complainant was a credible witness or that the appellant was unpersuasive.

44 As I have set out above, the judgment of Murray AJA makes it clear that the District Court Judge's acceptance of the complainant as a truthful witness was an error because it was made before adequately and appropriately evaluating the reliability of her evidence, having regard to the obvious elements of forensic disadvantage which the case threw up. It led to a substantial miscarriage of justice. In my view this is the same conclusion reached by Steytler P at [22], that the errors were central to the decision of the District Court Judge that it was safe to convict essentially on the strength of the complainant's

evidence, and by Miller JA at [146] that an error had been made by the District Court Judge in that what was missing from the *Longman* direction given by her was a direction that the delay had in fact made it difficult to test the complainant's evidence.

45 It follows that the comments of Steytler P at [23] (that this is a case in which it would be open to a trier of fact to convict AM); Miller JA at [187] (that there was ample evidence to support the verdict of guilty) and Murray AJA at [196] (that the proposition that the verdict and decision of the District Court Judge was unreasonable or cannot be supported, having regard to the evidence, is not made good) upon which the Commissioner of Police relies in the reformulated reasons at [22] are comments which are to be read in the context of the judgments as a whole. It is correct that the fourth ground of appeal was dismissed and that Steytler P and Miller JA respectively held that it would be open to a trier of fact to convict and there was ample evidence to support the verdict of guilty. However, the observations of the District Court Judge regarding both the complainant's truthfulness and AM's unpersuasiveness were found to be part of an error which resulted in a substantial miscarriage of justice. Their decision means that in order to decide those issues and whether there will finally be a verdict of guilty there will need to be a retrial. In the absence of a retrial, those issues of credibility are and remain undecided.

46 I therefore conclude that the reliance by the Commissioner of Police on the observations of the District Court Judge and the respective judgments of the Court of Appeal as to the fourth ground of AM's appeal is, with respect, not reasonably open to him. When the respective judgments are read as a whole, they do not form a reasonable basis for him to be satisfied that there is a sufficient doubt about AM's suitability to be a Police Officer. To hold otherwise is to say AM's removal is fair on the basis of observations regarding credibility made by the District Court Judge in proceedings which were subsequently overturned or on the basis of certain comments made by the three Judges of the Court of Appeal which when read in context were themselves not sufficient to lead them to dismiss AM's appeal.

47 As Mr Andretich submitted, the Commissioner of Police did also have before him the material contained in the Summary of Investigation. However, there are two difficulties with the material contained in the Summary of Investigation. First, it is not clear that the Commissioner of Police relied upon this material in the reformulation of his reasons. The reformulated reasons show at [7] that AM's conviction and imprisonment alone were the deciding factors in the Commissioner of Police's decision to remove AM because he "saw no need to revisit [his] reasons for requiring the appellant to show cause prior to removing him from office" and the fact of conviction and imprisonment made his removal necessary.

48 The Commissioner of Police may not have relied upon this material due to the second difficulty which is that prior to AM's conviction, the Commissioner of Police recognised that the material contained in the Summary of Investigation was untested. It was, as Mr Andretich stated, a suspicion and therefore, properly in my view, the Commissioner of Police decided not to take removal action pending the outcome of the criminal trial in relation to the charges preferred against AM under s 326 of the Criminal Code (Tab 2). The fact is that the material contained in the Summary of Investigation remains untested. The reformulated reasons at [25] states that the Commissioner of Police relies upon the Summary of Facts in his response of 30 June 2009, however to the extent that the Summary of Facts states as fact the allegation made against AM (particularly [3] to [6]), the Commissioner of Police is not able to fairly rely upon the Summary at all: the allegation still remains an allegation and it has not been established as a fact. Therefore the earlier decision of the Commissioner of Police not to take removal action pending the outcome of the criminal trial in relation to the charges remains. I find Ground 3 is made out.

Conclusion

49 The essential question before us is whether the decision of the Commissioner of Police to remove AM was harsh, oppressive or unfair (*McKay .v Commissioner of Police* [2006] WASC 189 at [25]; (2006) 155 IR 336). The test whether the decision of the Commissioner of Police to remove AM was harsh, oppressive or unfair is whether the legal right of the Commissioner of Police to remove AM has been exercised so harshly or oppressively against him as to amount to an abuse of that right (*Carlyon v. Commissioner of Police* (2004) 85 WAIG 708 at 724; [2004] WAIRC 11966 at [181], applying *The Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch* (1985) 65 WAIG 385 per Brinsden J at 386). That test necessarily involves a consideration of all of the circumstances including those set out in s 33Q(4) of the Police Act.

50 Having regard to the interests of AM (which we are required to do under s 33Q(4)(a) of the Police Act), I consider there is much force in the submission of Ms Vernon that in the circumstances where a retrial was ordered, AM is entitled to the presumption of innocence. If that was not the case, the Court of Appeal would not have upheld the appeal and ordered a retrial. The fact that there will not be a retrial does not remove that presumption and it remains.

51 The interests of AM include the material contained in the background to his Response to the Commissioner's Loss of Confidence Notice (Tab 5, page 4) which refers to a seemingly unblemished service of 11½ years as a member of the Victoria Police, including having been awarded the Police Service Medal for Diligent and Ethical Service, and a number of written commendations and references attesting both to his ability as a Police Officer and to his character.

52 We are also to have regard to the public interest which is taken to include the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force, and the special nature of the relationship between the Commissioner of Police and members of the Force. Maintaining public confidence in the Police Force is a matter of fundamental importance. The allegation against AM in the material in the Summary of Investigation is very serious; the fact remains, however, that after a trial before a Judge of the District Court and the subsequent appeal, the allegation (in the form of the criminal charge) ultimately has not been proven.

53 AM was convicted and imprisoned. If this appeal was to be decided on those two circumstances alone I would dismiss the appeal. However, as Mr Andretich observed in relation to Ground 1, correctly in my respectful observation, circumstances have moved beyond the removal of 12 February 2008 with the reformulated reasons of 11 September 2009. The new evidence before us demonstrates that the conviction resulted from a trial process where, per Miller JA, it is impossible to assess the impact of the irregularity on the fairness of the trial and the conviction was quashed and AM was released.

54 Further, although the conduct alleged is very serious, it does not refer to AM's conduct or performance as a Police Officer although I add that if the allegation had been proven, the fact that AM was not a Police Officer at the time it occurred would not prevent a finding that that the Commissioner of Police had lost confidence in his suitability to be a Police Officer on the basis of a lack of integrity or honesty. In these circumstances, I do not consider that public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force is compromised.

55 In relation to the special nature of the relationship between the Commissioner of Police and members of the Police Force, the position of the Commissioner of Police in relation to AM cannot reasonably be significantly different today from the position in July 2006 when he was not prepared to take removal action pending the outcome of the criminal trial. Whilst I accord considerable respect to the perceptions of the Commissioner of Police regarding that relationship and its special nature, in this case the outcome of the criminal trial will not be known, the State having discontinued its proceedings against AM. AM is still presumed to be innocent; the observations of the District Court Judge regarding the credibility of both the complainant and AM respectively came from a trial process where, per Miller JA, it is impossible to assess the impact of the irregularity on the fairness of the trial and which warranted a retrial; and the comments of the Judges of the Court of Appeal referred to and relied upon at [22] of the reformulated reasons are to be read in the context of the judgments as a whole which held the errors made by the District Court Judge required the appeal to be upheld and a retrial ordered.

56 In this case, the above analysis of the judgments of the Court of Appeal shows that the reformulated reasons for removing AM do not rest upon a strong foundation. The allegation against AM which led to the loss of confidence is the same as the offence for which AM was charged and for which he is still presumed to be innocent. In this circumstance, the fact that the allegation does not relate to AM's service as a Police Officer becomes important: AM's record of service as a Police Officer both in Victoria and for the relatively short time in WA is not questioned. Taking into account his interest and the public interest in s 33Q(4)(b), I conclude on the basis of the new evidence before us that it was unfair to remove AM from the Police Force. It was unfair because notwithstanding s 33W, the Commissioner of Police had decided not to take removal action pending the outcome of the criminal trial and that outcome has left the allegation against AM unproven and, in respect of the reformulated reasons, the observations made by the District Court Judge and the selected comments of the Judges of the Court of Appeal relied upon do not take into account the reasons why AM's appeal was upheld. I find Ground 3 is made out and that AM has discharged the onus upon him of showing the Commissioner of Police's decision to take removal action relating to him was harsh, oppressive or unfair.

Orders to be made

57 Section 33U of the Police Act applies if the WAIRC decides on an appeal that the decision to take removal action relating to an appellant was harsh, oppressive or unfair. Neither party addressed the issues which arise for consideration out of that section. There is no submission before us that it is impracticable for it to be taken that AM's removal from office is, and had always been, of no effect (s 33U(2)). I would declare the removal of AM to be harsh, oppressive or unfair and make the order envisaged under s 33U(2). However, it would not be my intention to thereby include the period during which AM was imprisoned, that being a period when he was unavailable to discharge the duties of office. I would request the parties to confer on the order to issue and provide the WAIRC with a draft order within 14 days of the issuance of this decision.

HARRISON C:

58 I have read the reasons for decision and I agree with those reasons and have nothing to add.

MAYMAN C:

59 I have had the opportunity of reading in draft form the reasons of the Chief Commissioner in this matter. I agree with the reasons given and have nothing further to add.

2010 WAIRC 00061

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AM
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
HEARD	BY WRITTEN SUBMISSIONS 8, 22 JANUARY 2010
DELIVERED	THURSDAY, 11 FEBRUARY 2010
FILE NO.	APPL 8 OF 2008
CITATION NO.	2010 WAIRC 00061

Catchwords	Removal of Police Officer - Loss of confidence by Commissioner of Police - Whether it is impracticable for it to be taken that removal from office is, and had always been, of no effect - Police Act 1892 (WA) s 33Q(4), s 33S, s 33U, s 33U(2)
Result	Order to issue that removal of police officer is and is to be taken to have always been of no effect
Representation	
Appellant	Ms D Scaddan (of counsel) by written submission
Respondent	Ms KA Vernon (of counsel) by written submission

Further Reasons for Decision

1 This is our unanimous decision. We published our reasons for decision in this matter on 4 December 2009. Paragraph 57 of the Chief Commissioner's reasons, which was agreed to by Harrison and Mayman CC, stated as follows:

> 57. Section 33U of the Police Act applies if the WAIRC decides on an appeal that the decision to take removal action relating to an appellant was harsh, oppressive or unfair. Neither party addressed the issues which arise for consideration out of that section. There is no submission before us that it is impracticable for it to be taken that AM's removal from office is, and had always been, of no effect (s 33U(2)). I would declare the removal of AM to be harsh, oppressive or unfair and make the order envisaged under s 33U(2). However, it would not be my intention to thereby include the period during which AM was imprisoned, that being a period when he was unavailable to discharge the duties of office. I would request the parties to confer on the order to issue and provide the WAIRC with a draft order within 14 days of the issuance of this decision.

2 On 10 December 2009, the Commissioner of Police wrote stating that he had not been invited to make submissions as to whether it was appropriate to invoke s 33U(3) of the *Police Act 1892* ("the Police Act") and he remained unaware that there was a need to address the WAIRC on the issue until the WAIRC's decision was known. The Commissioner noted the form of words used in [57] and asked for some indication as to whether or not the WAIRC was prepared to entertain submissions with respect to s 33U(3) or whether the WAIRC had made its final decision in that regard.

3 In response, on 10 December 2009, AM opposed what was seen by him as a re-opening of the matter and submitted that it was no longer open to the Commissioner of Police to seek such an opportunity. AM's notice of appeal always sought an order under s 33U(2) and a respondent (that is, the Commissioner of Police) must respond to all aspects of the appeal including the appropriateness of the relief sought. It is not for a respondent to wait to find out the outcome of the principal finding and then seek to address the WAIRC on the relief, nor wait to be invited to make submissions on the relief. Further, AM submitted that the scheme in s 33 of the Police Act does not contemplate that there will be a separate enquiry after the decision is delivered. In the view of AM, the issue should have been raised by the Commissioner of Police at the hearing of the appeal, and as the respondent did not submit that the relief sought would be inappropriate, AM did not deal with it in his submissions. AM provided a minute of proposed order on 11 December 2009.

4 On 17 December 2009, the Chief Commissioner's Associate was instructed to advise the parties that we had considered the correspondence and were prepared to agree to receive submissions with respect to s 33U(3) as requested by the Commissioner of Police. Our reasons for doing so now follow.

5 The conclusions in [57] show the intention of the WAIRC. That intention had not yet been given effect by the issuing of an order. Indeed, both AM and the Commissioner of Police are to return to the WAIRC with a draft order. We consider we have the power to receive submissions with respect to s 33U(3) and that it is a matter for our discretion whether to do so.

6 In the exercise of that discretion we gave weight to the fact that s 33U was not the subject of any evidence or submissions in the appeal. This may have been because in proceeding on an appeal under s 33Q(1), the WAIRC is first to consider the Commissioner of Police's reasons for deciding to take removal action; this may not include the Commissioner of Police's submissions why the relief sought is opposed because no issue of relief will arise until after the removal has occurred and an appeal is lodged under s 33P.

7 Further, the second requirement is to consider the case presented by AM as to why the decision was harsh, oppressive or unfair; the case presented did not specifically address AM's current circumstances for the purposes of any order to issue under s 33U. It is therefore understandable that the third requirement in s 33Q(1)(c), that of considering the case presented by the Commissioner of Police in answer to AM's case, may not have addressed the matter.

8 To the extent that our preparedness to receive submissions on the operation of s 33U in this matter is effectively re-opening the matter, we proceeded on the assumption that the parties did not wish to specifically address the relief sought. That was not the case and therefore the parties have not been heard on that matter. That is a proper basis for re-opening (*Wentworth v. Woollahra Municipal Council and Others* (1981) 149 CLR 672 at 684). We note the Commissioner of Police is not seeking to re-argue his case and seeks to address only the issue of the operation of s 33U(3). In the circumstances we would not wish to deny the opportunity of either party to put submissions regarding s 33U. Only one previous decision of the WAIRC has given consideration to s 33U and, in the distinguishable circumstances of that case, that consideration did not extend to s 33U(3) (*Maria Letizia Jones v. Commissioner of Police* ((2007) 87 WAIG 1101; [2007] WAIRC 00440)

9 Accordingly, we indicated our preparedness to receive submissions. On 8 January 2010 the Commissioner of Police provided a further written submission to which AM responded on 22 January 2010 in a further written submission. We thank both parties for the assistance this has provided to us.

10 The Commissioner of Police referred to s 33U(3) and (4). They provide as follows:

> (3) If, and only if, the WAIRC considers that it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect, the Commission may instead of making an order under subsection (2), subject to subsections (5) and (6), order the Commissioner of Police to pay the appellant an amount of compensation for loss or injury caused by the removal.
>
> (4) In considering whether or not it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect it is relevant to consider —
>
> (a) whether the position occupied by the appellant at the time of his or her removal is vacant; and
>
> (b) whether there is another suitable vacant position in the Police Force.

11 In relation to s 33U(4)(a) and (b), the Commissioner of Police advised that the position occupied by AM at the time of his removal is not vacant, however another position commensurate with AM's rank, experience and training is available. This advice is not disputed by AM and we accept it and find accordingly.

The Further Submissions of the Commissioner of Police

12 In summary, the significant point made by the Commissioner of Police is that s 33U(3) obliges the WAIRC to consider whether or not it is impracticable for it to be taken that AM's removal from office is and has always been of no effect. The fact that s 33U(4) requires the WAIRC to have regard to the matters in sub-paragraphs (a) and (b) does not preclude the WAIRC from also considering other matters. In other words, the matters in sub-paragraphs (a) and (b) are not exhaustive. To interpret s 33U(4) as requiring the Commissioner of Police to reinstate a police officer subject only to the limited matters referred in sub-paragraph (a) and (b) creates a situation that is more restrictive than the general law pertaining to the reinstatement of employees. The Commissioner of Police referred to *Bienke v. Minister for Primary Industries and Energy* (1994) 125 ALR 151 and to *Murphyores Inc Pty Ltd v. Commonwealth of Australia* (1976) 136 CLR 1 to support the submissions.

13 The Commissioner of Police further submits that, given the special relationship between the Commissioner of Police and police officers, any loss of trust is more significant than a breakdown of trust in an ordinary employment relationship. In this case, the Commissioner of Police has lost trust in AM. If the reason for the loss of trust was because of performance-related issues, the relationship between the Commissioner of Police and the police officer may not be irretrievably destroyed in the event the WAIRC found that the Commissioner of Police had not done all that he was required to do to remedy the officer's performance prior to taking removal action. However in a case such as this, the loss of confidence by the Commissioner of Police does not allow any prospect of any remedial activity by which the officer can regain that trust. The Commissioner of Police is now in the difficult position of having to assign duties to the appellant that requires the exercise of extensive police powers when interacting with the community where the Commissioner of Police believes that AM represents a risk to the community.

14 Furthermore, as the Commissioner of Police has lost confidence in AM, and continues not to trust him in the performance of his duties as a police officer, this may permit his credibility to be questioned if ever AM himself was to give evidence in court proceedings. The Commissioner of Police points out that the Court of Appeal did not acquit AM; it ordered a re-trial.

The Further Submission of AM

15 In summary, AM points out that the availability of another suitable vacant position in the police force favours a finding that it is not impracticable to make the order contemplated by s 33U(2) of the Police Act. AM states that the authorities relied upon by the Commissioner of Police in support of the submission that the WAIRC is not restricted to the consideration in s 33U(4) are distinguishable from the facts of this matter. He submits that s 33U(4) does not provide the WAIRC with the same wide powers as the general industrial relations legislation and there is no reason for inferring that the expressed considerations are not exhaustive. If the considerations expressed in s 33U(4) are not exhaustive such that other considerations may be taken into account, AM submits that the practicability of reinstatement does not depend on notions of loss of confidence in the employee. Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is practicable, provided that such loss of trust and confidence is soundly and rationally based.

16 AM considers the fact that the Commissioner of Police is said to "harbour a suspicion" about him suggests that AM's successful appeal, the dropping of the charge by the Director of Public Prosecutions without re-trial, and the WAIRC's decision, is apparently irrelevant to the Commissioner of Police. AM submits that the Commissioner of Police's suspicion is not a sound and rational basis for the Commissioner of Police to conclude that reinstatement is impracticable. AM submits that trust and confidence are the hallmarks of every employer-employee relationship and are not unique to the Commissioner of Police and police officers. AM may be assigned any number of positions within the WA Police which may not require him to exercise the extensive powers of a police officer.

17 In any event, the Commissioner of Police's decision to remove AM is not taken on the basis that there was any doubt about AM's performance or operational abilities. There is no evidence to support the Commissioner of Police's belief that AM represents a risk to the community. AM rejects any suggestion that his credibility is likely to be questioned if he was called upon to give evidence as part of his duties. The fact that the Court of Appeal ordered a re-trial in preference to an acquittal is irrelevant to whether it is impracticable to re-instate AM. Concluding that re-instatement is impracticable would effectively operate to punish AM for a crime of which he has not been convicted. It would deprive AM of the benefit of the WAIRC's decision that his removal was harsh, oppressive or unfair and give AM the same outcome as the removal which had been found to be unfair.

Consideration

18 The first issue is whether, when the WAIRC is considering whether or not it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect, we are restricted only to the matters set out in s 33U(4). In *Commissioner of Police for New South Wales v. Industrial Relations Commission of New South Wales and Raymond Sewell* [2009] NSWCA 198 at [73], (2009) 185 IR 458 at 469 Spigelman CJ, with whom Macfarlan and Young JJA agreed, stated:

> A statutory requirement to "have regard to" a specific matter, requires the Court to give the matter weight as a fundamental element in the decision-making process (*R v Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32; (1979) 180 CLR 322 at 329; *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327 at 333, 337-338; *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589 at [71]- [73]). An equivalent formulation is that the matter so identified must be the focal point of the decision-making process (see *Evans v Marmont* (1997) 42 NSWLR 70 at 79-80; *Zhang supra* at [73]).

19 In this case, the language of s 33U(4) states that when considering whether or not it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect "it is relevant to consider" the matters set out in s 33U(4)(a) and (b). We consider there is little practical difference between a statutory requirement to "have regard to" matters and a statutory requirement making them a relevant consideration: in both cases, those matters are elevated into matters which are obliged to be considered. We consider the matters set out in s 33U(4)(a) and (b) are fundamental elements in the decision-making process when considering whether or not it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect. The fact that another position commensurate with AM's rank, experience and training is available means to that extent it is not impracticable for it to be taken that AM's removal from office is and always has been of no effect.

20 We agree with the submission of the Commissioner of Police that s 33(4) does not preclude the WAIRC from also taking other matters into consideration. This is because firstly, the language of s 33U(4) does not itself restrict the WAIRC's consideration to the matters set out in sub-paragraphs (a) and (b): it makes them relevant considerations; it does not state that they are the only considerations.

21 Secondly, s 33Q(4) provides that the WAIRC is to have regard to the interests of the appellant and to the public interest "in determining the appeal" (underlining added). The language does not restrict those matters only to determining whether the removal of a police officer was harsh, oppressive or unfair. In other words, we consider the words "in determining the appeal" embrace both whether the removal of a police officer was harsh, oppressive or unfair and the relief to be ordered, if applicable.

22 Thirdly, s 33S applies s 26(1)(a) of the *Industrial Relations Act 1979* ("the IR Act") (subject to Part II of the Police Act with any necessary modifications) to and in relation to an appeal and a determination of an appeal instituted under Part II B of the Police Act. Section 26(1)(a) is as follows:

> **Commission to act according to equity and good conscience**
>
> (1) In the exercise of its jurisdiction under this Act the Commission —
>
> (a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms;

23 We conclude that the requirement on the WAIRC to act in accordance with equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms is a requirement which argues against a narrow interpretation of s 33U(4). Those three reasons, taken together, lead us to conclude that the Commissioner of Police is correct in his submission that in considering whether or not it is impracticable for it to be taken that AM's removal from office is and always has been of no effect, the WAIRC is not restricted to the matters set out in 33U(4)(a) and (b).

24 We also now take into account the submission that notwithstanding our conclusion that AM's removal was harsh, it remains the case that the Commissioner of Police continues to harbour a suspicion about AM and, therefore, has lost trust in him, that the Commissioner of Police believes AM represents a risk to the community and that notwithstanding that AM's conviction was quashed, it remains the case that the Court of Appeal ordered a re-trial in preference to acquitting AM.

25 In our earlier reasons at [55], we noted that we accorded considerable respect to the perceptions of the Commissioner of Police regarding the special nature of the relationship between the Commissioner of Police and members of the police force. The fact that the Commissioner of Police continues to harbour a suspicion about AM, and therefore has lost trust in him, is not to be treated lightly by the WAIRC. However, with respect, the fact that the Commissioner of Police continues to harbour a suspicion about AM and therefore, has lost trust in him cannot be determinative of AM's appeal. By providing an appeal to the WAIRC in Part IIB of the Police Act, Parliament has given the power to the WAIRC to find that the removal of a police officer is harsh, oppressive or unfair and, pursuant to s 33U(2) the power to order that the removal from office is and is to be taken to have always been of no effect notwithstanding that the Commissioner of Police has lost confidence in that police officer.

26 Section 33L of the Police Act provides that the Commissioner of Police may lose confidence in a member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct. The process of appeal to the WAIRC, and the relief which the WAIRC may order does not depend upon which of those five reasons forms the reason for the loss of confidence. In the Commissioner of Police's submission, he places emphasis upon the doubt he has regarding AM's integrity. In *Commissioner of Police for New South Wales v. Industrial Relations Commission of New South Wales* (cited above at [18]) the New South Wales Court of Appeal considered whether there had been jurisdictional error on the part of the Full Bench of the Industrial Relations Commission of NSW refusing leave to appeal against a decision of that Commission that the removal of a police officer on the basis of the Police Commissioner's loss of confidence in him was harsh in all of the circumstances, and ordered reinstatement. In considering that matter, Spigelman CJ, with whom Macfarlan and Young JJA agreed, stated at paragraphs [75] and [76] (IR 458 at 470):

> The central significance for the decision-making process in the Industrial Relations Commission of any issue of integrity that has been raised and of the Commissioner's role in the legislative scheme can be accepted. Nevertheless, the entire point of the provision for review in Div 1C of the Police Act is precisely to enable the Industrial Relations Commission to overturn the Commissioner's decision on the basis of a finding, to be made by the Industrial Relations Commission, "that the removal is harsh, unreasonable or unjust".
>
> It cannot be, and it is not directly, suggested that the Police Commissioner's decision on matters of this kind can be regarded as determinative. Without saying so, as a matter of substance, that is what the applicant sought to achieve in this Court. Of course, that is inconsistent with the conferral of a power of review on the Industrial Relations Commission.

27 We consider those comments to be applicable in the circumstances of this case.

28 The power given to the WAIRC in s 33U(2) to order that AM's removal from office is to be taken to have always been of no effect is analogous to the power given to the WAIRC in the general jurisdiction of the IR Act to order the reinstatement of an employee who has been harshly, oppressively or unfairly dismissed. In such cases, the WAIRC has recognised that reinstatement should not be ordered where it is impracticable, nor where management has a genuine distrust or lack of confidence in the employee, nor if reinstatement would adversely affect staff morale or general discipline. This was stated by the Full Bench of the Commission in *Max Winkless Pty Ltd v Graham Lindsay Bell* (1986) 66 WAIG 847 at 848 and the Full Bench continued:

> "In other words reinstatement should not be contemplated without full regard for the consequences and that we take to be the import of the views expressed in *Slonim v. Fellows* (1984) 8 IR 175 by Wilson J at 181 that the power to order re-employment "will always be a power to be exercised with caution having regard to the circumstances of the case".

29 A similar approach has been adopted by the Industrial Relations Commission of NSW in dealing with reviews by that Commission when reviewing an order removing a police officer from the police service in that State: *Van Huisstede v. Commissioner of Police* [2000] NSWIRComm 97; (2000) 98 IR 57. In that matter, Walton J concluded at [249] (IR 57 at 120):

> "The proposed reinstatement of a police officer whose integrity has been impugned is a matter of some gravity having regard to the position of trust and responsibility occupied by the members of the police force in our society. However, the remedy of reinstatement is clearly provided by the Act. The capacity of an officer to seek the review by the Commission of his or her removal under s 181E is itself evidence that the legislature did not intend either the making of an order removing the officer or the fact of allegations being raised against the officer to of itself preclude reinstatement."

30 A similar view was also expressed in *Oswald v. New South Wales Police Service* (1999) 90 IR 42 at 67.

31 In this case, we acknowledge that the Commissioner of Police continues to harbour a suspicion about AM and therefore has lost trust in him. Given our conclusion that this cannot be determinative of whether it is impracticable for it to be taken that AM's removal from office is and has always been of no effect, it is necessary to objectively consider the reasons given why the Commissioner of Police holds that view. To the extent that it is for the same reasons given in the Commissioner of Police's reformulated reasons, we have considered those in our earlier Reasons for Decision and given our conclusions why we consider the reformulated reasons do not rest upon a strong foundation.

32 The Commissioner of Police also refers to a likelihood that AM's credibility might be questioned if he was called upon to give evidence. In the absence of any precedent or supporting authority for this submission, we regard the likelihood as remote and do not accord it great weight. The Commissioner of Police again points to the fact that the Court of Appeal ordered a re-trial in preference to acquitting AM. We are not entirely sure of the point being made. We observe that the Commissioner of Police's decision in July 2006 was not to take removal action pending the outcome of the criminal trial (Tab 2 of Commissioner of Police's documents). This was based upon the advice that while there is a separation between criminal prosecution and the loss of confidence process, the loss of confidence nomination was based upon the result of a criminal investigation (Tab 3). The criminal trial did not finally determine the matter.

33 In relation to the public interest, it is vital to the integrity of the police force that its members be, and be seen to be, above reproach (*Minister of Police and Commissioner of Police v. Desmond John Smith* (1993) 73 WAIG 2311 at 2323 and per Fielding C at 2327; *Police Service Board and Another v. Morris* (1984) 156 CLR 397 at [412]). However, we consider here that an order that AM's removal is and is to be taken to have always been of no effect given the quashing of the conviction and the discontinuance of the proceedings by the Director of Public Prosecutions, thus leaving AM presumed innocent until proven otherwise, will not have an adverse effect upon the public perception of the integrity of the members of the police force.

34 We consider that the harbouring by the Commissioner of Police of a suspicion about AM with his resulting loss of confidence in him, viewed objectively, in circumstances where the conviction against AM has been quashed and a retrial was ordered and did not take place means that AM is entitled to the presumption of innocence. Given that another position commensurate with AM's rank, experience and training is available, the fact that AM is not convicted of any offence and that there is no basis to doubt AM's integrity, honesty, competence, performance or conduct from his past service as a police officer, leads to the conclusion that it is not impracticable to order that AM's removal from office is to be taken to have always been of no effect. We propose to make an order to that effect and we again request the parties to confer on the order to issue and provide the WAIRC with a draft order within 14 days of the issuance of this decision.

2010 WAIRC 00174

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AM
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 1 APRIL 2010
FILE NO.	APPL 8 OF 2008
CITATION NO.	2010 WAIRC 00174

Result	Order issued
Representation	
Appellant	Ms K Vernon (of counsel)
Respondent	Ms D Scaddan (of counsel)

Supplementary Reasons for Decision

1 This is our unanimous decision. In accordance with our request, both parties provided the WAIRC with draft Minutes of Proposed Orders and were further heard in relation to those drafts. Only two issues of significance arise for consideration.

2 Although both parties' drafts contained draft orders that would either create an entitlement for AM to be paid a salary from 12 October 2008 or to order the Commissioner of Police to pay AM an amount comprising the total remuneration and accrued entitlements he would have received from 12 October 2008, we conclude that there is no power in s 33U of the *Police Act, 1892* ("the Police Act") for the WAIRC to issue such orders.

3 The powers given to the WAIRC in s 33U(2) and (3) of the Police Act once the WAIRC decides that the decision to take removal action relating to AM was harsh, oppressive or unfair are either to order that his removal from office is and is to be taken to have always been of no effect or if, and only if, the WAIRC considers that it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect, to order the Commissioner of Police to pay AM an amount of compensation for loss or injury caused by the removal.

4 It appears to us that as we have decided that the decision to take removal action relating to AM was harsh, oppressive or unfair, and that it is not impracticable for it to be taken that the appellant's removal from office is and has always been of no effect, the only order we are empowered to make is an order that his removal from office is and is to be taken to have always been of no effect.

5 In the absence of a clear power to do so it is not open to the WAIRC to go beyond that and by further order create an entitlement to payment of salary or entitlements not earned during the period of AM's removal. The payment would not be wages earned and accrued and in their essential character would be compensatory: *Dellys v. Elderslie Finance Corporation Ltd* [2002] WASCA 161 at [34]. Such orders would effectively be to order compensation to be paid when there is no express power to do so unless the WAIRC considers that it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect (and see *City of Geraldton v. Cooling* [2000] WASCA 346; (2000) 80 WAIG 5341 in respect of s 23A of the *Industrial Relations Act, 1979* ("the IR Act")). In our view, such further orders could not be said to be an exercise of the WAIRC's powers which are incidental and necessary to the exercise of the jurisdiction or the powers conferred on the WAIRC under Part IIB of the Police Act (*Robe River Iron Associates v. Association of Draughting, Supervisory and Technical Employees of WA* (1987) 68 WAIG 11 per Kennedy J at 17 and see too *City of Geraldton -v- Cooling* (above) at [19]).

6 We will therefore order that AM's removal from office is and is to be taken to have always been of no effect. We have previously stated that such an order is not to include the period during which AM was imprisoned, that being a period when he was unavailable to discharge the duties of office. Accordingly AM's removal from office is and is to be taken to have always been of no effect from 12 October 2008, being the date of his release from prison.

7 The second issue is that the Commissioner of Police proposes that the WAIRC order that compliance with any orders to issue is to be 21 days after they have been made. This is opposed by AM. The Commissioner of Police informed the WAIRC that he intends to appeal the decision in this matter and an order that AM's removal from office is and is to be taken to have always been of no effect would mean that AM would be in a position as a member of the Police Force which he might not be entitled

to occupy. The Commissioner of Police does not have confidence in AM, and, in order to comply with the order, a particular position would need to be identified for AM. Issues with respect to AM having been out of the police environment for up to 2 years would also need to be dealt with.

8 The Commissioner of Police relies on s 33U(9) which is as follows:

> (9) An order under this section may require that it be complied with within a specified time.

9 The Commissioner of Police states that s 33U(9) applies to the whole of s 33U and in the context of an order under s 33U(2) it can only mean either enabling one party to appeal or to enable the Commissioner of Police to make good the order.

10 We have considered the submission of the Commissioner of Police but have reached a different conclusion in relation to the operation of s 33U(9). We consider the matters which the Commissioner of Police is obliged to address in order to comply with an order under s 33U(2) are no different in principle from the matters facing any employer when an order issues in the general jurisdiction of the WAIRC requiring the reinstatement of an employee whose dismissal has been found to be harsh, oppressive or unfair. A comparable provision exists in s 23A(11) of the IR Act and we are not aware of any authority or practice which shows it is used to defer the operation of an order on the basis of a stated intention by one party to appeal the order. We do not consider it appropriate to make an order in the terms sought, given our decision that it is not impracticable to order that AM's removal is and is to be taken to have always been of no effect. For those reasons we decline to issue the order sought.

11 An order now issues that pursuant to s 33U(1) of the Police Act, the Commissioner of Police's decision to remove AM from office was harsh, oppressive or unfair and that pursuant to s 33U(2) of the Police Act, AM's removal from office is and is to be taken to have always been of no effect from 12 October 2008.

12 Order accordingly.

2010 WAIRC 00175

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AM
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 1 APRIL 2010
FILE NO/S	APPL 8 OF 2008
CITATION NO.	2010 WAIRC 00175

Result	Order issued
Representation	
Appellant	Ms K Vernon (of counsel)
Respondent	Mr R Andretich (of counsel) and later Ms D Scaddan (of counsel)

Order

HAVING HEARD Ms K Vernon (of counsel) for the appellant and Mr R Andretich (of counsel) and later Ms D Scaddan (of counsel) for the respondent, the WAIRC having published its reasons for decision on 4 December 2009 and 11 February 2010 and having heard the parties further on 31 March 2010 on the orders to issue, hereby orders:

1. THAT pursuant to s 33U(1) of the *Police Act, 1892* the respondent's decision to remove the appellant from office was harsh, oppressive or unfair;

2. THAT pursuant to s 33U(2) of the *Police Act, 1892* the appellant's removal from office is and is to be taken to have always been of no effect from 12 October 2008.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2010 WAIRC 00148

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP WAYNE BARTLETT
	APPLICANT
	-v-
	ABORIGINAL ALCOHOL AND DRUG SERVICE (INC)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	TUESDAY, 23 FEBRUARY 2010
DELIVERED	MONDAY, 29 MARCH 2010
FILE NO.	U 229 OF 2009
CITATION NO.	2010 WAIRC 00148

CatchWords	Industrial Law (WA) – Jurisdictional issue – Procedure for hearing matter – Principles *Springdale Comfort Pty Ltd t/as Dalfield Home v Building Trades Association of Unions of Western Australia (Association of Workers)* – Declaration issued
Result	Declaration issued
Representation	
Applicant	Mr P Bartlett
Respondent	Mr S Bibby (as agent)

Reasons for Decision

1 These are my reasons for decision regarding a preliminary matter raised by the Aboriginal Alcohol and Drug Service (Inc) (the respondent) regarding how the matter ought be heard.

2 Mr Phillip Wayne Bartlett (the applicant) lodged a claim for unfair dismissal in the Western Australian Industrial Relations Commission (the Commission). The respondent lodged a jurisdictional objection stating that the applicant was not constructively dismissed but rather resigned and therefore the Commission was unable to proceed with the claim.

3 The initial conciliation conference was adjourned to allow for the jurisdictional issue to be heard and determined. On 23 February 2010 the application was listed for a directions hearing. After hearing from the parties the matter was adjourned into conference and private discussions were held between the respondent and the applicant regarding potential settlement. Settlement did not occur and the respondent requested the jurisdictional issue be heard and determined separately. The applicant later advised that he had re-considered his position and wished the jurisdictional and merit issues be heard together.

4 On 19 March 2010, the Commission contacted the parties and provided them with an opportunity to put submissions in writing as to whether the matters ought be heard separately or joined. The Commission has received those submissions and thanks the parties for their prompt response.

Applicant

5 It is the view of the applicant that the jurisdictional and merit issues ought be heard together in that:

- much of the quantity and content in relation to both the jurisdictional and merit issues are one and the same;
- to hear the matters separately would lead to confusion and additional expenditure of time and resources for all parties;
- the evidence required to be presented is weighty and cumbersome and may prejudice the applicant's ability to present the case if separated into the specific matters of jurisdiction and merit; and
- the applicant lives in the north of Western Australia and will be travelling to Perth for the proceedings.

Respondent

6 The views of the respondent are that the:

- principles reflected in the Industrial Appeal Court decision in *Springdale Comfort Pty Ltd t/as Dalfield Home v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 325, 330 are binding on the Commission. In this regard his Honour, Rowland J noted:

> Once a question of jurisdiction is raised the Commission must determine that question under s 24 before exercising power to resolve the dispute before it under s 44.

- the onus of establishing that the Commission has jurisdiction lies with the party making the application before the Commission, in accordance with the principles from *Springdale Comfort*;
- when questions or issues of jurisdiction were raised the jurisdictional issue was to be heard first and failure to do so would be in breach of the *Industrial Relations Act 1979* (the Act);
- the applicant was not constructively dismissed but rather terminated his contract following consideration of his position with the organisation; and
- accordingly it would be procedurally improper, unfair and unjust for the respondent to furnish further expense dealing with both the jurisdictional and merit issues together.

Conclusion

7 Having considered each of the parties' submissions I turn to the primary question for the Commission to consider, that being whether the jurisdictional issue raised by the respondent ought be heard separately from the merit matter raised by the applicant. With respect to the issue as to whether the applicant was constructively dismissed or resigned in *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200, Lee, Moore and Marshall JJ stated:

> In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.

8 Clearly, the respondent's view is that the jurisdictional aspect should be heard separately from the merit aspect of the proceedings. On my reading of *Springdale Comfort*, there is no barrier to hearing the issues of jurisdiction and merit at the same time. What the decision does establish is that the jurisdictional aspect must be determined at first instance.

9 On that basis, it is the Commission's determination, on the balance of convenience, that the preliminary and merit matters ought be heard together and in accordance with the principles of *Springdale Comfort*, the jurisdictional aspect be determined as a preliminary point.

10 A declaration will issue accordingly.

2010 WAIRC 00149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP WAYNE BARTLETT
	APPLICANT
	-v-
	ABORIGINAL ALCOHOL AND DRUG SERVICE (INC)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 29 MARCH 2010
FILE NO.	U 229 OF 2009
CITATION NO.	2010 WAIRC 00149

Result	Declaration issued.
Representation	
Applicant	Mr P Bartlett
Respondent	Mr S Bibby (as agent)

Declaration

HAVING heard Mr P Barlett as the applicant on his own behalf and Mr S Bibby (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

DECLARES that the jurisdictional and merit matters in the aforementioned proceedings be listed and heard together and the jurisdictional matter raised by the respondent be determined as a preliminary point.

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

2010 WAIRC 00136

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROY HARRY BRICE
	APPLICANT
	-v-
	COLIN AND KAREN OLSEN
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 25 MARCH 2010
FILE NO/S	U 4 OF 2010
CITATION NO.	2010 WAIRC 00136

Result Application dismissed

Order

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

WHEREAS on the 25th day of March 2010 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conference the parties reached agreement in respect of the application and agreed to an order issuing reflecting that agreement; and

WHEREAS at the conference the parties waived their rights to speak to the Minutes of Proposed Order;

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

1. The respondent shall pay to the applicant the sum of $4,600 net in full and final settlement of all matters relating to the applicant's employment by the respondent save for workers' compensation entitlements.
2. Such payment shall be made by the close of business on the 15th day of April 2010.
3. The application otherwise be, and is hereby dismissed.

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

2010 WAIRC 00111

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLA ELIZABETH BULL
	APPLICANT
	-v-
	MACMAHON CONTRACTORS PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 MARCH 2010
FILE NO/S	B 195 OF 2009
CITATION NO.	2010 WAIRC 00111

Result Application dismissed

Order

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

WHEREAS on the 2nd day of December 2009 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS the application was set down for hearing and determination on the 4th day of March 2010; and

WHEREAS at the hearing the applicant's representative sought leave to withdraw the application and the respondent's representative consented to the application being withdrawn;

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

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 00127

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUZANNE CARNELL
	APPLICANT
	-v-
	JOHN KENNETH FENTON - COASTWAY TRANSPORT
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 23 MARCH 2010
FILE NO/S	U 215 OF 2009
CITATION NO.	2010 WAIRC 00127

Result	Application dismissed

Order

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

WHEREAS on the 25th day of February 2010 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties agreed to a settlement in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 00132

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY-ANNE GOULDEN
	APPLICANT
	-v-
	RAMADAN ABAS (PRESIDENTIAL CONTRACT SERVICES)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 24 MARCH 2010
FILE NO/S	U 191 OF 2009
CITATION NO.	2010 WAIRC 00132

Result	Dismissed

Order

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

WHEREAS on 21 October 2009 the Commission wrote to the applicant to advise that service of the application should be effected in accordance with the Regulations under the *Industrial Relations Act 1979* by 4 November 2009 however, this did not occur; and

WHEREAS on 5 November 2009 the Commission left a message on the applicant's answering machine requesting that she contact the Commission with respect to her application however, there was no response; and

WHEREAS on 25 November 2009 the Commission wrote to the applicant to advise that if no written or verbal advice was received from the applicant by the close of business on 9 December 2009 the matter would be listed for a show cause hearing as to why the matter should not be dismissed pursuant to s 27(1) of the Act; and

WHEREAS the applicant did not contact the Commission nor was service of the application effected by this date; and

WHEREAS the matter was listed for a show cause hearing on 19 March 2010 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 show cause hearing on 19 March 2010 nor did she advise the Commission beforehand as to any reason why she was unable to attend the hearing; and

WHEREAS the Commission is satisfied that the applicant has been given numerous opportunities to pursue her claim and has chosen not to do so;

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.

2010 WAIRC 00197

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD HARGROVE
	APPLICANT
	-v-
	SEVENTH DAY ADVENTIST CHURCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	BY WRITTEN SUBMISSIONS FILED 12 MARCH, 18 MARCH, 22 MARCH AND 6 APRIL 2010
DELIVERED	FRIDAY, 9 APRIL 2010
FILE NO.	B 264 OF 2009
CITATION NO.	2010 WAIRC 00197

Catchwords	Industrial Law-Denied contractual benefits-Preliminary issue as to capacity of industrial agent to appear-Industrial agent struck off the Roll of Legal Practitioners in WA-Repeal of former legislation-Principles of statutory interpretation discussed
Legislation	*Industrial Relations Act 1979* s 29(1)(b)(ii); s 31; s 112A
	Legal Practice Act 2003 s 31; s 123; s 124; s 203
	Legal Profession Act 2008 s 11; s 12; s 18; s 28; s 53; s 595; s 605
	Legal Practitioners Act 1893 s77A
	Interpretation Act 1984 s 18; s 19; s 37(1)(a)
Result	Declaration issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Ms J McCubbin of counsel
Amicus curiae	Mr R Andretich of counsel

1 The substantive claim in this matter is one by the applicant under s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") for the sum of $344,849.50 as contractual benefits allegedly denied by the respondent.

2 A preliminarily issue has arisen in these proceedings relating to the capacity of the applicant's industrial agent Mr Mullally, to act on behalf of the applicant under s 31 of the Act. Specifically, the issue arises as to whether Mr Mullally, as a legal practitioner who was struck off the Roll of Legal Practitioners in this State in May 2001, can appear as an industrial agent in proceedings before the Commission, given the terms of the Legal Profession Act 2008 ("the LP Act 2008") and in light of an earlier decision of the Commission in *Enright v Sleepeezee Bedding Australia Pty Ltd* (2004) 84 WAIG 305. In *Enright* the Commission concluded that under the terms of the former Legal Practice Act 2003 ("the LP Act 2003") Mr Mullally, and another legal practitioner struck off the Roll, could not appear as agents in proceedings before the Commission.

3 The issue that arises in this matter is whether the repeal of the LP Act 2003 and the enactment of the LP Act 2008 in May 2008, means that Mr Mullally continues to be excluded from appearing before the Commission. This seems to be the first occasion in which the matter has arisen for determination since the decision of the Commission in *Enright.*

4 The preliminary issue was heard on the written submissions of the parties. The Attorney General of Western Australia appeared *amicus curiae* through Mr Andretich of counsel. Given that the substantive matter is to be heard on 19 April 2010 it is necessary to determine this issue with some urgency.

Contentions of the Parties

5 The thrust of Mr Mullally's submission is that the former s 203(1) of the LP Act 2003, which was to the effect that a legal practitioner struck off the Roll of Practitioners was not able to represent any person in a statutory tribunal or court, and which was the basis of the decision of the Commission in *Enright*, was not carried over into the LP Act 2008 on the repeal of the former legislation and the enactment of the new legislation.

6 It was therefore submitted that given that the LP Act 2008 does not contain any express prohibition upon struck off legal practitioners appearing in a court or statutory tribunal then there is no impediment to Mr Mullally continuing to act for the applicant and appear for him in these proceedings.

7 In particular, reference is made to s 112A(3)(b) and (d) of the Act, which provides the basis for Mr Mullally to appear as a registered industrial agent. Section 12 of the LP Act 2008, is in similar terms to s 123(3)(c) of the former LP Act 2003, which permitted persons other than certificated legal practitioners, to engage in legal practice under the authority of a law of the State.

8 It was the submission of Mr Mullally, that given the continuation of this statutory authority in s 12(3)(a) of the LP Act 2008, and in the absence of any provision resembling s 203(1) of the former LP Act 2003, the circumstances regarding his capacity to appear before the Commission have materially changed.

9 Whilst the matter is essentially one for Mr Mullally, the respondent was given the opportunity to and did, make a brief submission in relation to this issue. It was submitted by Ms McCubbin that the principles discussed in *Enright* still have application under the LP Act 2008 and Mr Mullally's loss of capacity to appear as an agent, as a struck off legal practitioner, under the LP Act 2003, would continue under the current legislation. Furthermore, it was submitted that an issue arises, as to whether Mr Mullally's status as a person disqualified from appearing before the Commission, can be revived on the repeal of the LP Act 2003, and the enactment of the LP Act 2008, given the terms of s 37(1)(a) of the Interpretation Act 1984.

10 On behalf of the Attorney General, Mr Andretich made a number of submissions. It was contended that as a "disqualified person" under the LP Act 2008, by s 12(2) of the LP Act 2008, a person cannot engage in legal practice unless he or she is an Australian legal practitioner, being an Australia lawyer holding a current practising certificate. As Mr Mullally has been struck off the Roll of Practitioners, he is unable to engage in legal practice under the LP Act 2008.

11 In reliance upon *Barristers Board v Palm Management Pty Ltd* (1984) WAR 101 and *Barristers Board v Central Tax Services Pty Ltd* (1984) 16 ATR 115, Mr Andretich submitted that for the purposes for s 12 of the LP Act 2008, Mr Mullally, in advising and appearing for the applicant in these proceedings, is plainly engaging in work in connection with the administration of the law, and thus legal practice, for the purposes of the LP Act 2008.

12 As there are comprehensive provisions throughout the LP Act 2008 precluding a disqualified person from engaging in legal practice, and an object of the legislation is to protect the public by ensuring that only those persons with the necessary qualifications and fitness of character can engage in legal practice, it was contended by the Attorney General that any inconsistency between the effect of the LP Act 2008 and s 112A of the Act, should be resolved in favour of the former. It was thus submitted that it would be a perverse construction of the legislation and contrary to its intention, for Mr Mullally, as a disqualified person who has been considered unfit to engage in legal practice, to be regarded as able to engage in legal practice by the operation of s 112A of the Act.

13 Mr Mullally requested and was granted the opportunity to file a written submission in reply to those made by the respondent and the Attorney General. Mr Mullally referred to the repeal of the LP Act 2003 and the enactment of the LP Act 2008 as a progressive development in legislation regulating the legal profession. In particular, giving effect to recommendations of the Productivity Commission regarding restrictions on trade in professional services.

14 It was submitted that the Standing Committee of State Attorneys General, the Law Council of Australia and the Council of Australian Governments pursued the principles arising from the Productivity Commission Review and which ultimately has lead to a national model law for the legal profession. This model law was substantively the basis for the enactment of the LP Act 2008 in this State. Reference was made to various observations in debates in the State Parliament regarding the origins of the LP Act 2008 in this regard.

15 Furthermore, Mr Mullally submitted that the submissions of the Attorney General do not reflect accepted canons of statutory interpretation and represent a gloss on the plain meaning of the legislative provisions as now contained in the LP Act 2008. It was contended, in reliance upon relevant authority in relation to the interpretation of statutes, and the terms of ss 18 and 19 of the Interpretation Act 1984, that the primary task of any court or tribunal in the interpretation of statutory provisions is to consider the language of the statute within the context of its purpose overall.

16 In particular, Mr Mullally submitted that it is significant that the terms of s 203 of the former LP Act 2003, have been re-enacted only in part in the LP Act 2008, but not the relevant part for consideration in this matter. Those parts of the former s 203 dealing with prohibitions on a person struck off the Roll acting as an executor or trustee have been re-enacted whereas the prohibition upon such practitioners appearing in a court or tribunal, the subject of consideration in *Enright,* has not been re-enacted.

17 It was submitted that this is very significant as the Parliament has deliberately chosen not to include the former prohibition in the new legislation. Additionally, it was submitted that for example, in the Workers' Compensation and Injury Management Act 1981, a prohibition was introduced into that legislation in 2005, to preclude a person who has been struck off the Roll of Practitioners in this State from representing a party in proceedings under that legislation. It was contended that no similar provision was inserted into the Act.

18 The overall submission of Mr Mullally is that the Attorney General, in his submission, is requesting the Commission to ignore the plain terms of the legislation and to draw upon a prohibition that was in the former LP Act 2003 but which was not carried over into the LP Act 2008. It was submitted that there is no conflict between the terms of s 112A of the Act and LP Act 2008, as there is no material distinction between a person who has never been entitled to practice as a legal practitioner and one who has been disqualified from practice, for the purposes of s 12(3)(a) of the LP Act 2008. Furthermore, given the terms of s 112A(4) and (5) of the Act, the community is protected by the requirement for registered industrial agents to hold professional indemnity insurance and comply with a Code of Conduct made under the Industrial Relations Commission Regulations 2005.

19 In response to the respondent's submissions, Mr Mullally contended that there is no basis for the conclusion in *Enright* to be carried forward under the LP Act 2008. Mr Mullally submitted that in representing the applicant in these proceedings, he is not doing so as legal practitioner but rather as an industrial agent acting lawfully in accordance with the provisions of s 112A of the Act.

Consideration

20 Under the former LP Act 2003, by Part 9-Unqualified and prohibited practice, a person was not to engage in legal practice unless that person was a certificated legal practitioner: s 123(1). In s 123(3)(c) of the former LP Act 2003, an exception to s 123(1) existed if the person concerned was "authorised by a written law" to do so.

21 By s 112A(3) of the Act as it then was, a person could appear before the Commission and provide advice and services in relation to industrial matters "for the purposes of s 123(3)(c) of the LP Act 2003". Thus the effect of these provisions was to enable a person to act as a registered industrial agent without contravening the LP Act 2003, whilst not being a certificated legal practitioner.

22 The operation of s 123(3)(c) of the LP Act 2003, was however, qualified by the terms of s 203(1) of the former LP Act 2003, which arose for consideration in *Enright.* Section 203(1) of the former LP Act 2003 provided as follows:

> (1) A legal practitioner struck off the Roll of Practitioners or suspended from practice is not entitled —
>
> (a) to engage in legal practice until the legal practitioner has been re-admitted, or the period of suspension has elapsed, as the case requires;
>
> (b) without limiting paragraph (a) to represent any person in a statutory tribunal or a court."

23 In *Enright,* Beech SC (as he then was) concluded that s 203(1) expressed a legislative purpose such that legal practitioners struck of the Roll of Practitioners, prior to or after the commencement of the former LP Act 2003, were precluded from acting as industrial agents under s 31 of the Act. This was held to be consistent with the purpose and object of the former LP Act 2003, to provide an effective means of regulation of the legal profession such that persons considered unfit to practice law in this State, were not able to engage in any form of legal practice or legal work.

24 The LP Act 2008 substantially commenced on 1 March 2009. By s 598, it repealed the LP Act 2003.

25 By s 605 of the LP Act 2008, the Roll of Practitioners kept under s 31 of the former LP Act 2003, continues as the "local roll" under s 28 of the LP Act 2008.

26 Similar transitional provisions existed under the former LP Act 2003, to the effect that the Roll of Practitioners under the predecessor Legal Practitioners Act 1893, from which Mr Mullally was struck off as a legal practitioner in 2001, continued as the Roll from 2003.

27 On this basis, I am satisfied that Mr Mullally is a person who is a "disqualified person" as described in s 3 of the LP Act 2008, as a person whose name has been removed from an Australian Roll.

28 The LP Act 2008 was enacted to give effect to the move towards a national legal profession and its terms appear to have been based substantially on the "national model law" for the legal profession, at least as this was described in the Parliamentary debates leading to its enactment (See Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 October 2007, pp 6695d-6696a (Mr JA McGinty, Attorney General)).

29 Part 3 of the LP Act 2008 deals with "Reservation of legal work and related matters". By s 11, the purposes of Part 3 are "to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by those who are properly qualified to do so". Protection of consumers is also a stated purpose.

30 For present purposes s 12 of the LP Act 2008 is important. It relevantly provides as follows:

> **12. Prohibition on engaging in legal practice when not entitled**
>
> (1) In this section —
>
> ***"legal work"*** means —
>
> (a) any work in connection with the administration of law; or
>
> (b) drawing or preparing any deed, instrument or writing relating to or in any manner dealing with or affecting —
>
> (i) real or personal estate or any interest in real or personal estate; or
>
> (ii) any proceedings at law, civil or criminal, or in equity;
>
> ***"public officer"*** has the meaning given in *The Criminal Code.*
>
> (2) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.
>
> Penalty: a fine of $20 000.
>
> (3) Subsection (2) does not apply to engaging in legal practice of the following kinds —
>
> (a) legal practice engaged in under the authority of a law of this jurisdiction or of the Commonwealth;
>
> (b) legal practice engaged in by an incorporated legal practice in accordance with Part 7 Division 2;
>
> (c) the practice of foreign law by an Australian-registered foreign lawyer in accordance with Part 8;
>
> (d) appearing or defending in person in a court;
>
> (e) drawing or preparing a transfer under the *Transfer of Land Act 1893*;
>
> (f) a public officer doing legal work in the course of his or her duties;
>
> (g) a person doing legal work under the supervision of an Australian legal practitioner, as a paid employee of a law practice or in the course of approved legal training;
>
> (h) legal practice of a kind prescribed by the regulations.

31 Mr Mullally, in providing advice to and representation of the applicant in this case, in my opinion, is clearly undertaking "legal work" as defined: *Legal Practice Board v Frichot* [2006] WASC 230. This includes the giving of legal advice to persons as to their rights and obligations under the law and the preparation of legal instruments by which legal rights are obtained, secured or given away. Undoubtedly, appearances before a court or tribunal must also be characterised as work "in connection with the administration of law" for the purposes of s 12(1)(a) of the LP Act 2008, set out above.

32 I therefore conclude that Mr Mullally, in acting for and on behalf of the applicant in these proceedings, is performing "legal work" and is also "engaging in legal practice" for the purposes of the relevant provisions of the LP Act 2008.

33 The next issue for consideration is the effect of s 112A of the Act. Section 112A(3) provides as follows:

> "(3) For the purposes of section 12 of the *Legal Profession Act 2008* a person who is —
>
> (a) registered under this section;
>
> (b) acting under a contract of employment for a person who is registered under this section; or
>
> (c) an employee or officer of any organisation, the Council, the Chamber, the Mines and Metals Association, or a prescribed body or class of body, acting on behalf of that body,is authorised to —
>
> (d) appear for a party, person or body under section 31, 81E or 91; and
>
> (e) provide advice and other services in relation to industrial matters."

34 The prohibition in s 12(2) of the LP Act 2008 on a person engaging in legal practice unless the person is an Australian legal practitioner is subject to the various exceptions in s 12(3), set out above. The relevant provision for present purposes is s 12(3)(a) to the effect that it is not an offence for a person to engage in legal practice without being an Australian legal practitioner, if the legal practice concerned is "engaged in under the authority of a law of this jurisdiction or of the Commonwealth".

35 Section 12 of the LP Act 2008 is in similar terms to the former ss123 and 124 of the former LP Act 2003. Importantly, under the former LP Act 2003, the effect of s 203(1) was to expressly preclude a legal practitioner struck off the Roll of Practitioners, from appearing in a court or statutory tribunal. Any conflict between this provision and s 112A(3) of the Act, was plainly to be resolved in favour of the former, as was concluded in *Enright.* It was this provision that was central to the Commission's conclusion in that case, that Mr Mullally, as a legal practitioner struck off the Roll of Practitioners, could not act as an industrial agent under s 31 of the Act, despite the apparent width of s 112A(3) of the Act.

36 On the repeal of the LP Act 2003, and the enactment of the LP Act 2008, the Parliament seems to have turned its mind to the terms of s 203 of the former LP Act 2003. This provision has not been re-enacted in whole in the LP Act 2008, but it has been re-enacted in part.

37 By s 203(2) and (3) of the former LP Act 2003, a legal practitioner struck off the Roll of Practitioners, was precluded from acting as a trustee of a trust or executor of a will, without the leave of the Supreme Court. This provision has been re-enacted in the LP Act 2008 as s 18, to the effect that a "prohibited person" (that being a person whose name has been removed from an Australian roll) is not to act as executor of a will or trustee of a trust without the leave of the Supreme Court.

38 Importantly for present purposes, s 203(1), dealing with the prohibition on legal practitioners struck off the Roll of Practitioners, from appearing in a court or tribunal, has not been re-enacted in the LP Act 2008.

39 Whether this is a consequence of the alignment of the LP Act 2008 with the national model law for the legal profession, as referred in the Parliamentary debates for the Legal Profession Bill 2007, is not clear. The fact remains however, that the prohibition in the former LP Act 2003, that was central to the decision of the Commission in *Enright*, was not continued in the LP Act 2008, on the repeal of the former legislation. However, s 123(3)(c) of the former LP Act 2003, was in substance continued in the new s 12(3)(a) of the LP Act 2008, set out above. A consequential amendment to s 112A(3) of the Act, reflects this.

40 It is trite that in the interpretation of a statute a purposive approach to construction should be adopted. No ambiguity is necessary before applying such an approach. In *Mills v Meeking* (1990) 169 CLR 214 Dawson J observed at pp. 233-234 as follows:

> "The requirement that a court should have regard to the purpose or object of an Act is hardly novel. It has always been the cardinal rule of statutory interpretation that a court should strive to give effect to the intention of Parliament. In doing so the purpose of the legislation may be all-important. As Viscount Dilhorne observed in *Stock v Frank Jones (Tipton) Ltd* (1978) 1 WLR 231 at p234; (1978) 1 All ER 948 at p951:
>
> > 'It is now fashionable to talk of a purposive construction of a statute, but it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it "according to the intent of them that made it" (Coke 4 Inst. 330).'
>
> The difficulty has been in ascertaining the intention of Parliament rather than in giving effect to it when it is known. Indeed, as everyone knows, the intention of Parliament is somewhat of a fiction. Individual members of Parliament, or even the government, do not necessarily mean the same thing by voting on a Bill or, in some cases, anything at all. The collective will of the legislature must therefore be taken to have been expressed in the language of the enactment itself, even though that language has been selected by the draftsman, who is not a member of Parliament."

41 In *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 McHugh, Gummow, Kirby and Hayne JJ at pars 69 and 71 observed as follows:

> "69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute [45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole" [46]. In *Commissioner for Railways (NSW) v Agalianos* [47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency with fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed [48]…
>
> 71. Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision [52]. In *The Commonwealth v Baume* [53] Griffith CJ cited *R v Berchet* [54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent."

42 Furthermore, recently, in *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273 McHugh ACJ, Gummow and Hayne JJ said at pars 10-12 as follows:

> 10. "The submissions for Nine initially eschewed any detailed consideration of the anterior legal and historical context in the United Kingdom; this was despite the significance of the British legislation which then followed, upon the later Australian legislation. Nine also stressed the significance of what was said to be the plain words of the provisions of the Act immediately in issue and sought to discount any reaction to the decision of the Full Court which emphasised that the construction favoured by the Full Court appeared to be at odds with the overall scheme of the Act. Accordingly, it is convenient now to restate several of the relevant principles or precepts of statutory interpretation.
>
> 11. In *Newcastle City Council v GIO General Ltd* (8), McHugh J observed:
>
> > "[A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context."
>
> His Honour went on to refer to what had been said in the joint judgement in *CIC Insurance Ltd v Bankstown Football Club Ltd* (9). There, Brennan CJ, Dawson, Toohey and Gummow JJ said (10):

> "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure (11). Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy (12). Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* (13), if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent (14).

43 And further at par 87 Kirby J said:

> "I accept wholeheartedly that the contemporary approach of this Court to the interpretation of contested statutory language is the purposive approach (76). However, adopting that approach does not justify judicial neglect of the language of the statute, whether in preference for historical or other materials, perceived legal policy or any other reason (77). A purposive construction is supported by s 15AA of the *Acts Interpretation Act 1901* (Cth). But that section also does not permit a court to ignore the words of the Act. Ultimately in every case, statutory construction is a text-based activity (78). It cannot be otherwise."

44 As noted above, there are limits to the purposive rule of construction. A court or tribunal is not permitted to rewrite a statute to give effect to what it considers to be its evident purpose: *Meeling; R v L* (1994) 122 ALR 464.

45 As discussed in the authorities, the task of a court or tribunal in construing a statute is to examine the language used by the draftsman to ascertain the meaning of the statutory provision in its ordinary and natural sense, consistent with the text and purposes of the statute as a whole.

46 It is the evident purpose of s 12(3) of the LP Act 2008, to provide a range of exceptions to the general disqualification created by s 12(2), preventing persons who are not Australian legal practitioners, from engaging in legal practice or otherwise performing legal work as defined. In the present case, in my opinion, there is no conflict between the provisions of the LP Act 2008 and the Act. The combined effect of s 12(3)(a) of the LP Act 2008 and s 112A(3) of the Act, constitute an exception to the prohibition on a non-legal practitioner from engaging in legal work and legal practice under consideration. If, as the respondent contends, s 37(1)(a) of the Interpretation Act 1984 has any work to do, then the failure to re-enact s203(1) of the former LP Act 2003 manifests a contrary intention in my opinion.

47 The position now under the LP Act 2008 as it applies to persons such as Mr Mullally is substantially as it was by the operation of s77A of the former Legal Practitioners Act 1893. This provided that the general prohibition on persons other than certified legal practitioners performing legal work did not apply to those doing such work authorised by a written law.

48 There was in my opinion, under the former LP Act 2003, a conflict between ss123,124 and 203 of that legislation, and s 112A(3) of the Act, which by the force of the former s 203(1), had to be resolved in its favour.

Conclusion

49 Whilst on one view this may not rest entirely comfortably with in part, the purposes of the LP Act 2008, I am compelled to conclude that by its terms, as now enacted, the LP Act 2008 does not preclude Mr Mullally from acting as an industrial agent under s 31 of the Act in matters before the Commission. In my opinion, it would be a bridge too far to read the LP Act 2008, as if s 203(1) of the former LP Act 2003 had not been repealed and essentially rewrite this provision back into the legislation. To take this step, in my opinion, would be to fall foul of the authorities referred to above. It would go much further than the insertion of a mere word or two to overcome a drafting omission, to give effect to the evident purpose of a statute applying the purposive approach to construction.

50 If my conclusions in relation to this matter are seen to be undesirable, then these are matters ultimately for the legislature in this State.

51 I will declare accordingly.

2010 WAIRC 00204

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD HARGROVE
	APPLICANT
	-v-
	SEVENTH DAY ADVENTIST CHURCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 14 APRIL 2010
FILE NO/S	B 264 OF 2009
CITATION NO.	2010 WAIRC 00204

Result	Declaration issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Ms J McCubbin of counsel
Amicus curiae	Mr R Andretich of counsel

Declaration

HAVING heard Mr Mullally as agent on behalf of the applicant, Ms McCubbin of counsel on behalf of the respondent and Mr Andretich of counsel as amicus curiae on behalf of the Attorney General of Western Australia, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, ("the Act") hereby declares-

THAT Mr P Mullally be and is hereby authorised to appear as an industrial agent under the Industrial Relations Act 1979 in proceedings before the Commission.

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

2010 WAIRC 00135

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NIKKI JAMES
	APPLICANT
	-v-
	ABINGDON MINIATURE VILLAGE
	IAN AND SONIA KLOPPER
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 25 MARCH 2010
FILE NO/S	U 262 OF 2009
CITATION NO.	2010 WAIRC 00135

Result	Application dismissed

Order

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

WHEREAS on the 24th day of February 2010 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the respondent made an offer of settlement to the applicant and the applicant sought time to consider that offer; and

WHEREAS on the 16th day of March 2010 the applicant advised the Commission that the matter had settled; and

WHEREAS on the 17th day of March 2010 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 00112

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN LINDEN
	APPLICANT
	-v-
	STANTONS INTERNATIONAL
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 MARCH 2010
FILE NO/S	B 185 OF 2009
CITATION NO.	2010 WAIRC 00112
Result	Application dismissed

Order

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

WHEREAS the application was set down for hearing and determination of the issue of jurisdiction on the 19th day of February 2010; and

WHEREAS at the hearing at the conclusion of the respondent's submissions, the applicant sought an adjournment to enable him to respond to the issue; and

WHEREAS at the hearing the parties agreed to proceed by way of written submissions; and

WHEREAS on the 2nd day of March 2010 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 00144

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR STEPHEN THOMAS MASON
	APPLICANT
	-v-
	DARREN STEVEN ELSEGOOD, BRADLEY KEITH ELSEGOOD, KYLIE MAY ELSEGOOD-SMITH, DAVID KEITH ELSEGOOD, SUNNY MAY ELSEGOOD AND SUNLIFE PTY LTD (ACN # 009415614) IN FAMILY PARTNERSHIP TRADING AS COMBINED METAL INDUSTRIES (ABN# 32737967619)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 29 MARCH 2010
FILE NO/S	U 197 OF 2009
CITATION NO.	2010 WAIRC 00144

Result	Discontinued
Representation	
Applicant	Mr S Mason on his own behalf
Respondent	Mr G McCorry as agent

Order

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

WHEREAS on 26 November 2009, and with the consent of the parties, the Commission convened a conference for the purpose of conciliating between the parties however, no agreement was reached; and

WHEREAS the matter was set down for hearing on 21 January 2010 as to whether the application should be accepted out of time; and

WHEREAS on 20 January 2010 the applicant requested that the hearing be adjourned for one month and, given the respondent's consent, the hearing was vacated; and

WHEREAS on 23 February 2010 the applicant advised the Commission that he wished to discontinue the matter; and

WHEREAS on 25 February 2010 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.

2010 WAIRC 00145

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN BRUCE MCKAY
	APPLICANT
	-v-
	STIRFRY ENTERPRISES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 29 MARCH 2010
FILE NO/S	B 42 OF 2009
CITATION NO.	2010 WAIRC 00145

Result	Dismissed

Order

WHEREAS this is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"); and

WHEREAS the Commission set down a conference on 7 May 2009 for the purpose of conciliating between the parties; and

WHEREAS on 29 April 2009 the Commission was advised that the respondent had been placed into voluntary liquidation on 5 March 2009; and

WHEREAS on 1 May 2009 the Commission wrote to the applicant to advise that as the respondent had been placed into voluntary liquidation this may prevent the Commission from exercising any jurisdiction in relation to the application and as the respondent's liquidator indicated that they would not be attending the conference set down on 7 May 2009, the conference was vacated; and

FURTHER the applicant was informed that the matter would be left open for 90 days to allow time for him to obtain advice and to consider his position; and

WHEREAS on 7 October 2009 the applicant advised that he would not be proceeding with the matter and undertook to lodge a Notice of Withdrawal or Discontinuance form in the Commission however, this did not occur; and

WHEREAS on 1 December 2009 the Commission wrote to the applicant about lodging a Notice of Withdrawal or Discontinuance forming however, there was no response; and

WHEREAS the matter was listed for a show cause hearing on 19 March 2010 as to why the matter should not be dismissed pursuant to s 27(1) of the Act; and

FURTHER the applicant was advised that non-attendance by the applicant at these proceedings would result in an order being issued dismissing the application; and

WHEREAS the applicant did not attend the show cause hearing on 19 March 2010 nor did he advise the Commission beforehand as to any reason why he was unable to 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.

2010 WAIRC 00137

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGE MOULE
	APPLICANT
	-v-
	VASCOS HOLDINGS PTY LTD T/A AVANTI ELECTRICS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 26 MARCH 2010
FILE NO/S	U 179 OF 2009
CITATION NO.	2010 WAIRC 00137
Result	Dismissed

Order

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

WHEREAS on 14 October 2009 the applicant's representative advised the Commission that the matter was presently being pursued at Fair Work Australia and undertook to inform the Commission if the matter was resolved; and

WHEREAS on 7 December 2009 the applicant's representative advised the Commission that the matter had been resolved and a Notice of Withdrawal or Discontinuance form would be lodged in the Commission however, this did not occur; and

WHEREAS on 25 February 2010 the Commission wrote to the applicant requesting a Notice of Withdrawal or Discontinuance form be lodged by 8 March 2010; and

WHEREAS as the Notice of Withdrawal or Discontinuance form was not lodged in the Commission by this date the matter was listed for a show cause hearing on 19 March 2010 as to why the matter should not be dismissed pursuant to s 27(1) of the Act; and

FURTHER 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 show cause hearing on 19 March 2010 nor did he advise the Commission beforehand as to any reason why he was unable to 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.

2010 WAIRC 00117

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REBECCA ANNE ROWE
	APPLICANT
	-v-
	AFREYA HAIR AND BEAUTY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 16 MARCH 2010
FILE NO/S	U 230 OF 2009
CITATION NO.	2010 WAIRC 00117

Result	Discontinued

Order

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

WHEREAS on 18 December 2010 the Commission wrote to the applicant advising her that her application could not proceed without filing a Declaration of Service; and

WHEREAS on 4 January 2010 the applicant lodged a Declaration of Service; and

WHEREAS the Commission set down a conference on 23 February 2010 for the purpose of conciliating between the parties; and

WHEREAS on 4 February 2010 the respondent's representative advised the Commission that the matter had settled; and

WHEREAS on 5 February 2010 the applicant's representative confirmed that a settlement had been reached; and

WHEREAS on 9 February 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and the conference was vacated; and

WHEREAS the respondent 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.

2010 WAIRC 00119

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BROOKLAND STEPHANIE
	APPLICANT
	-v-
	ILUKA RESOURSES ENEABBA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 16 MARCH 2010
FILE NO/S	U 180 OF 2009
CITATION NO.	2010 WAIRC 00119

Result	Discontinued
Representation	
Applicant	Ms S Brookland on her own behalf
Respondent	Ms A Toohey and Mr S Bowler (of counsel)

Order

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

WHEREAS on 9 November 2009 the Commission convened a conference to deal with scheduling issues relating to the application being lodged out of time and the issue of jurisdiction raised by the respondent in its Notice of Answer and Counter-proposal; and

WHEREAS on 24 November 2009 the Commission wrote to the parties advising timeframes for filing and serving submissions with respect to the issue of jurisdiction raised by the respondent; and

WHEREAS on 8 January 2010, after the parties had filed their written submissions and prior to a decision issuing in relation to the issue of jurisdiction, the applicant advised the Commission that she did not wish to proceed with this application; and

WHEREAS on 12 January 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 4 February 2010 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.

2010 WAIRC 00114

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ODETTE STEWART
	APPLICANT
	-v-
	KUNUNURRA WARINGARRI ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 15 MARCH 2010
FILE NO/S	B 146 OF 2009
CITATION NO.	2010 WAIRC 00114

Result	Application discontinued
Representation	
Applicant	Mrs O Stewart
Respondent	Ms A Toohey (of counsel)

Order

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

AND WHEREAS on 2 September 2009 and 7 September 2009 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 7 September 2009 agreement was reached between the parties;

AND WHEREAS 8 March 2010 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.

2010 WAIRC 00113

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ODETTE STEWART
	APPLICANT
	-v-
	KUNUNURRA WARINGARRI ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 15 MARCH 2010
FILE NO/S	U 146 OF 2009
CITATION NO.	2010 WAIRC 00113

Result	Application discontinued
Representation	
Applicant	Mrs O Stewart
Respondent	Ms A Toohey (of counsel)

Order

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

AND WHEREAS on 2 September 2009 and 7 September 2009 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 7 September 2009 agreement was reached between the parties;

AND WHEREAS 8 March 2010 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.

2010 WAIRC 00196

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENYS WATT
	APPLICANT
	-v-
	DJOORAMINDA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 9 APRIL 2010
FILE NO/S	U 204 OF 2009
CITATION NO.	2010 WAIRC 00196

Result	Discontinued
Representation	
Applicant	Ms G Watt on her own behalf
Respondent	Mr B Jackson (of counsel) and Ms C Broers

Order

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

WHEREAS on 18 December 2009 the Commission convened a conference for the purpose of scheduling a hearing with respect to the application being lodged out of time and the issue of jurisdiction raised in the respondent's Notice of Answer and Counter-proposal lodged in the Commission on 6 November 2009; and

WHEREAS at the conference held on 18 December 2009 issues were raised about whether or not the applicant had been terminated and the respondent was given further time to obtain information; and

WHEREAS on 17 February 2010 and 19 February 2010 the Commission convened further conferences; and

WHEREAS at the conclusion of the conference on 19 February 2010 the parties reached an agreement in principle in respect of the application; and

WHEREAS on 4 March 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 17 March 2010 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.

2010 WAIRC 00146

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRACY WILKINSON
	APPLICANT
	-v-
	STIRLING SKILLS TRAINING INC. TRADING AS JOBS WEST
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 29 MARCH 2010
FILE NO/S	B 104 OF 2009
CITATION NO.	2010 WAIRC 00146

Result	Dismissed
Representation	
Applicant	Ms T Wilkinson on her own behalf
Respondent	Mr J Theodorsen as agent

Order

WHEREAS this is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"); and

WHEREAS on 2 and 15 July 2009 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference held on 15 July 2009 the parties reached an agreement in principle in respect of the application; and

WHEREAS the Commission contacted the applicant on a number of occasions about lodging a Notice of Withdrawal or Discontinuance form however this did not occur; and

WHEREAS the matter was listed for a show cause hearing on 19 March 2010 as to why the matter should not be dismissed pursuant to s 27(1) of the Act; and

FURTHER the applicant was advised that non-attendance by the applicant at these proceedings would result in an order being issued dismissing the application; and

WHEREAS the applicant did not attend the show cause hearing on 19 March 2010 nor did she advise the Commission beforehand as to any reason why she was unable to 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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Anne Marion Coyne	Kimberley Aboriginal Medical Services Council Inc.	U 220/2009	Chief Commissioner A R Beech	Discontinued
Colin Michael Adamson	Churches of Christ of WA Inc	U 154/2009	Chief Commissioner A R Beech	Discontinued
David Geoffrey Crowley	Tiwest Pty Ltd	B 226/2009	Commissioner S J Kenner	Discontinued
Eleanor Mary Criddle	Ms Belinda Bailey - CEO Rural Health West	U 9/2010	Chief Commissioner A R Beech	Discontinued
Linda Sutherland Skinner	Outcare Incorporated	U 241/2009	Commissioner S J Kenner	Discontinued
Mariana Fili Smith	Mr Wayne Adrian Collinson and Ms Elizabeth Collinson	U 194/2009	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2010 WAIRC 00134

DISPUTE RE PUBLIC HOLIDAY ENTITLEMENTS FOR PART TIME EMPLOYEES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

THE DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH AS HEALTH CORPORATE NETWORK

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

ACTING SENIOR COMMISSIONER P E SCOTT

DATE THURSDAY, 25 MARCH 2010

FILE NO PSAC 17 OF 2008

CITATION NO. 2010 WAIRC 00134

Result Order Issued

Representation

Applicant Mr D Ellis

Respondent Mr P Heslewood

Order

WHEREAS this is an application pursuant to section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on Thursday, the 11th day of March 2010 the Public Service Arbitrator convened a further conference to deal with the issue of the calculation and non payment for public holidays for employees eligible to be members of the applicant union; and

WHEREAS at the conclusion of the conference it was agreed that an Order should issue to reflect the agreement of the parties for the finalisation of payments due to employees;

NOW THEREFORE, having heard Mr D Ellis on behalf of the Health Services Union (Union of Workers) and Mr P Heslewood on behalf of the respondent the Public Service Arbitrator hereby orders that:

> Health Corporate Network shall pay to employees and former employees of the Metropolitan Health Services eligible to be members of the Health Services Union of Western Australia (Union of Workers) all arrears as claimed by those employees, prior to 31 March 2010, and former employees for public holidays referred to in the Order issued by the Public Service Arbitrator on 3 September 2009 [2009 WAIRC 00635], in respect of public holidays up to and including 31 January 2010 by no later than 29 April 2010.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	Director General of Health in right of the Minister for Health as the Metropolitan Health Service	Scott Acting SC	PSAC 25/2009	13/11/2009	Dispute in relation to reclassification appeals	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Department of Education and Training	Harrison C	C 32/2009	6/10/2009	Dispute in relation to paid planned personal leave being withdrawn from union member	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department for Communities	Scott Acting SC	PSAC 23/2009	19/10/2009	Dispute re work performance and status of union member	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department for Child Protection, Government of Western Australia	Scott Acting SC	PSAC 24/2009	28/10/2009 6/11/2009	Dispute re disciplinary process	Referred
The Civil Service Association of Western Australia Incorporated	The Commissioner of Police, Western Australia Police Service	Scott Acting SC	PSAC 1/2010	N/A	Dispute re Return to Work	Discontinued
The State School Teachers' Union of WA (Incorporated)	The Director General, Department of Education and Training	Harrison C	C 13/2009	7/04/2009 1/05/2009 4/05/2009 6/05/2009 4/06/2009	Dispute re unlawful and unfair downgrading of an employee from Level 4 to Level 3	Referred

PROCEDURAL DIRECTIONS AND ORDERS—

2010 WAIRC 00208

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MICHAEL QUARRY

APPLICANT

-v-

DEPARTMENT OF EDUCATION & TRAINING

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE FRIDAY, 16 APRIL 2010

FILE NO/S U 38 OF 2009

CITATION NO. 2010 WAIRC 00208

Result Order issued

Representation

Applicant Mr M Quarry on his own behalf

Respondent Mr D Leigh of Counsel

Order

WHEREAS this is an application pursuant to s 29(1)(b)(i) of *the Industrial Relations Act 1979* ("the Act") lodged on 3 March 2009; and

WHEREAS conciliation was unavailing and the parties were advised on 25 May 2009 that the matter was set down for hearing on 8, 9 and 10 September 2009; and

WHEREAS on 25 August 2009 the hearing dates were vacated as the applicant did not attend conferences set down on 14 and 21 August 2009 to deal with interlocutory matters with respect to the hearing; and

WHEREAS the matter was listed for a show cause hearing on 22 September 2009 and at the show cause hearing the applicant advised the Commission that he wished to proceed with his application and undertook to provide contact details where he could be reached during working hours; and

WHEREAS on 29 October 2009 and 10 December 2009 scheduling conferences were held in relation to the hearing of the matter; and

WHEREAS on 18 February 2010 the parties were advised that the application had been set down for hearing and determination on 13 and 14 April 2010; and

WHEREAS on 6 April 2010 the applicant wrote to the Commission requesting an adjournment of the hearing set down for 13 and 14 April 2010; and

WHEREAS on 7 April 2010 the respondent advised the Commission that it did not consent to an adjournment being granted; and

WHEREAS on 9 April 2010 the Commission convened a conference for the purpose of hearing further from the parties in relation to the request to adjourn the hearing; and

WHEREAS at the conference on 9 April 2010 the applicant advised the Commission that:

- the preparation required for the hearing was excessive and was causing a deterioration of his chronic medical condition and his objective was to protect his health;
- if the hearing was to proceed the presentation of his case was likely to lack focus and succinctness and he wanted to avoid frustrating or wasting the time of all involved and he wanted to ensure that he had a fair hearing;
- the applicant relied on a letter attached to his submissions which was a medical certificate from his psychiatrist, dated 1 April 2010, advising that the applicant's major depressive disorder has been deteriorating over the last few months and she recommended that as the applicant should reduce his level of stress over the next two months this application should be adjourned for that period; and

WHEREAS the respondent's representative argued that:

- the respondent did not consider that a further adjournment of this application was appropriate;
- there was no indication that the applicant's health issues will be lessened by the passage of time as confirmed by the applicant himself therefore if an adjournment is granted at this stage it is unclear if it will not lead to a further adjournment in the future;
- the respondent is concerned that the applicant did not attend scheduling conferences in August 2009 with respect to a hearing, the applicant has already once been obliged to show cause why the matter should not be struck out and further delays would be contrary to the requirement on the Commission to act expeditiously;
- the respondent has expended considerable time and effort in preparing its case and witnesses have been advised of the hearing dates and are ready to give evidence at the hearing on the dates set and at least one witness may not be available to give evidence if this application is adjourned;
- the prejudice to the respondent if the hearing is adjourned is with respect to increased costs and the continuing disruption of the respondent's staff in being requested to repeatedly prepare for this matter; and

WHEREAS after hearing from the parties and in deciding whether the Commission should exercise its discretion to grant the adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* (1969) WAR 19), the Commission is of the view that an adjournment should be granted based on the medical evidence submitted by the applicant confirming that he has been experiencing difficulties preparing for his case and that he will require two months to complete this task without compromising his health; and

WHEREAS it is also my view that the disadvantage to the applicant is greater than the disadvantage to the respondent if an adjournment is not granted; and

WHEREAS in reaching this decision I am mindful of the possible disadvantage to the respondent if any of its witnesses are unavailable due to the adjournment of the hearing being granted and as a result will grant the respondent liberty to apply with respect to any programming order/s it believes may be necessary to overcome this disadvantage; and

WHEREAS it is my view that in the circumstances this application will be listed for a two day hearing in approximately three months time and the applicant is on notice that if he requests a further adjournment he will be required to bring evidence to the Commission in support of that adjournment;

NOW THEREFORE having heard Mr M Quarry on his own behalf and Mr D Leigh of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s 27(1), hereby orders:

1. THAT the hearing of U 38 of 2009 scheduled for 13 and 14 April 2010 is adjourned to a date to be fixed.
2. THAT the respondent is granted liberty to apply to seek programming orders in relation to any disadvantage with respect to witness evidence that it may suffer as a result of this adjournment being granted.

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

PUBLIC SERVICE APPEAL BOARD—

2010 WAIRC 00120

APPEAL AGAINST THE DECISION MADE ON 4 DECEMBER 2008 IN RELATION TO REPRIMAND AND REDUCTION IN REMUNERATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS BROCKLEHURST
	APPELLANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR W GREEN - BOARD MEMBER
	MR D SOLOSY - BOARD MEMBER
DATE	WEDNESDAY, 17 MARCH 2010
FILE NO	PSAB 21 OF 2008
CITATION NO.	2010 WAIRC 00120

Result	Appeal to the Public Service Appeal Board dismissed
Representation	
Appellant	Mr M Gunning, of Counsel
Respondent	Mr J Misso, of Counsel

Order

WHEREAS this is an appeal pursuant to section 80I of the Industrial Relations Act 1979; and

WHEREAS on the 8th day of March 2010 the Appellant's representative filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00140

APPEAL AGAINST THE DECISION MADE ON 9 NOVEMBER 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN MATHEW LONGA
	APPELLANT
	-v-
	KALGOORLIE BOULDER CEMETERY BOARD
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON - CHAIRMAN
DATE	FRIDAY, 26 MARCH 2010
FILE NO	PSAB 25 OF 2009
CITATION NO.	2010 WAIRC 00140

Result Withdrawn by leave

Order

WHEREAS this is an appeal to the Public Service Appeal Board lodged in the Commission pursuant to s 80I of the *Industrial Relations Act 1979*; and

WHEREAS on 21 January 2010 the appellant advised that he no longer wished to proceed with this application; and

WHEREAS on 4 February 2010 the appellant filed a Notice of Withdrawal or Discontinuance in respect of this appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby withdrawn by leave.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00153

APPEAL AGAINST THE DECISION MADE ON 30 SEPTEMBER 2009 RELATING TO SUSPENSION OF UNION MEMBER WITHOUT PAY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL PRESTAGE
	APPELLANT
	-v-
	THE DIRECTOR-GENERAL, DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MR R BECKER - BOARD MEMBER
HEARD	THURSDAY, 26 NOVEMBER 2009, FRIDAY, 5 FEBRUARY 2010
DELIVERED	TUESDAY, 30 MARCH 2010
FILE NO.	PSAB 16 OF 2009
CITATION NO.	2010 WAIRC 00153

Catchwords	Public Service Appeal Board – Appeal against decision to suspend without pay – Decision adjusted by setting the decision aside - Respondent erred in exercising its discretion unreasonably and unfairly– *Industrial Relations Act 1979* s 80I(1)(d); *Public Sector Management Act 1994* s 8, s 9, s 64(1)(a), s 76, s 81(1) and (2) and s 82(1) and (3); *Interpretation Act 1984* s 52(1); *Public Sector Management (General) Regulations 1994* r 16
Result	Appeal upheld
Representation	
Appellant	Ms S Bhar and Mr S Farrell
Respondent	Mr D Hughes and Mr E Rea

Reasons for Decision

1 These are the unanimous Reasons for Decision of the Public Service Appeal Board ("the Board").

2 On 7 October 2009 Daniel Prestage ("the appellant") lodged an appeal to the Board pursuant to s 80I(1)(d) of the *Industrial Relations Act 1979* ("the Act") against a decision to suspend him without pay made on 30 September 2009 by the Director-General, Department for Child Protection ("the respondent").

3 The schedule attached to the appellant's application is as follows:

"**Schedule 1**

1. Daniel Prestage, ("the Appellant"), is employed as a Youth and Family Support Worker by the Department of Child Protection ("the Respondent") (sic)

2. On or about 30 September 2009, the Appellant received a letter from the Respondent advising him that the Respondent had decided to suspend him without pay pursuant to *s.82(1) of the Public Sector Management Act 1994 ("the PSMA 1994").* A copy of that letter is attached herewith and marked as "Attachment A".

3. The Appellant is aggrieved by this decision of the Respondent made in the exercise of its power under *section 82 of the PSMA 1994* and appeals against that decision pursuant to *section 78(3)(b)* of the *PSMA 1994.*

Background

1. On 6 July 2009, the Respondent wrote to the Appellant advising him that he was suspected to have committed a breach of discipline under *section 80 of the PSMA 1994.* A copy of that letter is attached herewith and marked as "Attachment B".
2. The suspected breach of discipline relates to allegations that on 29 June 2009, the Appellant breached the Western Australian Public Sector Code of Ethics which required the Appellant to treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare.
3. The allegations specifically claimed that on the said date, the Appellant committed an act of aggravated sexual assault upon [name of person] and on an unspecified date in June 2009, the Appellant threatened to kill her or another person. Further, the acts are alleged to have taken place in the presence of the children of the relationship and the Respondent formed the view that such actions may be destructive of the Appellant's authority and influence as its employee.
4. The Respondent specifically states in Attachment B (paragraph 4) that the above acts may be in breach of the Western Australian Public Sector Code of Ethics and other legislation, citing sections *9* and *80* of the *PSMA 1994.*
5. The Respondent provided the Appellant with the opportunity to respond to the allegations by 17 July 2009.
6. On 10 July 2009, the Respondent further wrote to the Appellant directing the Appellant that, in light of the disciplinary and criminal charges brought against him, he was to remain away from the workplace on full pay until further notice. The Respondent stated that its decision was based on the severity of the allegations against the Appellant, the likely review of the Appellant's Working With Children card and the likely adverse impact on the Respondent's reputation. A copy of the Respondent's letter is attached herewith and marked as "Attachment C".
7. On 4 August 2009, the Respondent again wrote to the Appellant referring to the allegation that the Appellant breached the Western Australian Public Sector Code of Ethics which required the Appellant to treat people with respect, courtesy and sensitivity and to recognise their interests, rights, safety and welfare.
8. The Respondent acknowledged the Appellant's letter dated 24 July 2009 in which the Appellant exercised his right to not partake in any other process while his criminal proceedings were on-going. Nevertheless, the Respondent stated its intention to conduct its own investigation into the suspected breach of discipline and notified the Appellant that it intended to suspend the Appellant without pay until such time as outlined in section 82(2) or (3) of the PSMA 1994.
9. The Respondent outlined the following factors which it claims to have considered in the risk assessment and decision to pursue suspension without pay:
    - Potential risk of compromising the reputation of the organisation with the public;
    - Potential risk of adversely affecting the emotional well-being of any employee or client;
    - Potential impact on the effective operation of Departmental policies and programs;
    - The possibility of suspending with pay;
    - The appropriateness of moving the Appellant to another work location.
10. The Respondent further provided the Appellant with seven (7) days to provide the Respondent with reasons as to why the suspension without pay should not be imposed. A copy of the Respondent's letter referred to in paragraphs 7-10 is attached herewith and marked as "Attachment D".
11. On or about 6 August 2009, on behalf of the Appellant, solicitor Brian Lynch of Mony de Kerloy, Barristers and Solicitors, wrote to the Respondent advising the Respondent that the Appellant had entered a plea of not guilty with the court in relation to the charges against him and that the matter was before the court and due to go to trial.
12. Mr Lynch also requested that (sic) disciplinary process be stayed until the criminal investigation and/ or proceedings have concluded so as to afford natural justice to the Appellant. Mr Lynch further queried the basis on which the Respondent determined that the allegations amounted to a contravention of the code of ethics when the allegations had not been substantiated.
13. Mr Lynch also advised the Respondent that to suspend the Appellant without pay would have a severe adverse impact on the Appellant's ability to meet his day to day obligations and also importantly, his ability to pay for his legal advice, which would in turn impact upon his ability to be adequately represented in his criminal proceedings. A copy of Mr Lynch's letter dated 6 August 2009 is attached herewith and marked as "Attachment E".

14. At about the same time, the Appellant sought the advice and representation of the Civil Service Association in the industrial aspects of this matter to minimise the burden of legal costs. The CSA sought an extension of time from the Respondent for the Appellant to submit his reasons as to why he should not be suspended without pay (sic)

15. On or about 14 August 2009, the Appellant provided the Respondent with a letter outlining the severe financial hardship he would endure as a result of the suspension without pay. The Appellant also notified the Respondent that the criminal proceedings may take up to 18 months to conclude. The Appellant stated that he understood that the Respondent's position might be that it would be inappropriate for the Appellant to work in the same role or with children and if the Respondent should maintain that opinion, that he would be willing to work in another role which did not have child based interaction. A copy of the Appellant's letter to the Respondent is attached herewith and marked as "Attachment F".

16. On 30 September 2009, the Respondent notified the Appellant that despite the arguments presented by the Appellant and Mr Lynch, the Respondent maintained its belief that suspending the Appellant without pay is an appropriate course of action and that such suspension will continue until disciplinary proceedings are concluded. A copy of the Respondent's letter is attached herewith and marked as "Attachment A".

17. The Appellant authorised the CSA to lodge this appeal.

18. The Respondent's decision to suspend the Appellant without pay is harsh and unreasonable. The Appellant has 5 years of service with the Respondent and an unblemished record. The Appellant and the CSA allege that the Respondent has not fully considered all the alternatives to suspending the Appellant without pay. Despite setting out the factors it claims to have considered in determining its decision, the Respondent has not afforded the Appellant the reasons for concluding that suspension without pay is the only, or most appropriate, course of action in this matter.

19. The CSA and the Appellant deny that not suspending the Appellant without pay will:

    - Potentially risk compromising the reputation of the organisation with the public;
    - Potentially risk adversely affecting the emotional well-being of any employee or client;
    - Potentially impact on the effective operation of Departmental policies and programs.

20. The CSA and the Appellant further allege that the Respondent did not fully consider the possibility of suspending the Appellant with pay or the appropriateness of moving the Appellant to another role or work location.

21. The Appellant is suffering from financial hardship as a result of the suspension because he has major financial commitments as outlined in Attachment F and the period of suspension without pay will be protracted beyond a reasonable time-frame taking into account the indeterminate length of the criminal proceedings and then the duration of the disciplinary process, which the Respondent should rightfully only initiate at the conclusion of the criminal proceedings so as to not interfere with the court proceedings.

22. The Appellant submits that if the suspension without pay was to continue indeterminately, he would have to file for bankruptcy and will lose his house, vehicle and other assets and will not be able to financially provide for his children, the youngest of whom is only about a month old.

23. The Appellant does not present a real risk to the Respondent's operations, and could have been placed in other activities outside of child involvement pending the outcome of the criminal proceedings.

24. *Section 82(3) of the PSMA 1994* allows for the reinstatement of the Appellant's pay at the discretion of the Respondent taking into account whether or not it is likely that the investigation and/ or subsequent processes may be lengthy or delayed or if the Appellant has submitted that he is suffering financial duress.

25. The decision of the Respondent to suspend the Appellant without pay further contravenes the principles of *Gregory Robert Ireland -v- The Director-General, Department of Health* [2008 WAIRC 00297] in that it is tantamount to prejudging the outcome of the disciplinary process and has taken into consideration factors which are irrelevant and therefore in breach of the rules of procedural fairness.

Relief Sought

1. Urgently the Appellant requests that the Board use its powers under section 80I(d) (sic) of the *Industrial Relations Act 1979* to hear this appeal and adjust the Respondent's decision to suspend her (sic) without pay.

2. The Appellant requests that the Board orders the Respondent to reinstate all benefits due to her (sic) as if the decision had not been made effective from the date of the decision."

4 Attached to the Schedule of the application were Attachments A to F. Attachment A is a letter to the appellant dated 30 September 2009 from Cheryl Barnett, Executive Director Metropolitan Services, Department for Child Protection and is as follows (formal parts omitted):

"**SUBJECT: NOTIFICATION OF SUSPENSION WITHOUT PAY**

I refer to my letter dated 4 August 2009 regarding the notification that I intended to suspend you without pay and affording you the opportunity to provide reasons to me as to why the suspension without pay should not be imposed. I also refer to the letter from your Solicitor, Mr Brian Lynch of Mony De Kerloy, dated 10 August 2009 and your response received 14 August 2009.

I have carefully considered the arguments you have presented and those of Mr Lynch but believe that suspending you without pay is an appropriate course of action. Therefore, pursuant to section 82(1) of the Public Sector Management Act (sic) you are hereby suspended without pay from the date of this letter. This suspension shall continue until disciplinary proceedings are concluded.

In the event that no breach of discipline was committed, the Department will ensure that your pay during the period of suspension is restored.

Should you have any queries, please contact A/Manager Roger Nickerson on [telephone number]."

5 Attachment B is a letter to the appellant dated 6 July 2009 from Sandra Randall Acting Director Integrity and Screening, Department for Child Protection and is as follows (formal parts omitted):

"**SUBJECT: SUSPECTED BREACH OF DISCIPLINE**

It has come to my attention that you are suspected of having committed acts which may constitute a breach of discipline under section 80 of the *Public Sector Management Act 1994* (the Act).

Specifically, It (sic) is alleged that on 29 June 2009 at Coolbellup you breached the *Western Australian Public Sector Code of Ethics* that requires you to treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare.

By way of further clarification, it is claimed that on 29 June 2009 you committed an act of aggravated sexual assault upon [name of person] and on an unspecified date in June 2009 you threatened to kill her or another person. Both acts are alleged to have been committed in the presence of the children of the relationship. Such actions may be destructive of your authority and influence as an employee of the Department for Child Protection.

As previously mentioned such acts/ actions may breach the *Western Australian Public Sector Code of Ethics* in addition to other legislation which governs your behaviour such as the;

Public Sector Management Act 1994, section nine which states in part;

9. General principles of official conduct

The principles of conduct that are to be observed by all public sector bodies and employees are that they-

(a) are to comply with the provisions of -

(i) this Act and any other Act governing their conduct;

(ii) public sector standards and codes of ethics; and

(iii) any code of conduct applicable to the public sector body or employee concerned;

Public Sector Management Act 1994 section 80 which states in part;

80. Breaches of discipline

An employee who —

(b) contravenes —

(i) any provision of this Act applicable to that employee; or

(ii) any public sector standard or code of ethics;

a. commits an act of misconduct;

commits a breach of discipline.

I would like to provide you with the opportunity to respond to these allegations.

In accordance with Section 81(1) of the Act, please forward to me a written explanation in respect to the above alleged breach of discipline by close of business on 17 July 2009. I will take your explanation into consideration in determining what, if any, further action is taken in respect of these allegations.

Please contact the Manager Investigations and Assessments Chantelle Horsford on [telephone number] should you have any queries."

6 Attachment C is a letter to the appellant dated 10 July 2009 from Cheryl Barnett, Executive Director Metropolitan Services, Department for Child Protection and is as follows (formal parts omitted):

"**DIRECTION TO REMAIN ABSENT FROM WORK**

In view of the disciplinary charges that have been commenced against you and the criminal charges brought by Western Australia Police relating to events that are alleged to have occurred on or about 29 June 2009, you are directed to remain away from the workplace on full pay until further notice.

This decision takes into account the severity of the allegation against you, the likely review of your Working With Children card, and the likely adverse impact on the reputation of the Department.

I note that you have requested that Team Leader Rhonda Camilleri act as a liaison between yourself and the Department. Ms Camilleri can be contacted on [telephone number].

Should you have any queries regarding the disciplinary process please contact Manager Investigations and Assessments Chantelle Horsford on [telephone number].

I would like to remind you of the support services that are available to you through the PRIMEPSYCH Employee Assistance Program. These services can be accessed by calling [telephone number]."

7 Attachment D is a letter to the appellant dated 4 August 2009 from Cheryl Barnett, Executive Director Metropolitan Services, Department for Child Protection, and is as follows (formal parts omitted):

"**SUBJECT: NOTIFICATION OF INVESTIGATION INTO SUSPECTED BREACH OF DISCIPLINE**

I refer to the letter dated 6 July 2009 regarding the allegation against you, namely that on 29 June 2009, at Coolbellup, you breached the *Western Australian Public Sector Code of Ethics* that requires you to treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare.

I also refer to your letter received on 24 July 2009 (sic). Whilst acknowledging your decision not to render an explanation relating to criminal proceedings, I continue to suspect that you may have committed the alleged breaches of discipline. I have therefore decided to notify you of the Department's intention to initiate an investigation into the suspected breach of discipline, pursuant to section 81(2) of the *Public Sector Management Act 1994* (the Act).

I have directed Senior Investigator Roger Nickerson, with the Integrity and Screening Unit, to conduct the investigation pursuant to section 81(2) of the Act.

Pursuant to section 82(1) of the Act the Department intends to suspend you without pay. This suspension shall continue until such time as outlined in section 82(2) or (3) of the Act. However, before making the final decision to suspend you without pay, I will allow you the opportunity to submit reasons as to why this course of action should not be pursed (sic).

The following factors were considered in the risk assessment and decision to pursue suspending you without pay:

- Potential risk of compromising the reputation of the organisation with the public;
- Potential risk of adversely affecting the emotional well being of any employee or client;
- Potential impact on the effective operation of Departmental policies and programs;
- The possibility of suspending with pay;
- The appropriateness of moving you to another work location;

If you wish to provide reasons to me as to why the suspension without pay should not be imposed please do so in writing within seven (7) business days from receipt of this letter.

Please contact Mr Nickerson on [telephone number] should you have any queries."

8 Attachment E is a letter to Ms Cheryl Barnett dated 6 August 2009 from Brian Lynch of Mony de Kerloy Barristers and Solicitors and is as follows (formal parts omitted):

"**DANIEL PRESTAGE — NOTIFICATION OF INVESTIGATION INTO SUSPECTED BREACH OF DISCLIPINE**

We act for Mr Prestage in relation to the criminal allegations recently brought against him by the Western Australian Police.

We have to hand a copy of your letter to our client dated 4 August 2009.

Our client has entered a plea of not guilty with the court in relation to the charges so levied against him. This matter is before the court and is due to go to trial to be determined by the court.

It is trite law that a person is not obliged to answer questions or render an explanation to matters relating to criminal proceedings in a parallel process (see *Hammond v the Commonwealth* (1982) 152 CLR and *Chapman v Director of Public Prosecutions* (2009) WASCA 66).

It is clear that the requirement for our client to give an explanation or to participate in a Breach of Discipline process would, therefore, amount to an improper interference with the administration of justice and a contempt of court. Thus the entire process under the *Public Sector Management Act* 1994 must be stayed until the present criminal investigation (or any other criminal investigation) of this matter has concluded. It is clear that any response to you via the Breach of Discipline process may potentially prejudice our client's case under any criminal investigation into these matters as anything he says may potentially be used against him. These concerns would deny our client the right to procedural fairness in the disciplinary process.

Further we do not see how an allegation of the charges against our client can possibly equate to a *"contravention of the code of ethics"* so alleged by you in your letter dated 6 July 2009 or indeed to anything other than the fact that an allegation has been made against our client, which remains as you are aware as an allegation until the conclusion of the trial of this matter. We seek confirmation as to what foundation you have relied on (be it documentation or otherwise) to confirm your suspicion that our client has committed the alleged breaches. In other words please explain your suspicion.

Should you proceed to suspend our client without pay, it will have a severely adverse impact on his ability to meet his day to day obligations and indeed his ability to pay for his legal advice, which would in turn impact upon his ability to be adequately represented in the criminal matter.

We request that the proposed Breach of Discipline process under the *Public Sector Management Act 1994* be suspended until such time as the current criminal investigation of these allegations has been concluded.

Our client reserves his rights in relation to this matter."

9 Attachment F is an undated document written by the appellant. The appellant says in his application that this letter was provided to the respondent on or about 14 August 2009 and outlines what he says is the severe hardship he would endure as a result of being suspended without pay. The letter is as follows (formal parts omitted - verbatim account):

> "To whom it may concern
>
> I response to your letter; **Notifications of investigation into suspected breach of disciple**
>
> I cannot say as to whether I breached the discipline dew the impact that it may have on the criminal allegations.
>
> I understand that at this stage of the proceedings I am not able to work in the same capacity or role that I had prier to the allegations, I am willing to work in another Capacity or role that dose not contravenes the department's authority when working with children.
>
> This may be any role which does not have child based interaction.
>
> I will be put in a position of financial distress if I am suspended with out pay. The impactions of this will affect my children's maintenance, mortgage repayments, solicitor bills, and all monetary debts.
>
> This will also inadvertently affect my extended family.
>
> The solicitor cost is an important part of my life at the moment, as this will lead to a verdict of my innocence.
>
> The trial may take up to 18 months before a verdict can be made.
>
> I have the capacity to work at present, this is part of my bail conditions.
>
> I have worked for the department for 5 years and have never at any time compromised the organization, The time I have worked for the department I have praised and promoted D.C.P.
>
> Suspension with pay or the moving of me into another work location is my best options to continue my involvement with the department. The benefit of this for me and the Department are very easily seen
>
> Once the criminal matters are dealt with I have every intention of returning back to the department, being what ever that role may be.
>
> I am at this point still supporting three children and have a child dew in September, this will require money to support.
>
> a list of the cost to live for me at present
>
> I presently earn $850 a week $1700 per fort night.
>
> At this point I am paying Maintenance for the children at $150 a week.
>
> Mortgage $580
>
> Car repayments $208, I am not able to sell the car it is in my ex name.
>
> Petrol $30
>
> Mobile $30
>
> Insurance $150 per month
>
> Isaacs Maintenance $25 my olds son
>
> Power Phone Gas very
>
> Parents Board $200 a week
>
> Solicitor repayments any amount left
>
> Thank you I will await your response.
>
> Daniel Prestage."

10 A statement of agreed facts was filed by the parties on 23 October 2009 in relation to this matter. This statement reads as follows:

> "1. Daniel Prestage, ("the Appellant"), is employed as a Youth and Family Support Worker by the Director General, Department for Child Protection ("the Respondent").
>
> 2. The Appellant commenced employment with the Respondent on 4 July 2005 on a fixed term contract of employment.
>
> 3. The Appellant was permanently appointed to the role of Youth and Family Support Worker on 1 October 2008.
>
> 4. The Appellant has been continuously employed by the Respondent since 4 July 2005.
>
> 5. On or about 30 September 2009, the Appellant received a letter from the Respondent advising him that the Respondent had decided to suspend him without pay pursuant to *s.82(1) of the Public Sector Management Act 1994 ("the PSMA 1994").*
>
> 6. On 6 July 2009, the Respondent wrote to the Appellant advising him that he was suspected of having committed acts which may constitute a breach of discipline under *section 80 of the PSMA 1994.*
>
> 7. The suspected breach of discipline relates to allegations that on 29 June 2009, the Appellant breached the Western Australian Public Sector Code of Ethics which required the Appellant to treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare.

8. The allegations specifically claimed that on the said date, the Appellant committed an act of aggravated sexual assault upon [name of person] and on an unspecified date in June 2009, the Appellant threatened to kill her or another person. Further, the acts are alleged to have taken place in the presence of the children of the relationship and the Respondent formed the view that such actions may be destructive of the Appellant's authority and influence as its employee.

9. The Respondent specifically states in its letter dated 6 July 2009 that the above acts may be in breach of the Western Australian Public Sector Code of Ethics and other legislation, citing sections *9* and *80* of the *PSMA 1994.*

10. The Respondent provided the Appellant with the opportunity to respond to the allegations by 17 July 2009.

11. On 10 July 2009 the Applicant (sic) requested in a telephone conversation with the Respondent, that the Respondent grant an extension of the time for providing such a response, so that the Applicant (sic) could seek legal advice.

12. The Respondent agreed to an extension until 22 July 2009.

13. On 10 July 2009, the Respondent further wrote to the Appellant directing the Appellant that, in light of the disciplinary and criminal charges brought against him, he was to remain away from the workplace on full pay until further notice. The Respondent stated that its decision was based on the severity of the allegations against the Appellant, the likely review of the Appellant's Working With Children card and the likely adverse impact on the Respondent's reputation.

14. On 17 July 2009, the Appellant wrote to the Respondent, via email, requesting that the Respondent suspend its breach of discipline process until such time as the current criminal investigation has been concluded.

15. On 4 August 2009, the Respondent again wrote to the Appellant referring to the allegation that the Appellant breached the Western Australian Public Sector Code of Ethics which required the Appellant to treat people with respect, courtesy and sensitivity and to recognise their interests, rights, safety and welfare.

16. The Respondent acknowledged the Appellant's unsigned and undated letter received on 17 July 2009 (which was mis-described as being received 24 July 2009) in which the Appellant requested that the Respondent suspend its breach of discipline process. The Respondent informed the Appellant that it continued to suspect that the Appellant had committed the alleged breaches of discipline and intended to conduct an investigation pursuant to *section 82(1) of the PSMA 1994.* The Respondent stated that Senior Investigator Roger Nickerson had been directed to conduct the investigation pursuant to section 81(2) of the *PSMA 1994.*

17. The Respondent notified the Appellant that, pursuant to section 82(1) of the PSMA 1994 that it intended to suspend him without pay until such time as outlined in section 82(2) or (3) of the *PSMA 1994.*

18. The Respondent outlined the following factors which it considered in the risk assessment and decision to pursue suspension without pay:

    - Potential risk of compromising the reputation of the organisation with the public;
    - Potential risk of adversely affecting the emotional well-being of any employee or client;
    - Potential impact on the effective operation of Departmental policies and programs;
    - The possibility of suspending with pay;
    - The appropriateness of moving the Appellant to another work location.

19. The Respondent further provided the Appellant with seven (7) business days to provide the Respondent with reasons as to why the suspension without pay should not be imposed.

20. On or about 10 August 2009, on behalf of the Appellant, solicitor Brian Lynch of Mony de Kerloy, Barristers and Solicitors, wrote to the Respondent advising the Respondent that the Appellant had entered a plea of not guilty with the court in relation to the charges against him and that the matter was before the court and due to go to trial.

21. Mr Lynch requested that the disciplinary process be stayed until the criminal investigation and/or proceedings have concluded.

22. Mr Lynch also advised the Respondent that to suspend the Appellant without pay would have a severe adverse impact on the Appellant's ability to meet his day to day obligations and also, his ability to pay for his legal advice, which would in turn impact upon his ability to be adequately represented in the criminal proceedings.

23. On or about 14 August 2009, the Appellant provided the Respondent with a (sic) unsigned letter, submitted via email, outlining the severe financial hardship he would endure as a result of the suspension without pay. The Appellant also notified the Respondent that the criminal proceedings may take up to 18 months to conclude. The Appellant stated that he understood that the Respondent's position might be that it would be inappropriate for the Appellant to work in the same role or with children and if the Respondent should maintain that opinion, that he would be willing to work in another role which did not have child based interaction.

24. On 30 September 2009, the Respondent notified the Appellant that having carefully considered the arguments presented by the Appellant and Mr Lynch, the Respondent maintained its belief that suspending the Appellant without pay was an appropriate course of action and that such suspension will continue until disciplinary proceedings are concluded.

25. On 30 September 2009, the Respondent wrote to the Appellant's agent, solicitor, Brian Lynch and advised that the Respondent was willing to accede to Mr Lynch's request that the disciplinary process be suspended until such time as the current criminal investigations against his client had been concluded.

26. The Respondent also advised that due to the lengthy time period that was likely to pass before the criminal charges could be resolved that it believed that it would be unreasonable and contrary to the public interest for the Respondent to continue paying the Appellant.

27. On 7 October 2009, the Appellant lodged a Form 11, Notice of appeal to the Public Service Appeal Board with the Western Australian Industrial Relations Commission appealing against the decision to suspend the Appellant without pay pursuant to section 82(1) of the *PSMA 1994*. The Appellant also lodged a Form 18, Warrant to appear as agent, authorising the Civil Service Association of Western Australia (Inc) to appear on his behalf in the matter of PSAB 16 of 2009.

28. On 8 October 2009, the Appellant's agent, CSA, wrote to the Respondent advising that the Appellant had filed an appeal to the Public Service Appeal Board in relation to the Respondent's decision to suspend the Appellant without pay. The Appellant's agent requested the Respondent rescind its decision to suspend the Appellant without pay, or alternatively, to authorise the Appellant to seek casual alternative employment.

29. On 9 October 2009, the Respondent wrote to the Applicant's (sic) agent, CSA, and advised that the Department had not received any information that would alter its position with regards to the decision to suspend the Appellant without pay. The Respondent stated that now that the matter had been referred to the Pubic Service Appeal Board that it was appropriate to have it determined in that jurisdiction.

30. Furthermore the Respondent confirmed that all requests for secondary employment must be made in writing and provided the Appellant the appropriate policy document and form relating to such a request. The Respondent indicated that it would prioritise any such request in light of financial hardship which the Appellant's agent, CSA, referred to in the letter to the Respondent dated 7 October 2009."

11 A set of agreed documents was also filed by the parties on 23 October 2009. These documents are as follows:

"The parties agree that the following correspondence contains the full written communication between the parties in relation to this matter:

1. Letter from the Respondent to the Appellant dated 6 July 2009.
2. Letter from the Respondent to the Appellant dated 10 July 2009.
3. Unsigned letter from Appellant to Respondent, sent via email, undated, received 17 July 2009.
4. Letter from the Respondent to the Appellant dated 4 August 2009.
5. Letter from Appellant's agent, solicitor, Brian Lynch, to the Respondent dated 10 August 2009.
6. Unsigned letter from the Appellant to the Respondent, sent via email, undated, received 14 August 2009.
7. Letter from the Respondent to the Appellant dated 30 September 2009.
8. Letter from the Respondent to the Appellant's agent, solicitor, Brian Lynch dated 30 September 2009.
9. Letter from the Appellant's agent, CSA to the Respondent dated 8 October 2009.
10. Letter from the Respondent to the Appellant's agent, CSA dated 9 October 2009."

12 The parties filed written submissions in relation to this application, the appellant on 29 October 2009 and the respondent on 28 October 2009, and at a directions hearing held by the Board on 18 November 2009 and prior to these submissions being heard by the Board the appellant withdrew paragraphs 29 to 35 inclusive of their submissions but reserved its position to comment on the status of the respondent's investigation at a later stage.

13 The appellant is seeking that the following orders be issued by the Board:

- The decision of the respondent to suspend the appellant be adjusted by setting the decision aside.
- The respondent to reinstate all benefits due to the appellant as if the decision had not been made effective from the date of the decision.
- Any other orders the Board considers necessary.

14 The respondent opposes the issuance of these orders.

Submissions

Appellant

15 The appellant disputes the decision of the respondent to suspend him without pay pursuant to s 82(1) of the *Public Sector Management Act 1994* ("the PSM Act"). The appellant argues that whilst the power of an employing authority to suspend an employee without pay during the conduct of a disciplinary investigation is provided for under s 82 of the PSM Act this power is not unfettered. The appellant also argues that s 82(3) of the PSM Act provides the employing authority with the power to restore pay to an employee who has been suspended without pay, either on its own initiative or on the application of the employee.

16 The appellant argues that when exercising the power to suspend an employee, an employing authority must have regard to ss 8 and 9 of the PSM Act. Section 8 of the PSM Act provides at paragraph (c) that employees are to be treated fairly and consistently and are not to be subject to arbitrary or capricious administrative acts and s 9 of the PSM Act outlines the general principles of official conduct to be observed by all public sector bodies and employees. The appellant submits that whilst ss 8

and 9 of the PSM Act place certain broad obligations on the respondent in the exercise of its power to suspend an employee without pay, any decision taken in relation to such suspension must also be in accordance with the Disciplinary Procedures Guide issued by the Department of the Premier and Cabinet in November 2007 ("the Guide").

17 The appellant submits that the Guide makes it clear that suspension should not be used to penalise an employee, nor to make an example of them and suspension should be considered a "risk management strategy". The appellant also submits that the Guide sets out an objective approach to the consideration of the issue of suspension and ought to be highly persuasive to both the respondent and the Board.

18 The appellant has notified the respondent that he is suffering financial duress as a result of being suspended without pay and the appellant's solicitor has provided submissions as to the effect of suspension without pay on the appellant (see Agreed Documents Items Nos 5 and 6). As the investigation process will be lengthy given that the principles of natural justice require the respondent to suspend its investigation pending the outcome of the criminal proceedings, which is estimated to be around 18 months, this detriment to the appellant will be ongoing.

19 The appellant maintains that the Guide has not been fairly and appropriately applied to him. The appellant made submissions about the following factors which the respondent considered in its risk assessment and decision to suspend the appellant without pay:

- potential risk of compromising the reputation of the organisation with the public;
- potential risk of adversely affecting the emotional well-being of any employee or client;
- potential impact on the effective operation of Departmental policies and programs;
- the possibility of suspending with pay;
- the appropriateness of moving the appellant to another work location.

The appellant denies that by not suspending him without pay he poses a potential risk of compromising the reputation of the respondent's organisation with the public on the basis that the public is unaware of this matter as the allegations have not yet been substantiated. The appellant also rejects the respondent's claim that by not suspending him this has the potential risk of adversely affecting the emotional well being of its other employees and clients as no other employee or client of the respondent is involved in this matter and the person who made the allegations is neither an employee of the respondent nor a client. Furthermore, the respondent has provided no evidence that by not suspending the appellant without pay this will have any potential impact on the effective operation of Departmental policies and programs and unless and until such further evidence is provided by the respondent, the appellant denies that this is a relevant factor to be considered as part of its risk assessment of the appellant remaining at work. There was also no evidence of any potential negative impact on the respondent's employees particularly given that the allegations against the appellant are not work related. The appellant also claims that the monitoring device he is required to wear under his bail conditions is not visible to clients and other employees and there was no evidence that the appellant's prior or current conduct demonstrates a risk that he will prejudice the investigation or inquiry and none of the appellant's colleagues were witness to the alleged misconduct and no documentation or records held at the appellant's workplace are involved in the alleged misconduct.

20 The appellant argues that the failure to provide natural justice to an employee may result in the disciplinary process being found to be void (see Clause 2.6 of the Guide) and as natural justice is central to the disciplinary process, the respondent should be mindful that a criminal charge cannot lead to a presumption of guilt.

21 Section 81(2) of the PSM Act provides that an investigation into a suspected breach of discipline is to be carried out in accordance with prescribed procedures. Regulation 16 of the *Public Sector Management (General) Regulations 1994* prescribes the procedures as:

> "For the purposes of section 81(2) of the Act, the prescribed procedures in accordance with which a suspected breach of discipline is to be investigated are that the respondent is notified in writing -
>
> (a) that an investigation of the suspected breach of discipline is being initiated and of the purpose of that investigation;
>
> (b) that the investigation referred to in paragraph (a) will lead to a finding being made in respect of, and may lead to action being taken against, the respondent under Division 3 of Part 5 of the Act and of the range of possible findings and possible action;
>
> (c) of the steps which may be taken in the conduct of that investigation prior to the making of a finding, and the taking of any action, against the respondent;
>
> (d) of any interviews or meetings which the respondent is required to attend; and
>
> (e) of his or her right to have present during any interviews or meetings attended by the respondent a representative capable of providing advice to the respondent."

The appellant argues that these procedures make it plain that the employee suspected of a breach of discipline is to be afforded procedural fairness and a fundamental tenet of the rules of procedural fairness is that a decision-maker is not to prejudge whether a person has committed a breach of discipline and the appellant argues that the respondent's decision to suspend the appellant without pay has involved the respondent prejudging the outcome of the disciplinary process and has taken into consideration irrelevant factors (see *Mr Gregory Robert Ireland -v- The Director-General, Department of Health* (2008) 88 WAIG 489) ["*the Ireland decision*"]). The appellant submits that when he was notified of the respondent's intention to initiate an investigation into the suspected breach of discipline pursuant to s 81(2) of the PSM Act he was not given any other further information about the investigation as outlined in the prescribed procedures (see letter dated 4 August 2009 Agreed Documents Item No 4).

22 The appellant wishes to return to work rather than be suspended with pay and he has indicated a willingness to work in an alternative location should the respondent maintain the view that it is not appropriate for him to work with children whilst the criminal proceedings and/or investigation is ongoing. As a last resort, should the respondent not be able to find an alternative work location for the appellant, he will accept suspension with pay and whilst this will not preclude the respondent's perceived pre-judgment of the outcome of the matter, suspending the appellant with pay will alleviate the severe financial hardship the appellant is currently facing and will allow him to maintain his house, car, assets and child support and maintenance payments. The appellant's conduct that he is alleged to have undertaken took place outside of the workplace and is therefore irrelevant to the work that he undertakes and the appellant submits that the detriment to him by not being reinstated to a position with the respondent is greater than the detriment suffered by the respondent's employees or clients if he was to remain suspended without pay.

23 The appellant argues that the Guide must be applied in determining any decision to suspend without pay and such a decision must be viewed only as a risk management strategy and the appellant argues that there are alternatives to suspending him without pay. The appellant submits that the respondent did not fully consider the option of relocating the appellant to another role or work location and maintains that the appellant does not pose a real risk to the respondent's operations and can be placed in activities outside of child involvement pending the outcome of the criminal proceedings if the respondent maintains this as the preferable option including an administrative support position. The respondent is also aware that the appellant has previously worked in other roles and the appellant argues that the respondent has the capacity to re-employ him and there is no need for a specific position to be available, only for work to be provided to him. As the respondent is one of the largest public service organisations in Western Australia and as the appellant is prepared to work anywhere throughout Western Australia this increases the pool of opportunities available to him. The appellant maintains that he has gained a range of skills whilst working with the respondent over five years as part of his current role involves undertaking administrative duties, he could undertake project work and deal with ministerial and phone enquiries. Furthermore, the respondent undertakes a range of activities where there is no interaction with clients.

24 The appellant argues that the prospect of him being able to undertake outside employment is unlikely given his bail conditions and the close monitoring that he would be subject to, including random visits and phone calls. In the circumstances it is unlikely that the appellant would be able to obtain alternative employment.

25 The appellant argues that an employee facing a criminal charge is entitled to request that the disciplinary process be put into abeyance and in this instance this request was rightly granted and this should not be held against the appellant in considering suspension without pay (see *Health Services Union of Western Australia (Union of Workers) v Director General of Health in right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service* (2008) 88 WAIG 543 ["*the HSU decision*"]).

26 The appellant claims that notwithstanding the respondent's concern about the appellant's bail conditions that he would be subject to, the respondent has an obligation to the appellant as an employee, which is greater than a potential employer would have with respect to the appellant. The appellant also argues that the respondent did not give sufficient weight to him having no prior convictions and five years of good service when deciding that he should be suspended without pay. The appellant therefore argues that the respondent's decision to suspend him without pay was harsh and unreasonable in the circumstances.

Respondent

27 The respondent argues that it was appropriate to suspend the appellant without pay until the outcome of the investigation into the appellant's alleged breach of discipline. The respondent is an employing authority charged with the protection of children throughout the state of Western Australia and works with children and families to establish and promote functional living environments for both children and the families with whom they have contact. The respondent works with the most vulnerable children and families who have often been traumatised through violence and abuse and it is the respondent's responsibility to promote and ensure the safety of children and families with which it has contact.

28 The appellant is employed as a Youth and Family Support Worker and in this position he is required to build and maintain relationships with young people and their families, in particular those reluctant to access services of the respondent and/or Police and one of the primary goals of the position is to engage with young people and/or family groups to develop a trusting and respectful relationship. The nature of the work is such that the appellant was required to work unsupervised at most times with children and families (see Job Description Form Attachment 1 to respondent's Outline of Submissions lodged on 28 October 2009).

29 The respondent maintains that the appellant is a public service officer employed pursuant to s 64(1)(a) of the PSM Act and in accordance with s 76 of the PSM Act the provisions of Part 5 - Substandard Performance and Disciplinary Matters of the PSM Act govern the method of the respondent conducting substandard performance and disciplinary actions. On 6 July 2009, in accordance with s 81(1) of the PSM Act, the appellant was advised that he was suspected of having committed a breach of discipline and he was provided with a reasonable opportunity to submit an explanation. On 4 August 2009, in accordance with s 81(2) of the PSM Act, the respondent advised the appellant that whilst acknowledging receipt of the appellant's letter to the respondent dated 17 July 2009 it continued to believe that the appellant may have committed a breach of discipline and he was advised that the respondent would be initiating an investigation into the suspected breach and the appellant was advised that Mr Roger Nickerson, Senior Investigator had been directed to conduct an investigation into the suspected breach of discipline. The respondent also advised the appellant that it was considering suspending him without pay pursuant to s 82(1) of the PSM Act and provided him a reasonable opportunity to make a submission as to why such a suspension should not be imposed.

30 On 30 September 2009 the respondent advised the appellant that it had decided to suspend the appellant without pay pursuant to s 82(1) of the PSM Act. Section 82(1) of the PSM Act provides that:

> "If an investigation is initiated under section 81, the employing authority may at any time before proceedings against the respondent are terminated within the meaning of subsection (2) suspend the respondent, if still its employee, without pay."

The respondent argues that s 82(1) of the PSM Act does not include specific factors to be considered when an employing authority is deciding whether suspension without pay is appropriate. In the absence of express factors to be considered when making such a determination the respondent must determine relevant factors to be taken into account on the basis that; "... they must be determined by implication from the subject-matter, scope and purpose of the Act" (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J).

31 The respondent notes the contents of the Guide (see Attachment 2 to respondent's Outline of Submissions lodged on 28 October 2009). The respondent submits that the Guide does not hold the force of law however provides what is considered best practice throughout the Western Australian public sector when employing authorities are utilising the disciplinary provisions contained in the PSM Act. The respondent relies on *the Ireland decision* at paragraph 73 where the Board stated that:

> "The next question that follows is whether the respondent erred in failing to have regard to, or sufficient regard to, the matters set out in Clause 3.2 of the Disciplinary Procedures Guide. Employment policies which provide guidance on the exercise of a discretion are desirable to ensure employees are treated equally and consistently. This requirement is reflected in s 8(1)(c) of the PSM Act."

Given this statement in *the Ireland decision* the respondent submits that taking into account the factors outlined in Clause 3.2 of the Guide has been approved by the Board. Clause 3.2 provides, in part, as follows:

> "Suspension [without pay] in disciplinary matters should not be automatically applied, rather, it must be viewed as a risk management strategy. When determining if it is appropriate for a respondent to be suspended, the employing authority may wish to consider if not suspending the employee risks:
>
> - compromising the reputation of the organisation with the public;
> - the emotional or physical well being of any employee or client;
> - the effective operation of any agency policies or programs; or
> - prejudicing the disciplinary investigation inquiry i.e. if there is a risk the respondent could tamper with records required for the investigation."

32 The respondent argues that it is under no legislative obligation to move an employee to another work location rather than suspend them without pay pursuant to s 82 of the PSM Act notwithstanding the Guide stating at Clause 3.2 that:

> "... it may be deemed more appropriate to move the employee to another work location for the period of the disciplinary process."

33 The respondent is aware that employers may suspend employees with pay pursuant to s 52 of the *Interpretation Act 1984* which states at s 52(1) that:

> "(1) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position, including an acting appointment, the person having such power or duty shall also have the power —
>
> (a) to remove or suspend a person so appointed to an office or position, and to reappoint or reinstate, any person appointed in exercise of such power or duty;"

34 The appropriateness of suspending an employee with pay during a disciplinary investigation that has been stayed at the request of an employee was considered in *Health Services Union of Western Australia (Union of Workers) v Director General of Health in right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service* (2007) 87 WAIG 3120 where Scott C, as she was then, at paragraph 37 stated that:

> "... given the lengthy period which was likely to pass before the criminal charges could be resolved, it would be unreasonable and contrary to the public interest for the respondent to be required to continue to pay Mr Moodie while he was providing no work. This period of delay was beyond the control of the respondent and the respondent was unable to conclude its investigation through no fault of its own. This is as a consequence of agreeing to Mr Moodie's request. It is of no benefit to the respondent to have such a delay, although it is to Mr Moodie's benefit"

35 The respondent submits that this consideration formed part of Scott C's (as she was then) decision that the merits of the case favoured suspension without pay and the respondent argues that this process was approved by Beech CC on appeal in *the HSU decision* where he stated at 582:

> "The duty on the Arbitrator to decide the matter according to equity, good conscience and the substantial merits of the case entitled her to consider all of the circumstances before her. The Arbitrator did go on to consider … the lengthy delay before a trial, and that the deferral of the disciplinary proceedings was at Mr Moodie's request, all merited suspension without pay. This lead the Arbitrator to dismiss the matter.
>
> … whilst the Arbitrator followed a correct process ..."

The respondent therefore submits that the appropriateness of continuing to pay an employee during an investigation which has been stayed at his or her request favours suspension without, as opposed to with, pay, especially if the period is likely to be lengthy.

36 The respondent submits that when deciding whether to suspend the appellant without pay it took the following relevant factors into consideration based on the Guide. The respondent considered the possible damage to its reputation should the public become aware that the respondent continued to provide the appellant with work following such serious disciplinary allegations being put to him. The respondent argues that the nature and severity of the disciplinary allegations put to the appellant namely undertaking non-consensual sexual acts in the presence of children and threatening to kill persons in the presence of children are extremely serious and should it become public knowledge that the respondent continued to provide him work during the period of investigation its credibility would suffer severe damage in both the short and long term and this would also impact on the ability of the respondent to fulfil its statutory obligations under the *Children and Community Service Act 2004*.

37 The respondent determined that the emotional well being of clients and/or staff may be impacted by the appellant remaining at work and the operation of the respondent's policies and programs may be compromised as the respondent has a duty of care to its clients to ensure that its employees behave appropriately to undertake the work for which they are employed. At the time the respondent decided to suspend the appellant without pay the respondent had put the current disciplinary allegations to the appellant and he had declined to provide any response to the allegations. On the information available to the respondent at the time the respondent therefore determined that the appellant provided both an emotional and physical risk to both the employees and clients of the respondent. The respondent is also aware that the appellant is required to wear a monitoring device to track his whereabouts when released on bail following him pleading not guilty to the criminal charges and the respondent took into account that should employees or clients become aware of the presence of such a device this would cause them distress. The respondent also maintains that its clients are quite often in a distressed, vulnerable or fragile emotional state and the presence and possible exposure of such a device would be likely to have a detrimental effect on their well being. The respondent claims that its clients may also suffer indirect emotional or physical harm due to adverse opinions being formed by the public about the conduct of the respondent's business, leading to an impaired ability to provide appropriate services to its clients through damage to the respondent's credibility.

38 The respondent also argues that if it was to reinstate the appellant, the appellant is subject to scrutiny given his bail conditions and he would be subject to random visits and phone calls and this could have a negative impact on employees and clients within the respondent's organisation.

39 Prior to suspending the appellant without pay the respondent reviewed the suitability and availability of alternative positions in which to temporarily place the appellant for the duration of the disciplinary process and the respondent determined that no suitable alternative positions were available within the respondent's operations. In reaching this decision the respondent took into account that in light of the current disciplinary allegations against the appellant he was not suitable to be placed into a role with child and client contact which was agreed to by the appellant (see Agreed Documents Item No 6). The respondent also considered the nature of the respondent's business whereby most positions within the Department undertake work involving child and client contact and the skill sets and experience which the appellant possessed as evidenced by the appellant's resume submitted to the respondent on 18 July 2008. After assessing alternative positions within the respondent's operations, which includes approximately 2,800 employees, roughly two thirds of whom work directly with clients, the respondent identified that there were no suitable alternative positions available with the respondent at the time the decision was made to suspend him without pay. The respondent disputes the appellant's claim that he has previously worked in varied roles with the respondent and claims that the appellant has only worked in one other role and as this role involved directly supervising and caring for children and having regard to the appellant's disciplinary charges this would be unsuitable and administrative skills are not an important part of the duties undertaken by the appellant and as a result there would be little meaningful work for him to undertake. The respondent also maintains that it would be difficult to provide alternative employment for the appellant given the current financial constraints facing the respondent. In the respondent's regional offices there are not many support services and limited non-frontline services and at the time of the hearing there were no positions available that the respondent has deemed suitable for the appellant within its State-wide operations. Research and project work generally is completed by employees at a higher level than the appellant and the appellant does not have the necessary skills to undertake these roles.

40 The respondent also considered the option of suspending the appellant with pay. The respondent decided that it was not appropriate to suspend the appellant with pay due to the lengthy time period which was likely to elapse prior to the disciplinary investigation concluding and the disciplinary investigation having been stayed at the request of the appellant and as such was not under the control of the respondent. Furthermore the respondent determined that to continue to pay the appellant during this period would damage the reputation of the respondent if the public became aware of the nature of the disciplinary proceedings and that the respondent had continued to pay the appellant during this period.

41 The respondent stated that sometimes employees who are subject to disciplinary proceedings are suspended with pay however this is usually in a situation where a matter is dealt with quickly. The respondent also maintained that it does not always suspend people without pay even if an allegation against an employee is serious and each matter is considered on its own merits.

42 The respondent dispute that its decision to suspend the appellant is harsh and unreasonable and the respondent denies that it has not fully considered alternatives to suspending the appellant without pay.

43 The respondent submits that it is not required to advise the appellant of the reasons for concluding that suspension without pay is the most appropriate course of action and submits that procedural fairness and natural justice only requires the appellant to be provided with the opportunity to be heard prior to the respondent taking any action which will be detrimental to the appellant and to take any submissions into account prior to making such a determination. The respondent submits that at all times it provided the appellant with a reasonable opportunity to make submissions about him being suspended without pay and it took his submissions into account when making its decision and the lengthy period of time between providing the appellant an opportunity to make a submission regarding the proposed decision to suspend him without pay and the time at which such a decision was made, approximately eight weeks, confirms that the respondent took the matter of suspending the appellant

without pay extremely seriously. Additionally, at the time the decision to suspend the appellant without pay was made the respondent was aware that such a decision was likely to cause financial hardship to the appellant. In recognition of the financial hardship to which the appellant referred the respondent indicated that if the appellant raised the possibility of undertaking work external to the respondent's operations the respondent would prioritise any request however, no request had been made by the appellant.

44 The respondent submits that the appellant has misconstrued s 82(3) of the PSM Act. Whilst s 82(3) provides for the reinstatement of pay to an employee who has been suspended without pay it provides no guidance on what factors should be taken into account. The respondent also submits that the appellant has misapplied the authority of *the Ireland decision* as the respondent at no time took into account irrelevant factors, such as those taken into account in that case, and has at no time made any determination that would prejudice the outcome of the disciplinary investigation.

45 In summary the respondent submits that it has a right to suspend the appellant without pay pursuant to s 82 of the PSM Act and argues this action should be viewed as a risk management strategy taking into account relevant factors. The respondent contends that it exercised its discretion to suspend the appellant fairly and reasonably taking into account these relevant factors as outlined in its submissions and the respondent's letter to the appellant dated 30 September 2009 (see Agreed Documents Item No 7). The respondent submits that the appellant was at all times afforded procedural fairness and natural justice and the respondent maintains its opinion that suspending the appellant without pay in this instance was, and continues to be, appropriate.

46 The respondent argues that the authority contained in *the HSU decision* can be relied upon by the respondent because this appeal was only upheld on a procedural matter and the original decision therefore remains on point.

47 The respondent maintains that it has a statutory duty of care towards children and families and the decision to suspend the appellant without pay was appropriate in all of the circumstances and in making this decision the appellant was afforded procedural fairness and natural justice. Furthermore the respondent did not take into account irrelevant factors and this decision was not made lightly.

Further documentation

48 At the end of the hearing the Board asked the parties for additional documentation and in accordance with this request on 2 December 2009 the appellant forwarded a copy of a document detailing the charges against him and the respondent forwarded a copy of the following documents:

- Best Practice Manual Discipline (2) – the respondent's policy on disciplinary processes;
- An employee guide to the department's processes – as listed in the forms and appendices in the respondent's policy;
- Guide for Managers – as listed in the forms and appendices in the respondent's policy;
- Discipline flow chart – as listed in the forms and appendices in the respondent's policy; and
- Sexual Assault Resource Centre ("SARC") referral form.

The respondent also confirmed that the above policy documents are those that were current at the time the SARC notification with respect to the incidents the appellant was alleged to have been involved in was received by the respondent and therefore formed the basis of the ongoing discipline investigation into the appellant.

Further submissions

49 After receiving additional documentation from the parties and after the Board had considered the parties' submissions, a letter was sent to the respondent asking it to provide further details about the review it conducted of its operations and the conclusion it reached that no suitable alternative employment was available for the appellant to undertake and the respondent did so by 21 January 2010.

50 The respondent maintained that prior to suspending the appellant without pay it reviewed the roles available that did not involve working with clients, namely children or families and the respondent determined that three broad categories of work fitted this criteria. These areas were administrative support, client support and management/project work. The respondent then stated that it was its view that in each of these areas it was inappropriate for the appellant to undertake any role given the appellant's skills and expertise and the nature of the duties in one instance.

51 The appellant responded to the information provided by the respondent about its consideration of alternative duties for him to undertake and contested the basis upon which the respondent reached the view that no positions and/or roles were suitable for him to undertake and sought the opportunity to request further information from the respondent in relation to this issue.

52 After considering the parties' submissions the Board asked the appellant to identify suitable positions it believed the appellant could undertake within the respondent's operations by 3 February 2010 and the Board indicated to the parties that it would reconvene on 5 February 2010 to hear further from the parties with respect to this issue and the disposition of this application.

53 In submissions filed by the appellant on 3 February 2010 at the request of the Board whereby the appellant was to identify suitable positions which he could undertake within the respondent's operations the appellant reiterated previous submission that as the respondent is a large employer it has a wide range of suitable positions or work available for the appellant to undertake on a State-wide basis given the appellant's skills and experience. The appellant also claimed that the respondent had failed to adequately review possible positions for the appellant which did not involve client contact.

54 After hearing further from the parties on 5 February 2010 the Board issued the following orders and advised the parties that the reasons for their issuance would follow:

"1. THAT the respondent's decision made on 30 September 2009 to stand down the appellant without pay be set aside.

2. THAT the respondent employ the appellant in a suitable alternative position commencing 8 February 2010 and pay him at his substantive Level 4 position from that date.

3. THAT the respondent pay the appellant an amount of money in respect of all of the remuneration lost by him by reason of his stand down as if he had worked continuously in the employment of the respondent between 30 September 2009 and 8 February 2010.

4. THAT the respondent re-instate the appellant's accrued entitlements and that his service with the respondent be regarded as continuous for all purposes including long service leave."

55 The Board's reasons for issuing these orders now follow.

Findings and conclusions

56 Some of the relevant principles with respect to a decision to suspend an employee without pay pursuant to the PSM Act are contained in *the Ireland decision* at paragraphs 57 to 64 which read, in part:

"An administrative decision maker is bound to take into account relevant considerations. However, a failure to take into account a relevant consideration is only fatal to a decision if a decision maker takes into account a matter that he or she is bound to take into account (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J). Conversely the taking into account of an irrelevant consideration can also lead to error. In *Peko* Mason J said at pages 39-40:

"(b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors — and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard: see Reg v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd ((1979) 144 CLR 45 at 49-50), adopting the earlier formulations of Dixon J in Swan Hill Corporation v Bradbury ((1937) 56 CLR 746 at 757-758), and Water Conservation and Irrigation Commission (NSW) v Browning ((1947) 74 CLR 492 at 505). By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act."

In *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 McHugh, Gummow, Kirby and Hayne JJ stated:

"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute (See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per Barwick CJ). The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole" (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320, per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617, per Lord Scarman, "in the context of the legislation read as a whole"). In *Commissioner for Railways (NSW) v Agalianos* ((1955) 92 CLR 390 at 397), Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed (*Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ; at 315, per Mason J; at 321, per Deane J)."

The PSM Act is an Act of Parliament which comprehensively provides for the administration and management of the public sector and the public service. Among other matters the PSM Act deals with and regulates the selection, appointment, standards of conduct and termination of employment of employees. Part 5 of the PSM Act deals with substandard performance and disciplinary matters of public service officers.

Sections 80, 81 and 82 of the PSM Act provide:

"80. Breaches of discipline

An employee who —

(a) disobeys or disregards a lawful order;

(b) contravenes —

(i) any provision of this Act applicable to that employee; or

(ii) any public sector standard or code of ethics;

(c) commits an act of misconduct;

(d) is negligent or careless in the performance of his or her functions; or

(e) commits an act of victimisation within the meaning of section 15 of the *Public Interest Disclosure Act 2003*,

commits a breach of discipline.

81. Procedure when breach of discipline suspected

(1) An employing authority may, when it suspects that a person has committed a breach of discipline whilst serving as an employee in its public sector body and has given the person such notice in writing of the nature of the suspected breach of discipline as is prescribed, give the person a reasonable opportunity to submit an explanation to the employing authority.

(2) After having given the respondent the reasonable opportunity referred to in subsection (1), the employing authority may —

(a) if it is not the Minister, investigate or direct another person to investigate; or

(b) if it is the Minister, direct another person to investigate,

the suspected breach of discipline in accordance with prescribed procedures.

(3) A person to whom a direction is given under subsection (2) shall comply with that direction.

(4) A direction shall not be given under subsection (2) to the Commissioner.

82. Suspension without pay

(1) If an investigation is initiated under section 81, the employing authority may at any time before proceedings against the respondent are terminated within the meaning of subsection (2) suspend the respondent, if still its employee, without pay.

(2) When proceedings against a respondent for a suspected breach of discipline are terminated by —

(a) the taking of action under section 83 or 84 that is not cancelled under section 85, or the taking of action under section 86(3), 88(1) or 89; or

(b) a finding that no breach of discipline was committed by the respondent,

the employing authority shall terminate any suspension of the respondent without pay under subsection (1) and, if no breach of discipline has been found to have been committed by the respondent, restore to the respondent the pay of which the respondent has been deprived during the period of that suspension.

(3) An employing authority may, in relation to an employee who has been suspended without pay under subsection (1), on its own initiative or on the application of that employee restore pay to that employee for such period as the employing authority thinks fit.

…

Section 82 is contained in Part 5 of the PSM Act. Part 5 deals with inquiries, penalties and disciplinary action that can be taken by employing authorities against public service officers and other officers and employees defined in s 76(1) of the PSM Act. Section 82 is part of Division 3 which deals with breaches of discipline. Sections 80, 81, 83 and 86 determine the process of investigation of breaches of discipline under s 80 of the PSM Act. Section 81 provides for an employee suspected of a breach of discipline to be given a reasonable opportunity to submit an explanation to the employing authority prior to a decision being made whether to initiate an investigation into the suspected breach of discipline. After the employee is afforded a reasonable explanation and an investigation is initiated, the employing authority may suspend the employee without pay. Sections 81, 82, 83, 84 and 85 make it clear a decision to suspend without pay is to be made independently from any findings or decisions made following an investigation into a suspected breach of discipline.

Pursuant to s 81(2) an investigation into a suspected breach of discipline is to be carried out in accordance with prescribed procedures. Regulation 16 of the *Public Sector Management (General) Regulations 1994* prescribes the procedures as:

"For the purposes of section 81(2) of the Act, the prescribed procedures in accordance with which a suspected breach of discipline is to be investigated are that the respondent is notified in writing —

(a) that an investigation of the suspected breach of discipline is being initiated and of the purpose of that investigation;

(b) that the investigation referred to in paragraph (a) will lead to a finding being made in respect of, and may lead to action being taken against, the respondent under Division 3 of Part 5 of the Act and of the range of possible findings and possible action;

(c) of the steps which may be taken in the conduct of that investigation prior to the making of a finding, and the taking of any action, against the respondent;

(d) of any interviews or meetings which the respondent is required to attend; and

(e) of his or her right to have present during any interviews or meetings attended by the respondent a representative capable of providing advice to the respondent."

These procedures make it plain that the employee suspected of a breach of discipline is to be afforded procedural fairness. A fundamental tenet of the rules of procedural fairness that a decision-maker is not to prejudge whether a person has committed a breach of discipline.

Section 82(1) and (2) contemplates that a decision to suspend without pay is to be made when an investigation into a suspected breach of discipline is initiated and prior to the conclusion of the investigation. Section 82(2) makes it clear that suspension without pay is to be terminated by the employing authority if a finding is made that:

(a) a minor breach of discipline is committed;

(b) a serious breach of discipline has been committed and the employee is charged with a serious breach of discipline and the charge is admitted by the employee under s 86(3); or

(c) no breach of discipline was committed."

57 The chronology of events with respect to the events leading up to the appellant's suspension without pay is not in dispute.

58 The appellant was advised on 6 July 2009 that the respondent suspected him of having committed acts which may constitute a breach of discipline pursuant to s 80 of the PSM Act and the appellant was given an opportunity to respond to allegations put to him. The allegations involve claims that the appellant had committed an act of aggravated sexual assault upon a person and on an unspecified date in June 2009 the appellant threatened to kill her or another person and these acts were alleged to have taken place in the presence of children.

59 On 10 July 2009 the respondent advised the appellant that it was standing him down on full pay until further notice based on the severity of the allegations against him, the likely review of the appellant's Working With Children card and the likely adverse impact on the respondent's reputation.

60 On 17 July 2009 the appellant wrote to the respondent requesting that it suspend its breach of discipline process until the criminal investigation into the allegations against him was concluded and subsequent to receiving this letter the respondent advised the appellant by letter dated 4 August 2009 that it intended to suspend him without pay (see Paragraph 7).

61 On or about 10 August 2009 the appellant's lawyer wrote to the respondent indicating that the appellant had pleaded not guilty to the criminal charges against him, and again requested that the disciplinary process against the appellant be stayed pending the conclusion of the criminal proceedings against the appellant. He also advised the respondent that suspending the appellant would lead to him experiencing difficulties meeting his day to day obligations and his ability to pay for legal representation.

62 On or about 14 August 2009 the appellant wrote to the respondent outlining reasons why he should not be suspended without pay and he highlighted the severe financial hardship he, his dependants and family would suffer as a result of being suspended without pay. In support of his claims he provided a breakdown of how his salary meets his financial obligations and he stated that any residual amount would contribute to his legal costs. The appellant also advised the respondent that criminal proceedings against him could take up to 18 months and he indicated that in the interim he would be willing to work with the respondent in a role with no child-based interaction.

63 After receiving the appellant's response the respondent wrote to the appellant on 30 September 2009 suspending the appellant without pay until disciplinary proceedings against the appellant were concluded (see Paragraph 4). On this date the respondent also wrote to the appellant's solicitor, Mr Lynch, agreeing to stay the disciplinary proceedings against the appellant pending finalisation of the criminal proceedings against the appellant. In this letter the respondent stated that due to the lengthy period for the criminal charges against the appellant to be resolved it would be unreasonable and contrary to the public interest for the respondent to be required to continue to pay the appellant whilst he was not providing work. This letter reads as follows (formal parts omitted):

"**MR DANIEL PRESTAGE**

Thank you for your letter dated 10 August 2009 advising that you act for Mr Daniel Prestage in relation to criminal allegations recently brought against him.

As you would understand, the Department for Child Protection is obliged to investigate allegations of misconduct in a timely manner whilst, at the same time, ensuring that the employee has a reasonable opportunity to respond to the allegations.

With reference to your request, the grant of such a stay is discretionary and in deciding how the discretion should be exercised, all the relevant factors must be balanced. In particular, the discretion involves consideration of the public interest in the investigation of a suspected breach of discipline balanced against your client's interest in maintaining his silence.

Having taken into account all relevant factors, I am willing to accede to your request on this occasion. However, the Department reserves the right to progress the matter of its own accord in the future, irrespective of any criminal charges Mr Prestage may be facing, should it be deemed necessary.

Your letter also seeks clarification as to what foundation the Department relies on to confirm suspicion that Mr Prestage has committed a breach of discipline. This advice has been clarified previously in the allegation put to Mr Prestage on 6 July 2009.

With respect to the Department's intention to suspend Mr Prestage without pay, I have decided that given the lengthy period which is likely to pass before the criminal charges could be resolved, it would be unreasonable and contrary to the public interest for the Department to be required to continue to pay Mr Prestage while he is providing no work.

If you have any queries in relation to this matter, please contact Ms Sandy Randall, A/Director, Integrity and Screening Unit on [telephone number]."

(Agreed Documents Item No 8)

64 The Statement of Agreed Facts confirms that the appellant has been employed by the respondent for over four years as a Youth and Family Support Worker and in this role he works with vulnerable children and their families. It is also the case that the disciplinary proceedings against the appellant relate to alleged incidents that are not work related and the parties involved, apart from the appellant, are not employees of the respondent.

65 It is desirable to apply policies which provide guidance when making a discretionary decision to ensure that employees are treated equally and consistently. This is consistent with s 8(1)(c) of the PSM Act which provides as follows:

"(1) The principles of human resource management that are to be observed in and in relation to the Public Sector are that —

…

(c) employees are to be treated fairly and consistently and are not to be subjected to arbitrary or capricious administrative acts;"

66 The respondent maintained that it applied the provisions of the Guide issued by the Department of Premier and Cabinet in November 2007 when deciding to suspend the appellant without pay. This document provides that an employee's suspension should not be automatically applied. Clause 3.2 of the Guide states, in part, as follows:

"Suspension should **not** be used as a tool by management to make an example of the respondent. This amounts to pre-judging the matter and is not in line with the principles of natural justice, as outlined in subsection 2.6.

Suspension in disciplinary matters should not be automatically applied, rather, it must be viewed as a risk management strategy. When determining if it is appropriate for a respondent to be suspended, the employing authority may wish to consider if not suspending the employee risks:

- compromising the reputation of the organisation with the public;
- the emotional or physical well-being of any employee or client;
- the effective operation of any agency policies or programs; or
- prejudicing the disciplinary investigation or inquiry i.e. if there is a risk the respondent could tamper with records required in the investigation.

Even if the agency has answered yes to these questions, **suspension is not the only option**; it may be deemed more appropriate to move the employee to another work location for the period of the disciplinary process."

(see Respondent's Outline of Submissions lodged 28 October 2009 – Attachment 2)

67 The respondent's policy 'An Employee Guide to the Department's Discipline Process' dated June 2009, a copy of which was provided to the Board on 2 December 2009, also applies when an employee is suspected of committing a breach of discipline, including misconduct. Page 6 of this policy provides, in part, as follows:

"***Will I be removed or suspended during the investigation process*?**

In exceptional circumstances the decision-maker may consider suspending an employee without pay. Specific procedures will apply and employees will be given an opportunity to respond to the decision-maker's proposal to suspend. If at the completion of the process it is found that no breach of discipline has been committed, the employee will be reimbursed any salary and commuted allowance for the period that it was terminated.

In some instances it will be preferable to negotiate a temporary transfer to an alternative workplace; in which case the employee will be paid for work done in fulfilling the duties of that position. Alternatively, the employee may be ordered to remain away from the workplace on full pay."

It is clear that the above extract provides that it is only in exceptional circumstances that an employee is suspended without pay and this policy also contemplates that an employee may be temporarily transferred, by negotiation, to an alternative workplace or an employee may be required to remain away from the workplace on full pay. It is also the case that, as submitted at the hearing by the respondent, on occasions the respondent suspends employees with pay who are subject to disciplinary proceedings, usually when proceedings are expeditiously finalised, the respondent also submitted that it does not always suspend employees without pay when subjected to disciplinary proceedings when an allegation against an employee is serious and it maintained that each decision to suspend an employee is considered on its own merits.

68 After carefully considering the submissions of both parties and relevant documentation the Board finds that the respondent erred and exercised its discretion unreasonably and unfairly when it decided to suspend the appellant without pay.

69 There was no dispute and the Board finds that s 82 of the PSM Act allows the respondent to suspend the appellant without pay pending the finalisation of an investigation into an alleged breach of discipline.

70 The Boards makes the following findings with respect to the factors considered by the respondent when deciding whether to suspend the appellant without pay and the additional factor in the Guide not considered by the respondent. Whilst the respondent was not legally bound to follow the factors contained in the Guide, as it chose to apply all but one of these factors, correctly in the Board's view, a review of their application to the appellant's situation is necessary to determine whether or not, in all of the circumstances, the appellant should have been suspended without pay.

Potential risk of compromising the reputation of the organisation with the public

71 The Board agrees with the appellant's claim that the general public is unaware of the issues surrounding the charges against the appellant and in any event these allegations have not yet been tested nor substantiated. Furthermore, the Board accepts that there is a public interest in an employee being entitled to a just and fair process with respect to allegations against him or her prior to any judgement being made about his or her actions.

Potential risk of adversely affecting the emotional well being of any employee or client

72 The respondent provided no evidence that the emotional well being of its employees would be adversely affected if the appellant was not suspended without pay. Furthermore, the appellant has indicated that he is prepared to accept employment in a role which has no client contact so no clients could be adversely impacted by the appellant remaining as an employee and attending the work place. The Board also accepts and takes into account that the allegations against the appellant do not relate to any matter arising out of work related issues and no one employed at the appellant's workplace is involved in the subject matter of the criminal proceedings against the appellant. The Board rejects the respondent's claim that the requirement on the appellant to wear a monitoring device to track his whereabouts whilst on bail would cause distress to other employees as there was no evidence to support this claim and the respondent's reliance on this causing distress to clients is irrelevant on the basis that if the appellant was provided with alternative employment he would not be working with clients. The Board also rejects the respondent's claim that clients may suffer indirect emotional or physical harm due to adverse opinions being formed by the public with respect to the conduct of the respondent's business if the charges against the appellant became public for the reasons given in the previous paragraph.

Potential impact on the effective operation of Departmental policies and programs

73 The Board is unaware of any evidence confirming that by having the appellant remain at work this would have an adverse impact on the operation of the respondent's policies and programmes. The Board therefore does not consider this factor to be given any weight in support of the respondent's decision to suspend the appellant without pay.

The possibility of suspending with pay

74 The Board notes that the respondent has the option to suspend an employee with pay and it chose not to do so in this instance, based on the timeframe for disposing of the criminal charges against the appellant being lengthy (see Agreed Documents Item No 8). In any event the Board does not consider this to be a desirable option for the appellant when taking into account the lengthy period for the criminal charges against the appellant and the respondent's disciplinary process to be finalised.

The appropriateness of moving the appellant to another work location

75 The appellant is a Level 2/4 employee with over four years of unblemished service with the respondent. Given the appellant's experience with the respondent and the administrative and other duties he has undertaken during this period the Board finds that he is capable of undertaking duties relevant to a number of positions within the respondent's operations. In reaching this conclusion the Board takes into account that the respondent employs a number of employees in Level 2 to Level 5 positions undertaking administrative and related functions (see Respondent's Additional Submissions dated 21 January 2010). As the respondent is a large employer with offices throughout Western Australia and as the appellant is prepared to work in any of the respondent's locations throughout Western Australia the Board therefore finds that it is appropriate that the appellant be found suitable alternative employment pending the finalisation of the disciplinary process.

76 Another factor contained in the Guide issued by the Department of Premier and Cabinet which the respondent did not appear to consider is the following:

> "Prejudicing the disciplinary investigation or inquiry i.e. if there is a risk the respondent could tamper with records required in the investigation."

The Board is of the view that there is no disadvantage to the respondent if the appellant remains at work as the allegations against the appellant relate to a matter which is not work related.

77 Issues with respect to pre-judging the outcome of a disciplinary investigation are not to be considered when deciding whether or not to suspend an employee pending the completion of the investigation into a suspected breach of discipline as any decision made under s 82(1) of the PSM Act must preserve the integrity of the investigation under s 81(2) of the PSM Act and any disciplinary inquiry which may follow under s 86(4) of the PSM Act (see *the Ireland decision*).

78 Even though the respondent maintained that it did not rely on the specifics of the allegations against the appellant when deciding to suspend the appellant without pay, the Board finds that the nature of the allegations against the appellant did influence the respondent's decision to suspend him without pay. The respondent's letter to the appellant dated 10 July 2009 when the appellant was initially suspended with pay refers to the severity of the allegations influencing its decision to suspend the appellant with pay (see Paragraph 6) and correspondence sent by the respondent to the appellant's lawyers dated 30 September 2009 states that as the criminal charges against the appellant would take some time to be resolved it would be unreasonable and contrary to the public interest to pay the appellant whilst he was "providing no work". This implies, in the Board's view, that following on from the respondent's decision to suspend the appellant with pay, due in part to the severity of the nature of the allegations against the appellant, it was now appropriate to suspend the appellant without pay due to the extensive time frame for dealing with the criminal charges against the appellant, based on public interest considerations.

79 The Board also finds that the respondent erred when it determined that it was not in the public interest to pay the appellant whilst the criminal proceedings against him were being finalised as stated in its letter to the appellant's lawyers on 30 September 2009. This letter confirms that it reached its decision to suspend the appellant without pay, as opposed to suspending him with pay, because of the length of time for the criminal proceedings to take their course. The finalisation of

criminal proceedings against the appellant is a matter over which the appellant has no control and there is authority for the proposition that delaying disciplinary proceedings pending the finalisation of criminal proceedings can be in the public interest. In *the HSU decision* his Honour the Acting President stated the following at paragraphs 210 to 218:

> "**(v) The Fairness of Suspension Without Pay and the Public Interest**
>
> The respondent submitted it was not in the public interest for Mr Moodie to be paid whilst suspended, whatever his personal circumstances. I do not accept this to be necessarily so.
>
> In my opinion in considering this issue it needs to be borne in mind the reasons why it was appropriate for the disciplinary process against Mr Moodie not to continue pending the hearing and determination of the criminal charges. As stated in the letter from Tottle Partners dated 19 October 2006 to continue with the disciplinary process could cause unfairness to Mr Moodie in the criminal proceedings. His response to the report might have involved the surrender of his right to silence, a fundamental right of an accused in the criminal process. On the other hand to not comment on the report could lead to Mr Moodie's dismissal. Also if the disciplinary proceedings were decided against him then this could prejudice his trial. It is these difficulties which made a decision to defer the disciplinary process fair and appropriate.
>
> That this was a proper way to proceed has been acknowledged by courts which have recognised that an injunction might be granted to restrain disciplinary processes pending the finalisation of parallel criminal proceedings. (See for example *Bannister v Director General, Department of Corrective Services* [2005] 1 Qd R 117 and *Lee v Naismith* [1990] VR 235).
>
> In *Re Martin; ex parte Dipane* (2005) 30WAR 164, Roberts-Smith JA, with whom Steytler P and Miller AJA agreed, said at [41] that interference with "*an accused's right to silence … is a relevant (and may be a decisive) factor in determining that disciplinary or other administrative proceedings ought not be concluded pending the outcome of relevant criminal proceedings*".
>
> The issue was also considered by the Full Court of the Supreme Court of Western Australia in *De Castro Martins and Others v Racing Penalties Appeal Tribunal of Western Australia and Another* (Unreported, Library No 970519C, 10 October 1997). Steytler J, with whom Kennedy J agreed, at page 10 quoted with approval the reasons of Hope JA in *Edelstein v Richmond* (1987) 11 NSWLR 51 at 59. Hope JA said that views, "*have been expressed and implemented that so long as related criminal proceedings may be instituted or are pending, it is generally undesirable that disciplinary proceedings should be dealt with … A possibly stronger view was expressed by McHugh JA in* Herron v McGregor *(1986) 6 NSWLR 246 at 266 that, while criminal proceedings are pending, it was only proper that disciplinary proceedings should not be brought on for hearing.*" In *Martins* an application to the Racing Penalties Tribunal against a greyhound trainer alleged a breach of a racing rule. The actions involved in this alleged breach could also be the subject of criminal charges. The trainer requested the Tribunal to adjourn the hearing of the disciplinary charge pending a decision being made about whether criminal charges would also be laid. The adjournment was not granted. Steytler J decided the adjournment ought to have been granted in part because of the trainer's "*right to silence*".
>
> In *Bannister*, corrective service officers were committed for trial for an alleged assault. They sought an order that the respondent be restrained from proceeding with disciplinary action about the same incident under the *Public Service Act 1996* (Qld) until the criminal proceedings had been concluded. The application was refused because the applicants had already surrendered their right to silence to the extent of providing responses to the disciplinary charges. However Holmes J endorsed what Hope JA said in *Edelstein*. His Honour said the possibility of the use, against the applicants in their criminal trial, of evidence derived from statements made in the disciplinary proceedings was a proper consideration in the exercise of the discretion to grant an injunction ([17]).
>
> A similar issue was considered by Southwell J in *Lee v Naismith*. There was an inquiry by the Pharmacy Board against a pharmacist who asserted criminal proceedings might also be brought against him for the same incident. It was held in the circumstances that there was no more than a fanciful possibility of this and therefore an injunction would not be granted. His Honour referred with approval however to the reasons of McHugh JA in *Herron v McGregor* at 66 and quoted above, in the reasons of Hope JA in *Edelstein.*
>
> As I have said, on the basis of these authorities and the fundamental principles of the rights to silence and a fair trial, the decision by the respondent not to proceed with the disciplinary proceedings against Mr Moodie was a fair and appropriate one. It was a decision taken by a public officer and it was in the public interest, as well as that of Mr Moodie, to try and ensure there was a fair trial. In these circumstances reliance upon the "*public interest*" argument of the respondent, accepted by the Arbitrator at [37] of her reasons, about "*expenditure of public funds*" can be over-emphasised.
>
> In my opinion it was not inevitable that the respondent would have rejected a submission that, given the deferral of the disciplinary process was the fair thing to do, it was not inappropriate for the respondent to continue to pay the salary of Mr Moodie."

80 The Board is also of the opinion that there are no exceptional circumstances, as provided for in the respondent's policy document 'An Employee Guide to the Department's Discipline Process', which would warrant the appellant's suspension without pay.

81 Given the above findings and when taking into account all of the circumstances the Board concludes that the respondent erred and exercised its discretion unreasonably and unfairly when it decided to suspend the appellant without pay. In the circumstances a suitable alternative position should have been found for the appellant instead of him being suspended without pay. It follows that the respondent's decision made on 30 September 2009 to stand down the appellant without pay should be set aside and the orders set out in Paragraph 54 which issued on 5 February 2010 confirm this decision and deal with consequential issues.

2010 WAIRC 00052

APPEAL AGAINST THE DECISION MADE ON 30 SEPTEMBER 2009 RELATING TO SUSPENSION OF UNION MEMBER WITHOUT PAY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL PRESTAGE
	APPELLANT
	-v-
	THE DIRECTOR-GENERAL, DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MR R BECKER - BOARD MEMBER
DATE	FRIDAY, 5 FEBRUARY 2010
FILE NO	PSAB 16 OF 2009
CITATION NO.	2010 WAIRC 00052

Result	Order issued
Representation	
Appellant	Ms S Bhar and Mr S Farrell
Respondent	Mr D Hughes

Order

HAVING HEARD Ms S Bhar and Mr S Farrell on behalf of the appellant and Mr D Hughes and later Mr E Rea on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

1. THAT the respondent's decision made on 30 September 2009 to stand down the appellant without pay be set aside.
2. THAT the respondent employ the appellant in a suitable alternative position commencing 8 February 2010 and pay him at his substantive Level 4 position from that date.
3. THAT the respondent pay the appellant an amount of money in respect of all of the remuneration lost by him by reason of his stand down as if he had worked continuously in the employment of the respondent between 30 September 2009 and 8 February 2010.
4. THAT the respondent re-instate the appellant's accrued entitlements and that his service with the respondent be regarded as continuous for all purposes including long service leave.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00138

APPEAL AGAINST DECISION MADE BY RESPONDENT RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANIA SHARP;
	SUSAN WARING;
	WENDY POWLES;
	JUDITH MARGARET WICKHAM;
	SHANE MELVILLE;
	JOHAN WILLERS
	APPELLANTS
	-v-
	WORKCOVER WA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR A PITTOCK - BOARD MEMBER
DATE	FRIDAY, 26 MARCH 2010
FILE NO.	PSAB 30 OF 2009, PSAB 31 OF 2009, PSAB 32 OF 2009, PSAB 33 OF 2009, PSAB 34 OF 2009, PSAB 35 OF 2009
CITATION NO.	2010 WAIRC 00138

Result Direction issued

Direction

WHEREAS these are appeals to the Public Service Appeal Board (the Board) pursuant to Section 80I of the *Industrial Relations Act 1979*, and

WHEREAS these appeals were set down for a scheduling hearing on the 25th day of March 2010; and

WHEREAS the parties agreed to Directions issuing for the purpose of preparation for hearing of the appeals;

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

1. THAT the respondent within fourteen (14) days file and serve full and complete particulars of its defence to these appeals.
2. THAT the parties within fourteen (14) days after point 1, exchange copies of those documents upon which they intend to rely in prosecuting/defending their respective claims.
3. THAT the parties no later than fourteen (14) days prior to the date of the hearing file a joint signed Statement of Agreed Facts. The appellants do draw and serve on the respondent the first draft of this joint Statement and the parties do settle and sign this joint Statement without undue delay and so as to comply with this Direction.
4. THAT these appeals be listed for simultaneous hearing at a time to be fixed.
5. THAT there shall be liberty to apply.

(Sgd.) J L HARRISON,
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 27/2009	Request for mediation	Beech CC	26/03/2009 09/04/2009	Concluded
APPL 1/2010	Request for mediation re terms of resignation	Kenner C	01/02/2010	Concluded

RECLASSIFICATION APPEALS—

2010 WAIRC 00167

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KERRY PHILLIP BRENNAN

APPELLANT

-v-

DEPARTMENT OF COMMERCE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 31 MARCH 2010

FILE NO PSA 30 OF 2009

CITATION NO. 2010 WAIRC 00167

Result Appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on Monday, the 15th day of March 2010, the appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00183

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHAN MARITZ WILLERS & OTHERS
	APPLICANTS
	-v-
	WORKCOVER, WESTERN AUSTRALIAN AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	WEDNESDAY, 26 MARCH 2008, FRIDAY, 18 SEPTEMBER 2009, THURSDAY, 5 MARCH 2009, MONDAY, 21 SEPTEMBER 2009, MONDAY, 8 FEBRUARY 2010, TUESDAY, 9 FEBRUARY 2010, WEDNESDAY, 10 FEBRUARY 2010
DELIVERED	FRIDAY, 9 APRIL 2010
FILE NO.	PSA 24 - 34 & 43 OF 2007
CITATION NO.	2010 WAIRC 00183

CatchWords	Public Service Arbitrator – Industrial Law (WA) – Classification level of WorkCover Arbitrator – History of workers' compensation regimes – Work value assessment – Classification determination in public sector – Broad-banded classification structure – Comparisons with other positions and offices – BIPERS assessments – Mercer CED assessment – Whether Public Service Arbitrator required to find manifest error – Requirements of Industrial Relations Act 1979 – Public Service Arbitrator's jurisdictions and powers – Fixing Remuneration – Role and functions of Arbitrator – Requirement to "act judicially" – Salaries and Allowances Tribunal's jurisdiction – *Industrial Relations Act 1979* (WA) s 80E(1) and (5) – *Workers' Compensation and Injury Management Act 1981* (WA) Parts XI, XII and XVII, Division 3, s 176, 179, 187, 286, 287(1), (2), 293 – *Public Sector Management Act 1994* (WA) s 3(2) – *Approved Procedures 1 and 2 – State Administrative Tribunal Act 2004* (WA) – *Criminal Injuries Compensation Act 2003* (WA) Schedule 1 – *Public Service Award 1992 – Government Officers Salaries, Allowances and Conditions Award 1989.*
Result	Applications Dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Reasons for Decision

1 The applicants occupy the positions of Arbitrators within the Dispute Resolution Directorate (DRD) of WorkCover WA.

2 The applicants say that the position of Arbitrator, when originally created in 2005, was incorrectly assessed and classified within the General Division of the Public Service Award 1992 at Level 9. They seek a reclassification of the position and although the Public Service Arbitrator does not have the power to order that the positions be within the jurisdiction of the Salaries and Allowances Tribunal, that such a recommendation issue.

3 At the commencement of proceedings the parties submitted a statement of agreed facts in following terms:

"STATEMENT OF AGREED FACTS

Historical background

1. Prior to November 2005 the Workers Compensation jurisdiction in Western Australia was conducted by a Conciliation and Review Directorate. It comprised a Workers' Compensation Magistrate, Conciliation Officers and Review Officers, and other officers.

2. The Conciliation Officers were classified Level 7, and Review Officers were classified Level 9, according to the classification provisions of the Public Service Award 1992.

3. On 8 July 1997, Commissioner Gregor in the Western Australian Industrial Relations Commission (**WAIRC**) gave his decision on an application by four Review Officers for reclassification of their positions. Upon hearing the evidence the application was dismissed.

4. In October 2004 the then Review Officers, *(sic)* lodged an application with the WAIRC for reclassification of their positions. Those applications were, however, withdrawn on 4 February 2005 as the then newly appointed Chief Executive Officer (**CEO**) of the Respondent undertook to arrange a comprehensive review of their positions.

5. On 14 November 2005, amendments to the *Workers (sic) Compensation and Injury Management Act 1981* (**WCIMA**) were proclaimed. The WCIMA as amended abolished the Conciliation and Review Directorate and created in its place a new Dispute Resolution Directorate (**DRD**) comprising a Commissioner (a District Court judge), a Director, arbitrators and other officers of the DRD.

6. On 11 March 2005, Ms Maureen Giorgio *(sic)* of Price Advertising and Consulting assessed the position of arbitrator (**Arbitrator**) as Level 9 based on the BIPERS classification system. Ms Giorgio *(sic)* was critical of the BIPERS system noting that because of the hierarchical nature of the evaluation, and the emphasis on scoring managerial roles higher in some areas compared to individual specialist positions, the system does not cater adequately for positions such as the arbitrator position. She recommended that an alternative job evaluation system be applied but concluded that the BIPERS assessment appeared to support a Level 9 classification.

7. The Department of the Premier and Cabinet classified the position of Arbitrator at Level 9 within the Public Service Award Framework on 6 May 2005.

8. The Director's position was classified Class 1.

9. On 2 November 2005, 9 Arbitrators were employed pursuant to a contract which contained a fixed term period of up to 5 years.

10. By operation of transitional provisions to the amending legislation all former Review Officers were eligible for appointment to the position of Arbitrator. Four of the five active former Review Officers applied, despite not being legally qualified, and all four were successful in being selected for the position of Arbitrator. These Review Officers were appointed using the same merit selection process as the other candidates into the Position on 2 November 2005. These additional Arbitrators are permanent public servants.

11. In September 2007 the Applicants commenced proceedings in the WAIRC to have the position of Arbitrator reclassified.

12. The Respondent commissioned an independent classification review of the position from CXC Consultants Exchange.

13. The resulting report (**the CXC Report**) submitted on 3 December 2007 concluded that the position of Arbitrator was correctly classified.

14. The Respondent accepted the CXC Report and declined to reclassify the position of Arbitrator. The Applicants were informed of this decision on 6 December 2007.

15. The Specified Callings salary scales in the Public Service Award General Agreement *(sic)* were reviewed by State Government and the Civil Service Association of WA Inc, and on 13 March 2008 the WAIRC issued an order whereby a new pay scale would apply to specified callings, including relevantly, Arbitrators.

16. As a consequence of the Agreement, legally qualified Arbitrators received a pay increase, retrospective to 1 July 2007, of at least 8%.

17. Five of the legally qualified Arbitrators are currently paid at the Specified Calling Level 6.3, being $134,656. Three of the legally qualified Arbitrators are paid an additional $3,648 per annum in accordance with clause 12 (5) (c) of the Public Service Award 1992. The non legally qualified Arbitrators are currently paid $126,873 per annum. The Director is currently paid at Specified Callings Level 7, being $142,244.

18. All rates of pay shown were accurate as of 1 March 2009.

19. The Applicants requested that the Respondent commission an alternative classification assessment from Mercer Consultants.

20. The Public Service Arbitrator issued a recommendation, in the course of the proceedings described at paragraph 15 above, that the Respondent commission an alternative classification assessment from Mercer Consultants, as requested by the Applicants.

21. The Respondent sought and obtained approval from the Department of Premier and Cabinet to seek such an assessment outside the public sector guidelines for classification of senior positions, and commissioned an assessment from Mercer Consultants, in compliance with the Public Service Arbitrator's recommendation.

22. Mercer Consultants delivered a report, as commissioned, on 4 November 2008, sent under cover of a letter to the Respondent dated 10 November 2008.

23. Mercer Consultants concluded that the position of Arbitrator fell below the minimum threshold for a Class 1 position, thereby confirming the Level 9 classification.

24. In the present proceedings the Applicants seek to challenge the finding that the position of Arbitrator should be classified at Level 9."

THE EVIDENCE

Applicants' Evidence

4 The applicants called evidence from Professor Robert Guthrie of Curtin University, Professor in Workers Compensation and Workplace Law. Professor Guthrie gave an outline of the history of the development of workers compensation bodies in Western Australia since the Workers Compensation Board (the Board) was created in 1948. He gave evidence as to the structure of that Board, headed by a person with the status of a District Court Judge. He described changes in constitution of the Board in the 1980's and difficulties in efficiency and workflow at that time. He also noted that there were two lay Board members, not legally qualified, but who were experienced in industrial relations and workers compensation matters. He described changes in the chairmanship of the Board over time and the manner in which the Board operated in respect of the application of the rules of evidence and the formal processes involved in hearings before the Board.

5 He stated that in 1993 the Workers Compensation Board was abolished and a system intended to be less legalistic was established involving the appointment of Conciliation Officers and Review Officers where there was a two stage process: conciliation by Conciliation Officers, and if that did not resolve the matter, then determination by a Review Officer. He outlined a number of the difficulties arising with that system and in particular the complexity of some of the matters which came before the Conciliation Officers and Review Officers at the time, including stress claims. He also dealt with changes occurring on the basis of medical panels which provided expert medical assessments to assist in the determination of claims. Although those medical panels' decisions were not subject to appeal, in the late 1980's they were subject to prerogative writs.

6 Professor Guthrie described the difficulties of a system where parties were not able to be legally represented however they could have their cases prepared by legal practitioners or could be represented by a number of other persons.

7 Professor Guthrie also described the circumstances in the early 1990's when consideration was given in Western Australia to a revised system, as a consequence of which, a new body was established by statute which abolished the conciliation and review process and set up an arbitration system. This was headed by a Commissioner, who was a District Court Judge, and Arbitrators with a dual function of conciliation and, if that did not resolve the matter, arbitration.

8 He described the "front loading" system which was established as part of those changes, which required that the all materials associated with a claim be submitted with the application. He also described the different manner in which a Review Officer's and Conciliation Officer's work is now undertaken by the Arbitrator, who is a legal practitioner with a number of years' experience, with parties being represented by legal practitioners.

9 Professor Guthrie was involved in the selection process for the appointment of Arbitrators and he described the criteria that were applied by the selection panel including:

1. Legal qualification;
2. Knowledge and background in workers' compensation or in industrial relations;
3. An ability to "collate, integrate and assess evidence";
4. The ability to write decisions in a prompt and coherent manner. (T62)

10 Professor Guthrie also noted the requirement to be able to understand the weight that should be attached to medical reports and "understand something about the aetiology of conditions and diseases". He also set out other issues which an Arbitrator would be required consider such as the definition of "worker" and the breadth of that definition, and the complexity arising from the requirement to understand the industrial relationship.

11 Professor Guthrie described the advantages of having lawyers involved in the process as compared with the previous system of conciliation and review which excluded legally qualified persons and pursued a more informal and less legalistic approach.

12 He noted that the importance of alternative dispute resolution within the workers' compensation process had generally been accepted within the legal community over the last two decades.

13 Professor Guthrie noted that the role of the Arbitrator in the current system of referrals to the medical panel requires a level of understanding in reading medical reports, particularly where there may be conflicting reports and that this adds complexity to the role of the Arbitrator. Whilst the Arbitrator may refer matters to the medical panel this is not necessarily required and experienced Arbitrators may undertake an assessment from within their own experience and competence.

14 Professor Guthrie said that the front loading system provided an opportunity for all the information to be before the Arbitrator undertaking conciliation. He said that, in theory, this provided for the prospect of an Arbitrator being fully armed with all of the information, being more effective in conciliation, and that if conciliation did not resolve the matter, move immediately to arbitration.

15 Professor Guthrie dealt also with issues of an Arbitrator conducting conciliation and arbitration of the same matter, involving a risk of actual or apprehended bias, and how this could be remedied by a competent Arbitrator being able to recognise the potential for such a situation and disqualify themselves.

16 Peter Morris Nisbet, the inaugural Commissioner of the Dispute Resolution Directorate of the respondent from October 2005 to November 2007, gave evidence of his role in that Directorate. He described it as directional; to set up the rules and framework within which matters were to proceed; to issue practice directions as points of clarification in the operation of the rules; to sit on appeals from Arbitrators' decisions which included deciding whether an appeal should lie on a question of law; and to determine matters referred by the Arbitrators on contentious and difficult questions. He said his main role was sitting as an appeal judge in those circumstances.

17 Mr Nisbet described the Arbitrators' roles as being to facilitate conciliation of disputes between various parties, including insurers or self insured and injured workers, and where that conciliation was unavailing, to arbitrate. Those determinations included issues of fact and law requiring statutory interpretation. Appeals do not lie from decisions of the Arbitrator on questions of fact, but with leave, on a question of law.

18 Mr Nisbet noted that Arbitrators require a good knowledge of the Workers' Compensation legislation, including previous interpretations of the current legislation and making comparisons with former legislation; the skills for statutory interpretation; knowledge of other areas of law, including employment law; contract law (including illegality of contract); a knowledge of the rules of evidence (even though they were not bound by those rules); issues such as abuse of process; principles of equity including issue estoppel and res judicata; and the tort of wrongful imprisonment. He noted they were required to undertake a process of reasoning in acceptance or rejection of evidence like any "other determinative fact… Magistrate, Judge, you know, or Commissioner" dealing with matters such as those. (T95)

19 Mr Nisbet also gave evidence about the role of Arbitrators in dealing with interlocutory matters such as further discovery, particulars and applications for extensions of time in which to file documents. He compared this with the Conciliation and Review Directorate where "there were no rules at all, a worker or an insurer just filed an application and then it meandered through the Conciliation (and) Review Directorate and it was formless and …….with respect, everybody…..a bit of a gormless sort of procedure as well. Had no structure. And it was meant…and lawyers were excluded, which in my opinion caused more problems than it cured." (T96) He noted there are now rules which provide for a quick turnaround. This was necessary because it is well known that the longer an injured worker remains in the workers' compensation system, the lower the prospects for rehabilitation.

20 Mr Nisbet gave evidence about the role performed by District Court Registrars in dealing with interlocutory applications, discovery of documents, the taxing of accounts and the like. He said that the Deputy Registrar's decision-making power involves the whole gamut of the District Court's civil jurisdiction. (T101) He compared and contrasted the roles of Registrar of the District Court and the Arbitrators, noting that the decision of the Arbitrator was final whereas no decision of the Registrar is final and can always be reviewed by a judge of the District Court.

21 Mr Nisbet expressed the view that if it were implemented effectively and understood by the litigants, front loading would have an important benefit of enabling conciliation, undertaken by an Arbitrator, to occur more effectively and to achieve the desired end of less matters being arbitrated. Where conciliation was unsuccessful there was a flurry of interlocutory activity involving the Arbitrator dealing with applications such as those for extensions of time, particulars, further discovery and to adduce additional medical evidence.

22 He compared this with the old system of Conciliation and Review where there was a series of rolling applications but the Officers had no real power to stop the parties from filing documents and were not supported by any Rules. Mr Nisbet agreed that the Review Officers had the power to control all of the matters that were necessary to get a matter ready for hearing and determination on review, and that the only appeal from a Review Officer was to a Compensation Magistrate on a matter of law. In those circumstances there was a significant degree of finality to a Review Officer's determination on the facts.

23 Mr Nisbet noted that the Arbitrators are appointed under the *Public Service Management Act 1994 (PSM Act)*, and in the performance of their duties, they are required act judicially rather than being judicial officers.

24 The applicants called evidence from Shane Melville, one of the applicants in this matter. Currently, Mr Melville is Acting Director of the Dispute Resolution Directorate however his substantive position is that of Arbitrator. Mr Melville is a legal practitioner and gave evidence as to his experience and areas of practice since he commenced articles in 1983.

25 Mr Melville gave evidence of how he deals with disputes which come before him, of the difference between dealing with matters under Parts XI and XII of the *WCIM Act* and the operation of the system of front loading. Mr Melville also gave evidence of the requirements of the Rules and how matters proceed through the system. Mr Melville's evidence dealt with the requirement for Arbitrators to have some level of understanding of medical reports for the purposes of reaching conclusions about injuries. He described the levels of authority of Arbitrators in awarding weekly payments, the payment of medical expenses and other matters, including the interim processes provided under Part XII of the *WCMI Act* and for final determinations under Part XI.

26 He noted the requirements to consider jurisdiction issues, including whether the person falls within the definition of "worker". He described this in the following way:

> "So you satisfy yourself that you've got jurisdiction to deal with the dispute; you satisfy yourself that the evidence meets the statutory criteria; and then you exercise your discretion having regard to all the evidence that's been filed, including that from, for example, the employer or the respondent, whether you should make the order. Sometimes matters are so complex you can order that the matter be dealt with instead pursuant to part 11 because it's simply the detail and the complexity of the evidence, and the depth of the evidence is too much, really, to justify a summary disposition of the matter. You can hold a hearing, but the act says we don't hold a formal hearing, but I do on occasions get the parties together on the phone, particularly if it looks like one party or the other has a good case, but there's a sort of technical deficiency in the evidence, I might give them an opportunity to remedy that." (T113)

27 Mr Melville said that these applications are rarely consented to and therefore there is a need for a determination.

28 Mr Melville explained his approach in dealing with conciliation conferences and arbitration. He noted that there is a need to read all of the documents that have been filed and identify the issues between the parties, both legal and factual, to read the evidence that has been filed in preparation for conciliation and for the purpose of the matter proceeding to arbitration.

29 Mr Melville described the challenges of conciliating between parties, as to whether they are represented by a lawyer or a lay person, or being unrepresented, and where there are two unrepresented parties. He noted that there may be a difference

between the level and competency of that representation. Those representatives may take different approaches depending upon whether they are more senior lawyers or relatively junior, as compared with representatives of insurance companies who may be very experienced in dealing with workers' compensation law. Mr Melville is of the view that overall, although not exclusively, it is better to have lawyers in the system, the exception being where there is an unrepresented litigant against an inexperienced or less than objective lawyer who may exploit the disparity between the relative experiences and knowledge.

30 Mr Melville described the complexities arising from stress claims, and dealing with parties with unrealistic expectations.

31 In respect of medical assessment panels, to which Arbitrators may refer questions for assessment, Mr Melville says that this requires the preparation of appropriate questions and identification of relevant documents to be forwarded to the panel. He noted that the panel's decision is binding on everyone, including the Arbitrator. Mr Melville did not recall personally having referred a question to a medical assessment panel, although he has inherited some files and seen other files where questions have been sent to the medical assessment panel.

32 Mr Melville gave evidence of the circumstances of referring a question of law to the Commissioner and how that practice operates.

33 In respect of the areas of law an Arbitrator needs to be familiar with in order to perform the role, Mr Melville described it as including the *WCIM Act;* contract law; statutory interpretation; the *Trade Practices Act 1974;* remedies; the law of negligence as it relates to the tortious concept of causation in apportioning liability between joint tortfeasors; being familiar with the circumstances under which a matter can proceed against a company in liquidation as opposed to a voluntary winding up or a creditor's involuntary winding up; aspects of insurance law to enable dispute resolution between insurers; industrial/employment relations law including familiarity with awards and certain provisions relating to the *Industrial Relations Act 1979 (IR Act).*

34 Mr Melville gave evidence of the system of delegations operating within the Directorate and that he had undertaken certain duties under delegations from the Director.

35 Mr Melville gave evidence of the involvement of a Legal Officer within the Directorate and its impact upon Arbitrators being asked to do work under delegation. He noted that the creation of the Legal Officer position had taken away some work from Arbitrators.

36 Mr Melville said that he had given evidence as to his personal experience but that he had some understanding of trends in respect of all of the Arbitrators and that his role as Acting Director had given him a lot more information and insight into the way the Arbitrators operate.

37 Mr Melville gave evidence about situations of apprehension of bias and how that would affect the allocation and performance of work by Arbitrators undertaking conciliation and arbitration of the same dispute.

38 Mr Melville noted that under the previous Conciliation and Review system, Review Officers dealt with applications of an interlocutory character, however, he noted that the more detailed processes and rules, with specified timeframes for filing various documents of the current system did not apply. This meant that Review Officers did not have to deal with the question of filing documents late, except where the Review Officer had issued an order that documents be filed within certain times. Under the Review system, the document was simply filed or, if not filed, then produced on the day of hearing.

39 Mr Melville estimated that the time recorded on the audio recording equipment for times when Arbitrators sit in hearing would be between fifteen and twenty hours per month, including in interlocutory hearings and some forms of conciliation. He said:

> "If what you're referring to as arbitration is simply the hearing such as we're having now, then I would accept happily…I'd accept 10 to 15 hours a month on average. If you, in referring to arbitration…you're including all of the…what I would describe as hearings that form part and parcel of it; more particularly the directions hearings and the interlocutory applications then I would say considerably more." (T132)

40 Mr Melville gave an assessment of the number of contested arbitrations involving significant complexity. He agreed that "decision makers in workers compensation in this state have had to deal with (issues of relative complexity including) credibility contests" and disputes as to law and fact, for many decades. (T133)

41 Mr Melville was asked about part of Mr Orrell's report of December 2007 where Mr Orrell had said that in respect of delegation of Part IV matters by the Director to an Arbitrator that the Arbitrators had individually and collectively refused to accept any such delegated functions from the Director. Mr Melville said that he thought there was a refusal to do certain tasks but the reality was quite different because he had accepted delegated functions from the Director and as Acting Director he had delegated functions to other Arbitrators who had never raised an issue in respect of it.

42 Helen Louisa Porter, the Chief Assessor of Criminal Injuries Compensation gave evidence. This included that the position is a statutory office, rather than a public service office. The salary for the position is fixed by the Governor on recommendation from the Public Sector Commissioner. It is in some way fixed to the salary of a magistrate.

43 Ms Porter gave evidence of her background and experience including as a legal practitioner and in particular, in the area of criminal court work.

44 According to Ms Porter, the work of an Assessor under the *Criminal Injuries Compensation Act 2003* (WA) involves the hearing and determination of claims for compensation and applications by the Department of the Attorney General to attempt to recover the funds paid in cases where there is a convicted offender. The great bulk of claims are dealt with on the papers with there being only sixteen hearings out of some 1100 awards granted in the previous year. The process requires information-gathering and the Assessor examines the material provided and considers whether additional information is necessary from, for example, the police, hospitals, medical practitioners, local government authorities, insurers and others.

45 The powers of the Assessor include investigative powers to seek information on any matter which is relevant. This work is often undertaken with the support of clerical officers acting under direction. The Assessors may request further information from applicants. Consideration is given to whether the offender ought to be notified and particular issues of sensitivity are taken into account in that decision.

46 Ms Porter gave evidence that a formal hearing may be undertaken where there are areas of contention and one or the other party indicates that there is information best put orally. There may be a need to deal with medical evidence which is contested or contradictory. There are issues of whether the applicant's conduct was reasonable and this can involve consideration on what Ms Porter described as a very personal view of the circumstances. (T139) There are cases where the injuries may have been caused by the commission of an offence but there may also be contributing factors in the background of the injured person.

47 The hearing is undertaken in an inquisitorial manner, her role being what Ms Porter described as "a kind of a blend of counsel and judicial officer in a sense that I know what I want to know; I know what information that I'm looking for…the nature of it…and I tend to ask more questions in that process than a normal judicial officer would…" (T140) More than half of the applicants are unrepresented in hearings so the Assessor takes a very directive approach to the hearing, having issued subpoenas and notices to gather information.

48 The complexities which arise in the matter include whether there has been an offence; if there has been a conviction, what was the conviction was for; whether the offence had anything to do with the injury; and whether other conduct which might have caused the injury but for which no person was charged. Ms Porter noted that the outcome of the prosecution can be remarkably complex in relation to questions of causation and contribution by the applicant.

49 The determination of compensation amounts may require an analysis of financial documents to establish the pre-incident earning capacity of the person. There is a need to determine real losses, of claimed future loss of earnings and to consider the statutory maxima.

50 In a separate process, the Assessor undertakes a role in recovering sums of money from the offenders for the award made in favour of an applicant for compensation. The application is brought by representatives of the Department of the Attorney General for the debt to be created and pursued. The recoverable amount may or may not be the full amount of the award and this might arise in circumstances where the extent of the injury exceeded the criminality of the conduct.

51 There are issues of public interest, including whether it is appropriate for the State to pursue the recovery in circumstances where the level of injury was significant and the level of criminality of conduct was less so. There are various issues of judgment to be applied in those cases.

52 Evidence was given by Michael John Harding by way of a statement which became exhibit A7. The respondent did not object to the tendering of this document and Mr Harding was not required for cross-examination.

53 Mr Harding's evidence was that he was formerly a Principal Registrar of the District Court of Western Australia. He described his professional qualifications and experience until his retirement on 3 March 2004. When he was appointed to the position of Principal Registrar on 3 March 1987 the position was a Level 7 officer in the public service. He described the circumstances of the complement of the Court at the time and noted that over the years the volume of business in the Court increased, that there were further Registrars appointed, including two Deputy Registrars, and when he retired there were 23 judges of the Court. Mr Harding described his duties including deciding upon and issuing orders in interlocutory applications in matters pending before the Court. Those matters were heard in chambers and were in respect of procedural matters, for example discovery, answers to interrogatories, further and better particulars, strike-out applications, and to take evidence *de bene esse*.

54 He noted that the parties were usually represented by legal practitioners and he described the manner in which matters were dealt with, that he would deliver an *ex tempore* decision with reasons or reserve his decision.

55 Mr Harding described the inter-relationship between the work of the District Court under section 93D of the *Workers' Compensation and Rehabilitation Act* in the period 1993-1999 and the matters he dealt with, noting that the degree of disability of the worker was required to be not less than 30% or future pecuniary loss of not less than an amount prescribed under the Act, and that degree of disability was determined by Review Officers at the Conciliation and Review Directorate. The Registrars of the District Court had to determine the future pecuniary loss. There was a right of appeal against those decisions to a District Court judge. He described changes since then and the impact upon his work as a Registrar.

56 Mr Harding also described the work in conducting pre-trial conferences on actions entered for trial. These matters related to all of the civil work of the District Court.

57 Mr Harding also referred to the duties of Registrars in taxation of costs saying that he retained to himself the more complex issues.

58 Mr Harding gave evidence of his other duties as Principal Registrar.

59 There was evidence as to efforts made which resulted in remuneration for Registrars being set by reference to the salaries of the District Court judges, and that those salaries are reviewed by the Salaries and Allowances Tribunal.

Respondent's Evidence

60 The respondent called evidence from Murray Peter Orrell, the Principal Consultant with CXC Consulting Pty Ltd (CXC). Mr Orrell gave evidence of his experience in industrial relations matters in government and in assessing classifications of positions within the public sector of Western Australia.

61 Mr Orrell was engaged through CXC by the respondent to review the classification of the position of Arbitrator in 2007. He obtained the appropriate papers from the organisation, met with the Arbitrators, with the Chief Executive Officer and the Director, Dispute Resolution Directorate. He prepared a report which he says is in accordance with Approved Procedures. His report (exhibit R1) sets out his methodology and findings.

62 Mr Orrell noted at page 2 of his report that the Arbitrators made reference to the similarity between their role and those of District Court Registrars and Magistrates, but also that "they indicated that Arbitrators should be remunerated with a package that is intermediate between an Ordinary Member and Senior Member of the State Administrative Tribunal". He said that the Arbitrators' main focus was in relation to the roles of Ordinary Member and Senior Member of the State Administrative Tribunal and that there was very little said in relation to a comparison with the District Court Registrars and Magistrates. In papers presented by the Arbitrators to the Department dated 17 May 2007, the Arbitrators had said:

> "While a very compelling case could be argued that Arbitrators *(sic)* duties are such that they should be remunerated at District Court Registrar or perhaps Magisterial levels, we accept that such an outcome would be resisted by the W.A. judiciary, WorkCover WA, and the Department of Premier and Cabinet." *(Ex R2 – Supplemental Information in Support of Reclassification of Arbitrator, Dispute Resolution Directorate)*

63 Mr Orrell says that because the Arbitrators did not provide any substantial material in relation to the duties and responsibilities of District Court Registrars, he did not pursue that comparison any further. Rather, the matter was considered on the basis on the salaries of Ordinary and Senior Members of the State Administrative Tribunal because that was the approach taken by the Arbitrators.

64 Mr Orrell explained that the Arbitrators had prepared a revised job description form which, although it was not accepted by the management of WorkCover, he examined and considered. His assessment was based on change in work value from the previous role of Review Officer as well as the original job description form. He examined the exercise of judicial and arbitral functions and the methods used in dealing with claims through conciliation, teleconferences, directional hearings, hearings and the like. He considered that the changes referred to by the Arbitrators did not reflect changes in the nature of duties and responsibilities or an increase in the work value of the position.

65 Mr Orrell's assessment was that the exercise of independent and discretionary powers contained within section 187 of the *WCIM Act* was not a new area of responsibility and existed prior to 2005.

66 His view was that the requirement to issue orders and written reasons for decision, and the decisions being final and binding on the parties and on superior courts, did not constitute a significant net addition to work value and that this was adequately catered for in the existing classification at Level 9.

67 In his view, dealing with interlocutory applications, determination and issuing of orders, and that orders are not appealable, were not new but had been part of the previous legislation.

68 As to proposed Duty 9 - the conduct of taxation of costs, this was not contained in the current job description form but was something previously taken into account.

69 As to proposed Duty 10 - delegation of authority from the Director, whilst this was not in the current job description form, the Director had the power to delegate and Mr Orrell was of the understanding that apart from the period of four months before the arrival of a Legal Officer who now performed those functions, Arbitrators had individually and collectively refused to accept delegations of functions from the Director. This meant that this was not a new or added responsibility for the position.

70 As to providing guidance and assistance to and monitoring of staff, Mr Orrell said it was acknowledged that this was undertaken by the Manager of Client Services and his view was that the Arbitrators had a working relationship with these officers but the end of line responsibility rested with the Client Services Manager. There was no change in the duties and responsibilities of the Arbitrator in that regard.

71 Mr Orrell's view of monitoring the performance of agents and legal practitioners and reporting unprofessional behaviour was that, at best, this represented a minor change in duties and responsibilities.

72 Involvement in community liaison and representing the Chief Executive Officer and Director on external committees and working parties was not a significant change to the duties and responsibilities. This type of responsibility occurs across Levels 5 to 8 in other positions with which Mr Orrell had dealt.

73 Although formally a new duty, liaising with the Commissioner and Director was not a significant change in duty or responsibility and not all Arbitrators were involved in this requirement.

74 Mr Orrell had also considered Ms Giorgi's report and the work undertaken by former Chief Commissioner Coleman and former Commissioner George. Mr Orrell said that he concluded that there was no significant increase in the work value of the position of Arbitrator. He recognised there were some changes in duties and responsibilities but they did not constitute a significant net addition to work value in the terms required by the Wage Fixation Principles. Therefore reclassification was not warranted.

75 Mr Orrell also undertook a BIPERS assessment. This required the applicants to fill in a job evaluation questionnaire. Ten factors were considered and points were allocated against each for the degrees associated with those factors. He described the various factors and how he had come to his score. He came to the conclusion that the position should be scored in the range between 507 and 512, which corresponded with Level 8 according to the BIPERS classification scores. He noted that Price Consultancy had scored them between 492 and 510, but described an error in the arithmetic which arrived at this score.

76 In regard to factor 6: Instructions Received, Mr Orrell noted that the Arbitrators claimed a degree of 15 on the basis that they were autonomous in respect of the work they undertook and the decisions they made. He found that this factor did not really

apply specifically to the Arbitrator position, but considered that it could be interpreted to apply to the fact that the Arbitrators cannot be directed in terms of the decisions that they make. Accordingly, he allocated a degree of 15, which is the highest that can be allocated for that factor.

77 In respect of factor 7: Influence on Results, he noted that the Arbitrators claimed a degree of 11 based around dispute resolution. His view was that the role of the Director of Dispute Resolution took responsibility for a functional area and that at best it could be said that the Arbitrators were responsible for a work area which had a large influence on the dispute resolution function and a large influence on WorkCover's results.

78 Factor 8: Size of Organisation is unrelated to the individual position. WorkCover is a Group 3 organisation.

79 In respect of factor 10: Subordination Level, Mr Orrell noted that Arbitrators are administratively at the third level of management. However he says he recognised that in the exercise of the statutory responsibility, they are at a second level of management responsibility, through to the Minister under s 289 of the *WCMI Act*. In this case he split the score to take account of this dichotomy, allocating the higher level for one and the lower for the other.

80 Having undertaken that scoring process, Mr Orrell also drew comparisons with the State Administrative Tribunal positions referred to by the applicants. He noted that the Salaries and Allowances Tribunal determines the salaries and conditions for those positions in accordance with the decision with the legislature. He examined the State Administrative Tribunal positions and noted that they were still under the control of the *PSM Act* and that the State Administrative Tribunal's functions and powers are established under the *State Administrative Tribunal Act* as well as there being jurisdiction gained from more than 130 other, enabling Acts. This provides a far broader range of responsibilities than applies to the Arbitrators, who operate under one primary act being the *WCIM Act.*

81 Under cross-examination Mr Orrell noted that he had approached the examination of the Arbitrator's position on the basis of a claim of change in work value on the basis that this was what he had been instructed to do, but he had also been instructed to review the classification of Arbitrator, not simply look at work value change. He says that he did examine work value change but also conducted a BIPERS assessment and then considered comparative positions.

82 Mr Orrell acknowledged that Ms Giorgi's report indicated difficulties with using the BIPERS tool for the purpose of an assessment where she had stated that the BIPERS job evaluation system emphasised scoring management roles higher than some specialist type functions and that the BIPERS system did not cater adequately for positions such as Arbitrators. Mr Orrell said that he did not believe that that was the case, saying that the system had been in existence since around 1985 and had been used for positions across the public sector in administrative, clerical, management, general and specialist positions both in the professional division of the public service and within the hospital sector. Mr Orrell said that the way in which he had conducted the assessment was that he recognised the specialist role particularly of Arbitrator in terms of the factors to be considered. He said that in the Subordination Level, he had been liberal in his interpretation of the factors, and what he described as generous in the scores he had allocated.

83 Mr Orrell acknowledged that he had provided a discussion paper to the Chief Executive Officer and the Director, Dispute Resolution in which he had commented that "my assessment places the position in the upper end of the range for a position classified as Level 8. The use of BIPERS, even with a very liberal interpretation of the factors, will only ever result in the positions being classified at Level 8 or 9. This is due to the fact that BIPERS is hierarchical in nature and does not make allowances for specialist positions like Arbitrators where they are required to operate independently by legislation." (T162) Mr Orrell says that whilst Arbitrators "start off behind the eight ball" (T163), in his assessment he made allowance for that. He believes that the BIPERS tool provides some discretion as to the various degrees that are allocated against each of the factors and that he had applied that approach in assessing the claim. He described how his and Ms Giorgi's views had diverged and how she had arrived at her scores whereas what he did was "looked at it from a different angle and that is that the Arbitrators were claiming responsibility for a functional area and that wasn't the case…that's the role of a Director…and they were responsible for work areas which have a large influence on both the dispute resolution function and a large influence on the agency's results, so in my assessment that's an appropriate degree to allocate". (T163)

84 Mr Orrell also gave evidence as to the impact of the size of the organisation on the overall scoring of the position and that due to it being a small organisation, it is a group three organisation. The score for factor 7: Influence on Results is combined with the score for factor 8: Size of Organisation, to achieve a result.

85 Mr Orrell explained how he dealt with the Subordination Level in factor 10, recognising that the Arbitrator has both an administrative line of responsibility (which was at the third level of management) to the Director, Dispute Resolution and a statutory responsibility at the second level of management through to the Minister and created what he described as "a range" in those circumstances. (T165)

86 Mr Orrell also gave evidence of the approach to comparison positions when looking at changing work value, as compared to classifying a new position. He noted that what Ms Giorgi did was look at the work value of the position, not change in work value, and that she had detailed in her report the key parts of the work value for the position.

87 Mr Orrell disagreed with the proposition that it is appropriate to examine the salary of comparable positions where the comparison positions are not within the same classification structure.

88 Robert Charles Butler, a Consultant with Mercer Australia Pty Ltd, gave evidence. Mr Butler described the process he had used to prepare a report for WorkCover on the approval of the Department of Premier and Cabinet using the Mercer CED methodology to assess the work value of the Arbitrator role. He was assisted by his associate, Adrienne Best. The process involved interviewing the incumbents, the Chief Executive Officer and the Director responsible for the Arbitrators; considering a number of submissions from the Arbitrators; evaluating the role; having a internal peer review of that evaluation and finalising the evaluation. He provided a report dated 4 November 2008 (exhibit R3).

89 The work value assessment involved reviewing all documentation and information from the submissions and the interviews which were conducted.

90 The preliminary work value outcome was discussed with WorkCover's Chief Executive and Director.

91 Mr Butler noted that in respect of the role of the Arbitrator, one of the practices of the Mercer CED methodology is to form a view of the level of independence of the role. He said the use of the word "judicial" is probably an unfortunate one in that Mercer was not in a position to say whether the position was a judicial one or not. Rather, the term referred to how an Arbitrator would be expected to act with a sense of fairness, to apply principles of natural justice, to form an independent view and methodically analyse the facts. (T171)

92 Mr Butler described the Mercer CED methodology as comprising a number of levels within each of the key factors of expertise, judgment and accountability, and a number of levels within each of the sub-factors. He noted that within the WA public sector, the Mercer CED methodology is only used above Level 8 and in the SES classification ranges. Class 1 within the public sector classification structure has a threshold of 1000 Mercer points.

93 Mr Butler noted that within the Mercer CED benchmarking and peer review process, they only benchmark against other positions that have been evaluated using that methodology, to ensure that they are comparing like with like. Therefore if a position had not been evaluated using that methodology, then direct comparisons could not properly be made with the same rigour.

94 The conclusion Mercer reached was that the position of Arbitrator had a high level of independence and could not be directed by WorkCover; was highly specialised; operated in a relatively complex area and spanned a range of activities; it required the exercise of reasoning that involved identification and resolution of fundamental problems on a case by case basis, and it operated in a relatively narrow field of law.

95 In assessing the information provided, Mr Butler was confident that from an expertise, judgment and accountability perspective and the application of methodology in a consistent way, a point score of 756 was reasonable and appropriate.

96 In cross-examination Mr Butler described how the initial assessment was done by himself and Ms Best individually and that they compared their assessments and came up with very minor differences. He described the internal peer review process and that in this case it was conducted by two of the most senior principals in the business, one of whom had extensive experience across a number of jurisdictions, including Western Australia, in evaluating roles in the judiciary and magistracy.

97 Mr Butler also gave evidence that he interviewed Mr John Young, a Deputy State Solicitor, who had previously had some involvement through the State Solicitor, in the role of Arbitrator.

98 Mr Butler described the process of considering each factor and the various ranges within those factors, noting that the Mercer CED methodology for each factor such as accountability or advice, involves starting at the lowest point of the particular scale of descriptors where the position matches the descriptor. The assessment continues up that scale to a point where the position no longer reflects the description in the scale. At that point, the assessment drops back to the one below, which is then seen as the best match.

99 Mr Butler explained that in the "expertise" factor, higher level positions are usually categorised with the Mercer CED system as being in the "F" or "G" ranges. They commenced by seeing if the Arbitrator position fell in the F– range, then looked at the F+ range and noted if there was anything that prevented them from saying that it fell within the F+ range, and settled on F. He noted that G is the higher range and this would apply to a Chief Executive or a Director General of a major government agency. An Executive Director of a large agency contributing to the broader strategic direction of the organisation; usually having a state-wide impact; developing and implementing high level policy and advising government on key areas of concern within their sphere of operation and speciality, would be expected to fall within the G– range.

100 Mr Butler explained that the traditional job evaluation system places significant emphasis on the management of resources, people and budgets, however the Mercer CED system looks at positions differently, taking account of those factors but also recognising that there are many positions particularly within government that are more advisory in nature and more policy-focused. Reference to "advice" or "advisory" was more appropriate for the Arbitrator position because "the value of the position lies more in the impact of the application of the expertise in determining matters rather than in managing a large set of resources". (T175) The impact of that advice is judged according to the breadth of its influence, for example Mr Butler said "higher level advice impacts on the whole organisation or an industry or a section of the community or the whole community". (T176) Mr Butler said that "[m]ost statutory office holders would be regarded as advisory, a lot of policy development roles, most positions in the judiciary and magistracy." (T176) The distinction to be drawn between the various roles is around the impact of the "advice" that is provided and, the level of influence that the position exercises, including the availability of alternative sources of advice.

101 Mr Butler noted that there are a number of roles in organisations both in public and private sectors that have both accountability for management of resources and also provide advice on policy or direction for the organisation. He said where there is no one predominant focus of the position, then an evaluation is conducted using both "advice" and "direct", and they err on the generous or higher side.

102 Mr Butler said that in undertaking conciliation, to try to obtain an agreement between the parties and in undertaking arbitration, including dealing with interlocutory applications, the Arbitrator would be considered to be performing an advice role. The impact or the breadth of that "advice" would result in a smaller score because it impacts only on the parties to the particular dispute. Mr Butler agreed that an assessment of a magistrate's role dealing with applications with only two parties would involve the same considerations, or the same system. He believed that the review and benchmarking processes referred to earlier included a range of evaluations which had been conducted which included roles such as a magistrate. However, he did not have the detailed evaluations in front of him to answer direct questions about those positions.

103 Mr Butler said that he believed that in their discussions with him, the Arbitrators had referred to particular positions at the State Administrative Tribunal and the District Court Registrar but that it was only possible to make general comparisons because the Mercer CED system had not been used to evaluate those positions.

104 Mr Butler provided a list of positions which had been used to benchmark and peer review the work value assessment for the position of Arbitrator (exhibit A11). They were Magistrate, Deputy State Ombudsman, Registrar Magistrates Court, Registrar Supreme Court, Deputy Chief Magistrate, Member Administrative Appeals Tribunal, Judicial Registrar, Industry Ombudsman, Electoral Commissioner (small State), Chair Transport Appeals Board and Chair Residential Tenancies Tribunal. He said that all of those positions fell below 1000 Mercer CED points, and that 1000 points is the minimum for Class 1.

105 Mr Butler also noted that roles such as Industrial Relations Commissioner, Chief Assessor of Criminal Injuries Compensation and Assessor of Criminal Injuries Compensation had been assessed in the past.

106 Mr Butler was referred to a comment at page 5 in his report that "the area of law relating to the arbitration role within WorkCover (was) relatively narrow when compared to other judicial roles", and he said that this comment was trying to provide the client with a view or summary "of the key points that have been raised throughout the discovery process, the interviews and submissions, and we believe that that was the overall view of the people we spoke to." (T179)

The Applicants' Submissions

107 The applicants do not rely on changed work value but say that the position was wrongly classified from the outset.

108 The essence of the applicants' position is that:

1. the BIPERS tool is not an appropriate mechanism for assessing the requirements of the position of Arbitrator. They say that both Ms Giorgi and Mr Orrell recognised that inappropriateness. The BIPERS tool is suited to the hierarchical structure where higher levels of positions bear higher levels of responsibility and authority for management of people and resources, as opposed to specialist positions such as Arbitrator. Positions which do not have management responsibility are unable to achieve the higher scores applicable to management positions because consideration is weighted in favour of management of numbers of employees, and financial and other resources. Specialist positions which have different types of authority, skill and knowledge are not adequately recognised.

2. Ms Giorgi used as a comparative position that of the former Review Officer. The applicants say that this was not an appropriate comparison because the Review Officer operated under a different structure and system. The differences include that the Review Officer was operating in a lay system whereas the Arbitrator operates in the system where lawyers are present. The Review Officer system did not have the front loading approach and did not have the same interlocutory applications or Rules issued by the Commissioner which make the current system more formalised, structured and legalistic. Arbitrators are required to have knowledge of various areas of law and apply it in their work.

3. The third assessment undertaken by Mercer, was also inappropriate because of its categorisation of the type of position and because of the comparative positions used in the assessment. The Mercer assessment gave insufficient weight to comparisons with like positions, categorised the position as "advice", then undervalued the position by reference to the breadth or scope of the effect of that advice being limited to the competing parties. The applicants say that the points score for a Magistrate or District Court Registrar under the "advice" category demonstrates the flaw in that approach.

4. There has been insufficient weight given to the work value of the position of Arbitrator.

5. The requirement of the position to act judicially demonstrates the specialised nature of the function. Of itself the requirement to act judicially does not attract great weight but the context in which the position acts judicially is recognition of that specialist nature.

109 The applicants say that since Commissioner Gregor's decision of the 8 July 1997, where he determined that positions within the broadbanded classifications structure were the only ones that could be used for comparison purposes, the Approved Procedures and the Senior Executive Classification Service Quality Framework have issued. According to the last such document, at page 3, external comparisons are now permissible. It allows for "comparison of both internal and external relativities, ie., like positions within the agency, the Public Sector and across Australia, with internal taking precedent *(sic)* taking over external. External comparisons should be examined more closely than simply reviewing the JDF". (exhibit A1) The applicants reject that comparison positions outside the broadbanded structure cannot be used and say that if that is so then there is no comparable position within the broadbanded structure.

110 The applicants put forward a table of positions with statutory powers for comparative purposes. These positions are under the jurisdiction of the Salaries and Allowances Tribunal and are said to be similar to the Arbitrator albeit that they deal with different types of issues.

The Respondent's Submissions

111 The respondent submits that:

1. It is necessary to view the position in the context in which the position fits within the statutory scheme including the *PSM Act* and the *WCIM Act* and taking account of history. Meaningful comparisons can only be made with like positions and those positions ought to be sourced within the public service of Western Australia.

2. The Public Service Arbitrator ought to review the respondent's decision for the purpose of finding manifest error and if it is found, correcting that by way of nullification, modification or variation (s 80E(5) of the IR Act). These terms suggest the correction not just of error but of material error.

3. The previous assessments of the position have not been demonstrated to have been in error but came to the right conclusion. The respondent says that if the Public Service Arbitrator were to stand in the shoes of the original decision-maker and come up with the "right" decision as opposed to discerning error, then the factual history of the positions is highly relevant. That history includes that Ms Giorgi reached a conclusion supported by the employing authority, Mr Orrell came to a third conclusion compatible with the outcome arrived at by Ms Giorgi and the employing authority, and Mr Butler of Mercer came to a similar conclusion using an entirely different classification process. In those circumstances there would need to be clear and cogent reasons why the correct or preferable decision ought to be different to the earlier outcomes.
4. Having regard to the history and context, the respondent says there is no material difference between the work done by the Arbitrator and the Review Officer which would have any consequence for work value. There have been what the respondent described as "swings and roundabouts", that in some ways the role of Arbitrator is a bit harder than that of its predecessors, the Conciliation Officer and Review Officer, and in other ways a bit easier. The material difference is that the Arbitrator is better prepared in a more efficient system.
5. The applicants have not clearly demonstrated manifest error on the part of previous assessments of the position of Arbitrator, but simply say that the outcome of the Orrell report was wrong and they seek what the respondent describes as a fifth bite at the cherry.

   If there was manifest error in the assessments, then the requirement is to come to a sensible conclusion, in the context of the legislative framework, rather than voiding the act done in breach. (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355)

   The respondent says that if the Public Service Arbitrator's role is to undertake the exercise of discretion afresh, then a very significant onus falls upon the applicants to demonstrate their case.
6. The respondent says that the applicants have misplaced a reliance on a characterisation of the functions of the position of Arbitrator as being "judicial".

112 As to the criticism of Mr Orrells's approach, the respondent noted Mr Orrell did not consider a comparison with the District Court Registrar because the applicants suggested that he should focus on the State Administrative Tribunal Positions and that is what he did. The respondent says that Mr Orrell was suitably flexible and sensible in the application of the Approved Procedure and the BIPERS tool.

113 The respondent says that the comparisons with District Court Registrars and Assessors of Criminal Injuries Compensation are not appropriate due to the different statutory sources of those positions and that they are not under Part 3 of the *PSM Act* but are remunerated under different schemes.

114 The respondent noted that there are many officers within the Public Sector who are required to investigate and deal with matters of complexity, involving emotion and requiring sensitivity, for example undertaking disciplinary or other public sector inquiries. The fact of there being no capacity to appeal against findings of fact made by the Arbitrator does not make a substantial difference to the issue of work value.

ISSUES AND CONCLUSIONS

Position of the Arbitrator

115 I note the Statement of Agreed Facts submitted by the parties at the commencement of the hearing, and set out in paragraph [3] of these Reasons.

116 The *WCIM Act* provides for the position of Arbitrator within the Dispute Resolution Directorate of the respondent in Division 3 of Part XVII. The Arbitrator is subject to the direction and control of the Director in the exercise of his functions (s 287(1)), however is not subject to such direction in respect of the decisions to be given on matters before the Arbitrator (s 287(2)).

117 The Commissioner makes Rules and issues practice notes with respect to the practice and procedure governing the jurisdiction, functions and proceedings of the Commissioner and the Arbitrators (s 293).

118 The Arbitrator is an "officer" of WorkCover (s 286), and a person cannot be an Arbitrator without the approval of the Minister.

119 The jurisdiction of the Arbitrator is set out in s 176 as being:

> **176. Exclusive jurisdiction**
>
> (1) In this Part –
>
> ***dispute*** means –
>
> (a) a dispute in connection with a claim for compensation, or the liability to pay compensation, under this Act;
>
> (b) a dispute in connection with an obligation imposed under Part IX;
>
> (c) any other dispute or matter for which provision is made under this Act for determination by an arbitrator;
>
> (d) any other matter of a kind prescribed by the regulations.
>
> (2) A proceeding for the determination of a dispute is not capable of being brought other than under this Part or Part XII.

(3) Subject to this Act, arbitrators have exclusive jurisdiction to examine, hear and determine all disputes.

[Section 176 inserted by No. 42 of 2004 s. 130.]

The powers of the Arbitrator are set out in various sections in Parts XI and XII of the *WCIM Act.*

120 The Job Description Form effective from 1 July 2005 (JDF) (exhibit A5) notes the reporting hierarchy of the Dispute Resolution Directorate including that a number of Arbitrators report to the Director at Class 1 and the Chief Executive Officer at Group 1 (max) of the Special Division.

121 The JDF describes the role of Arbitrator as –

"The Arbitrator is responsible for settling disputed claims for compensation between the parties in a Workers' Compensation claim. They exercise exclusive jurisdiction to examine, hear and determine disputes as defined in section 179 of the Workers' Compensation & Injury Management Act, 1981. The Arbitrator has jurisdiction to make a monetary award or series of awards to a particular worker, and the determinations of the Arbitrator are final and binding."

122 The duties in descending order of importance are:

"1. Acts judicially in exercising exclusive jurisdiction to examine, hear and determine disputes as defined in section 179 of the Workers' Compensation & Injury Management Act, 1981. ("The Act")

2. Presides over hearings as to and makes final and binding determinations on, disputed claims for compensation in accordance with Part XI of the Act.

3. Uses best endeavours to bring the parties to a dispute to a settlement acceptable to all of them.

4. Produces written reason *(sic)* for determination identifying the findings of fact and law applied in coming to the determination.

5. Makes decisions under Part XII of the Act as to interim payments, suspensions or reduction orders and minor claims without formal hearing.

6. Issues interlocutory orders in disputes arising under the DRD Rules.

7. Reconsiders decisions when new information becomes available in accordance with s186 of the Act.

8. Provides information to parties pertaining to their appeal rights.

9. Conducts taxations of costs."

123 The selection criteria are:

"ESSENTIAL

Qualifications/Experience

- Legal practitioner as defined in the Legal Practice Act, 2003.
- Relevant post admission experience in a legal role, preferably in dispute resolution.

Analytical, Problem solving and Decision making skills

- Proven ability to make determinations and resolve disputes.
- High level analytical skills and the capacity for impartial judgment.
- Ability to make sound and timely decisions.
- Proven ability to interpret and apply legislation.

Communication, Interpersonal and Negotiation skills

- High level written and verbal communication skills.
- Ability to undertake alternative dispute resolution especially in relation to conciliation and demonstrated high level negotiation skills.

DESIRABLE

- Previous experience in a quasi-judicial decision-making role.
- Previous experience in a workers' compensation jurisdiction.
- Basic computer and keyboarding skills including experience with Microsoft office suite of applications."

Jurisdiction and Powers of the Public Service Arbitrator

124 The jurisdiction of the Public Service Arbitrator is set out in s 80E of the *IR Act.* The relevant parts for the purposes of these matters are subsections (1) and (5) which provide as follows:

(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

…….

(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter within the

jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division.

125 The Industrial Appeal Court in *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244 dealt with the issue of the Public Service Arbitrator's powers in particular with regard to s 80E(1) and (5), and that the Public Service Arbitrator's jurisdiction is to deal with an industrial matter. Wheeler and Le Miere JJ at paragraphs 24 – 34 noted the following:

> **[24]** The definition of "industrial matter" in the Act is a lengthy one, but in its core meaning is "any matter affecting or relating or pertaining to the work … of employers or employees in any industry or of any employer or employee therein … ".
>
> **…..**
>
> **[28]** Turning, then, to the question of the proper construction of s 80E(5), read with s 80E(1), in our view the controversy which has arisen relates to a false issue. As we have noted, there is no power conferred by the Act upon the Arbitrator to engage in anything in the nature of "judicial review", or to make a bare declaration. That is jurisdiction of a kind quite different from the merits-based inquiry contemplated by s 80E. To the extent that the reasons of the Full Bench might be read as suggesting that there is such power, they are in error.
>
> **[29]** However, the powers of the Arbitrator are very wide. They are to inquire into and deal with any industrial matter. To the extent necessary, the exercise by an employer in relation to a government officer of a power relating to that industrial matter may be reviewed, nullified, modified, or varied by the Arbitrator.
>
> **[30]** An inquiry into an industrial matter will, where that industrial matter is affected by other legislation, or where the actions of persons involved in the industrial matter are, in some respect, governed by other legislation, involve an inquiry into what was done, in that legislative context. In order to determine how to "deal with" an industrial matter, the Arbitrator must find relevant facts. If it is the case that a relevant factual finding suggests that a person has been guilty of unlawful or improper conduct, that is a finding which it is open to the Arbitrator to make, not as an end in itself, but as a step in determining how the industrial matter is to be dealt with.
>
> **[31]** Where, as is presently the case, the way in which officers in the public service deal with each other is the subject of principles and requirements contained in legislation such as the PSM Act, it will often be desirable for the Arbitrator to consider whether the behaviour of individuals involved in the industrial matter has been in conformity with those principles and requirements. Again, findings of that kind would not be made as an end in themselves, but would be made in order to determine how, in the broad statutory context, it would be appropriate to deal with the industrial matter.
>
> **[32]** It will on occasion, as part of that process, be necessary for the Arbitrator to undertake a consideration of the relevant statutes, so as to ascertain how they apply to the facts as found. That exercise is undertaken, not in order authoritatively to declare the meaning of the statutory provision, but again as a step in the process of ascertaining what is required, in the statutory context, to deal with the industrial matter.
>
> **[33]** Those conclusions may on occasion lead to the view that it is necessary in order to deal appropriately with the industrial matter, to nullify, modify, or vary an action or decision of an employer, pursuant to s 80E(5). That subsection does not confer any independent jurisdiction to quash those decisions, but only to do so to the extent necessary to ensure that the industrial matter is dealt with as contemplated by s 80E(1). Similarly, the word "reviewed" in s 80E(5) is plainly not intended to confer some independent power to review any decision of an employer, but only a power to review (and, if necessary, to differ from) the decision where it is necessary to do so as part of the process of dealing with an industrial matter.
>
> **[34]** When s 80E(1) and (5) are understood in the way in which we have endeavoured to explain, the controversy about the Arbitrator's power of "judicial review" simply disappears. There is plainly no such independent power. Equally plainly, however, some of the questions which would be determined by a Court undertaking judicial review of the actions of government officers may be questions which it is necessary for an Arbitrator to consider and determine in order to deal with an industrial matter relating to those government officers. Those questions are dealt with by the Arbitrator, however, not in order to make an authoritative and binding determination concerning them, but as steps in the process of determining how the industrial matter is to be dealt with.

126 Hasluck J at paragraph 167 endorsed those comments.

127 It is my understanding of Wheeler and LeMiere JJ's comments that the powers of the Public Service Arbitrator are to enquire into and deal with any industrial matter. It is as part of that process that the Public Service Arbitrator may, in appropriate circumstances, review, nullify, modify or vary anything done by an employer in the exercise of any power. The Public Service Arbitrator does so in order to deal with the industrial matter. It requires that there be relevant findings of fact and dealing with the industrial matter. This does not require the Public Service Arbitrator to necessarily, as a first step, conclude that the employing authority has made a manifest error in the exercise of power but the power to review the decision of the employer is exercised "where it is necessary to do so as part of the process of dealing with an industrial matter". [33] Therefore I conclude that the Public Service Arbitrator is not limited to finding manifest error but may do so as part of the process where it is necessary to deal with the industrial matter.

Fixing Remuneration

128 Part of what the applicants seek is for the classification of the position of Arbitrator to be set by reference to a range of positions they say are comparable. Some of those positions have their salaries determined by the Salaries and Allowances Tribunal (eg the District Court Registrar and the Ordinary Member of the State Administrative Tribunal). The Chief Assessor of Criminal Injuries Compensation has a salary set by the Governor on recommendation from the Minister for Public Sector Management (*Criminal Injuries Compensation Act 2003* (WA) Schedule 1, Clause 3(4)).

129 The applicants say that amongst, other things, the salaries applicable to other positions ought to be taken into account.

130 This view seems reasonable on its face, however it ignores the reality of the way remuneration is fixed. There is no one, single wage or salary determination model applicable across all positions and offices within the public sector. Some are fixed by the Salaries and Allowance Tribunal, such as the Ordinary Member of the State Administrative Tribunal. Others are determined by the Governor on the advice of a Minister.

131 They may take account of salaries of like officers in other jurisdictions, or have a particular linkage or nexus.

132 This Commission and the Public Service Arbitrator fix remuneration according to a broad range of factors.

133 Remuneration is not fixed simply by reference to the salary of other positions which have some commonality of roles and responsibilities. It also takes account of the history of the position and its context. It takes account of the principles which applied at the time the remuneration was originally struck. It may take account of a range of elements of the job market such as attraction and retention, mobility, and conditions under which the work is performed. It is not simply a comparison of like with like, although that has a real role to play.

134 The fixing of remuneration for government officers within the public sector in WA has a number of particular elements. The first is that there is a need for consistency of treatment.

135 I have made these comments in respect of remuneration fixing generally, however, determination of classification is a branch of remuneration fixing which has its own criteria and processes, most particularly in the public sector.

136 The applicants have brought applications under s 80E of the *IR Act*. The Form 10 originally filed in each case sought an increase in the level of classification commensurate with Members of the State Administrative Tribunal. Therefore, they are required to demonstrate, not that the level of salary ought to be increased but that the level of classification ought to be increased. Therefore, the claims are to be determined by reference to the classification structure within the public sector and not by reference to the salary per se.

Classification of Positions Within Public Sector

137 Part of the process of classifying positions within the public sector is, by necessity, comparative. By this I mean that there needs to be a common thread linking all positions within the public sector, in particular those within the broad-banded classification structure set out in the *Public Service Award 1992*. Those positions may not be the same in terms of the types of duties and responsibilities, but there must be some means of working out how each position relates to others, even to unique positions. It is possible to group like positions, but all positions must be considered within the context of the overall structure. This is achieved by the application of indicators or levels of features of all positions and there being the ability to measure each position's features by reference to those levels.

138 The *PSM Act* authorises the Minister to approve in writing "any procedure or classification system" (s 3(2)). Approved Procedures 1 and 2 are such procedures. Division 3 – Public service officers other than executive officers of the *PSM Act* also deals with the appointment of public service officers to positions and classification levels, in accordance with approved procedures.

139 As Approved Procedure 1 notes, it is required that positions are assigned a classification level according to the *relative* worth of the job in comparison with like positions. An assessment is made through an evaluation of the critical factors in the job such as education, skills and responsibilities.

140 The particular factors used in determining the classification of a position are:

- The value of the work performed;
- The responsibilities and skills required;
- Comparisons of the work requirements of the job (internal and external) having similar duties, responsibility and skill requirements;
- The structural relationships of the job; and
- The indicative results of the approved job evaluation tool.

141 Approved Procedure 2 which deals with Senior Executive Service (SES) and Non-SES positions above Level 8 requires a similar approach, albeit that there are more checks through that process, such checks being undertaken externally to the employing authority. The SES Classification Quality Framework (part of exhibit A1), although no longer current, was current at the time the Arbitrator position was created. One of the objectives of Approved Procedures established under the *PSM Act* is "to ensure all senior executive officer positions are appropriately classified in a consistent manner across the public sector".

142 Therefore, to achieve a consistent approach, the same methodology ought to be applied across the broad-banded classification structure. This requires a common assessment tool. BIPERS has been the approved classification tool applicable to the public sector for some time. It is the job evaluation tool recognised as being applicable across the public service in both Approved Procedures 1 and 2. The SES Classification Quality Framework described the BIPERS system in the following manner:

"BIPERS is the classification system approved for the classification of SES positions. It is used as a guide to the classification level and is used in conjunction with the principles outlined above.

The BIPERS license in Australia is held by William M. Mercer Pty Limited.

BIPERS is a numerical rating system based on the following ten factors:

1.	EDUCATION	What is the minimum essential level of education required for the job?
2.	EXPERIENCE	How many years of varied and accumulated practical experience in related jobs are needed to perform this job?
3.	SCOPE OF ACTIVITIES	How varied are the activities performed and/or coordinated by the office holder?
4.	INTERPERSONAL SKILLS	How demanding is the job in terms of contacting, negotiating and gaining the cooperation of others inside and outside the agency?
5.	KINDS OF PROBLEMS	What type of analytical and creative ability is required for the position?
6.	INSTRUCTIONS	How much independence does the office RECEIVED holder have?
7.	INFLUENCE ON RESULTS	How important is the position to the achievement of overall results by the agency?
8.	SIZE OF THE AGENCY	What is the current Approved Average Staffing Level (expresses in Full Time Equivalents FTEs) and what is the current approved annual budget?
9.	PERSONNEL SUPERVISED	How many FTEs does the office holder OR CONTROLLED directly supervise and how many FTEs is the office holder responsible for?
10.	SUBORDINATION	Where is the position placed in the agency's hierarchy?

A Job Evaluation Questionnaire (JEQ) is used to assess the ten factors and a numerical value is assigned to each of these factors. The total score is then compared to the points required for each for each classification level." (exhibit A1)

143 It is true that a number of the factors applied in BIPERS relate to the management structure of the general public service involving positions which have control over people and resources. For example, Personnel Supervised is a factor which measures how many FTEs (full time equivalents) the position directly supervises or is responsible for.

144 Yet there are factors which relate not to the particular job but to the agency. The size of the agency is a factor which taken at its most objective would see like positions, with the same general level of skill and expertise but in different sized agencies, awarded different ratings because their agencies are of different sizes. The same situation applies with the factor of "Subordination" where the question is "Where is the position placed in the agency's hierarchy?"

145 Therefore, it can be seen that an assessment of the level of classification of a position is made in the context of the organisation and the sector, not merely as a free-standing position, or only by comparison with positions requiring similar skills and expertise, without regard to the broader context.

The BIPERS Assessments of the Arbitrator Position

146 One cannot ignore the decision of the legislature to include the position of Arbitrator within the public service by virtue of it being "an officer of WorkCover WA" (s 286 of the *WCIM Act*). Therefore significant weight must be given to it being classified accordingly, that is in accordance with those classification mechanisms and processes applicable to the public service, which includes a BIPERS assessment. It is very important to note that a BIPERS assessment is only one part of the process; not the only or determinative part.

147 This is a matter which needs to be emphasised, given that the applicants have focussed very strongly on the BIPERS assessment in their challenge to the position being classified at Level 9.

148 Under the BIPERS job evaluation tool, job evaluation is undertaken according to assessment against a number of factors noted above being education; experience; scope of activity; interpersonal skills; kinds of problems; instructions received; influence on results; size of organisation; personnel supervised; and subordination level.

149 The applicants' main contention is that the BIPERS assessments undertaken by both Ms Giorgi and Mr Orrell were flawed because the BIPERS tool is based on a hierarchical structure, and gives greater weight or value to positions of a managerial nature, with responsibility for personnel and resources. The existence of factor 9 Personnel Supervised or Controlled and factor 10 Subordination are said to demonstrate this.

150 There are many positions in the public sector which are assessed according to BIPERS but which, like the position of Arbitrator, are specialist positions. The specified callings contained within the *Public Service Award 1992* and the *Government Officers Salaries Allowance and Conditions Award 1989* both demonstrate this. Many specified callings positions may not fit comfortably into a hierarchical management system but nonetheless they are classified using BIPERS. If BIPERS were not able to be applied with some discretion and flexibility, then those positions too might arguably be under-valued. However, BIPERS is a system which is able to be flexibly applied.

151 I note in passing that in my experience in dealing with reclassification claims, when a job evaluation questionnaire is undertaken applicants for reclassification of their position score various factors higher than the independent assessor scores them. This demonstrates that, amongst other things, whilst BIPERS attempts to provide an objective assessment, the

application of the tool is subject to the view of the person undertaking the assessment. Job classification systems do not and should not be considered to provide absolutely determinative, objective, scientific answers. It may be said that the classification of positions within the public service is more art than science. If BIPERS were purely a scientific checklist, then all that would be necessary would be a strict assessment and a numerical rating according to the ten factors without regard to all of the other considerations referred to earlier and set out in the Approved Procedures. However, it is a tool which provides an *indication* of or guide to the range within which the position is likely to fall.

152 To some extent the applicants are correct, BIPERS is not an assessment tool designed to assess the position of Arbitrator. However that argument has only superficial attraction. BIPERS is a tool which can assess any position within the public sector because the assessment takes account of the position in context. That context includes the organisation and its size and the public sector generally. It is able to assess all of the possible permutations and combinations of job requirements such the education level and experience required, the interpersonal skills, scope of activities and the kinds of problems addressed, as well as organisational factors and sector-wide factors relating to numbers of employees supervised, size of organisation and the subordination level. As Mr Orrell noted in his evidence, some factors are considered together and adjusted to take account of the position concerned. For example, the size of the unit and the influence on results are scored together according a matrix. Factor 1 Education and factor 2 Experience are taken together and points are scored according to a matrix.

153 Ms Giorgi expressed the view that there was difficulty in scoring the Arbitrator position by reference to the factors of Instructions Received; Influence in Results; Size of the Agency and Subordination Level and recommended the application of an alternative job evaluation system. She did not identify any alternative system which might meet the deficit she perceived. Nonetheless, Ms Giorgi undertook an assessment comparing the position of Arbitrator with its predecessor under the previous structure, the Review Officer. She found that "the work value of the new Arbitrators is considered to be similar to that of the current Review Officers" (exhibit A9, p10), which was Level 9.

154 Mr Orrell says in his evidence that whilst he removed the statement which he had made in his Discussion Paper when preparing his final report, to the effect that BIPERS was a hierarchical tool which brought forth some difficulties from the assessment of these positions, nonetheless he adapted the assessment to take account of the factors applicable to these positions. For example, he gave the highest score in factor 6: Instructions, taking account of the fact that although the Director is administratively or managerially responsible for the Arbitrator, the Arbitrator cannot be directed in his or her work. Mr Orrell did this by interpreting the requirements and authority of the position in a way that was relevant, and the position received the benefit of that flexible approach by being awarded the highest score for that factor. He took a similar flexible approach to factor 10 Subordination.

155 BIPERS may not be a perfect match for these positions but it is clear that Mr Orrell has significant experience in applying the BIPERS tool for the purpose of arriving at an appropriate assessment for the very broad range of positions across the public service. BIPERS is an assessment tool which takes account of the hierarchical nature of the public service, but it is also a tool which takes account of education and experience, skill and independence. It can be adjusted and finetuned to take account of the multitudes of different positions. There is flexibility both of the tool and the assessor's application of it. I am not satisfied that the assessment of the position is wrong because BIPERS was used.

The Mercer CED Assessment

156 The challenges to the assessment by the applicants include that the factor which Mercer found to be applicable to the position was the "advice" factor because its comparisons were limited, the ultimate score was wrong and it did not recognise of the real value of the position. The full structure and methodology of the Mercer CED system is not before me, however. it is clear that this evaluation system is, like BIPERS, based on dividing the requirements of the job into factors, scoring the job against those factors, and comparing it with other positions.

157 The key characteristics of the Mercer CED system that were considered relevant to the role of the Arbitrator were expertise, judgment and accountability. There is nothing inherently inappropriate about that. From what is before me, I am unable to conclude that the allocation of the Arbitrator position into the "advice" category in the Mercer CED scheme is wrong, or that another categorisation was more appropriate.

158 The applicants say that the positions which Mercer used to benchmark this position all appear to be undervalued using the Mercer score because of the relationship between the salaries of those positions and the Class 1 salary. Mr Butler provided a list of such positions which fall below 1000 Mercer CED points, which is the minimum threshold for Class 1. There is no indication of where below that 1000 points each of those positions falls. One might conclude that if the positions referred to by Mr Butler as falling below 1000 points and thus below Class 1, are correctly assessed by Mercer CED then they are undervalued. However, that does not assist the applicants.

159 The Arbitrator position scored 756, which is approximately 25% less than the 1000 Mercer CED points. In those circumstances, it might be suggested that if 1000 points is the minimum for Class 1, then a score of 756 may be too low for a position classified at Level 9. Either way, it is a long way short of Class 1.

160 I note in passing that the assessment using the Mercer CED methodology arose at the applicants' request. It is surprising then that in making such a request they would not have been aware of the features and approach of that methodology which they now challenge.

161 As to the issue of comparison positions, the Mercer CED scheme only compares with positions it has already assessed. That seems logical. It does not appear to me that this makes the assessment unfair.

Comparisons Generally

162 I understand the applicants to be referring to a range of comparison positions for two purposes. The first is to demonstrate that by reference to particular positions, the position of Arbitrator is undervalued. The second is for the purpose of supporting the claim for a recommendation that the position of Arbitrator be within the jurisdiction of the Salaries and Allowances Tribunal. I will deal with that first aspect of comparison positions now.

1. The Review Officer

163 The applicants claim that Ms Giorgi ought not to have used the Review Officer position as a comparison because it operated under a different regime with different processes.

164 Having considered the evidence of Professor Guthrie, Mr Nisbett and Mr Melville, I conclude that the position of Review Officer was an entirely relevant comparison position. I note that the system under which the Arbitrator operates is designed with the presence of lawyers in mind, that it provides Rules and directions, that frontloading is practised and that Arbitrators also undertake conciliation. However, the evidence clearly demonstrates that the issues, the duties and responsibilities and the matters of complexity which confront the Arbitrator are very much the same as those which confronted the Review Officer. They both hear and determine much the same types of claims, deal with the same or largely the same issues of law, and operate with very similar procedures such as interlocutory applications. However, the Arbitrator deals with these in a more structured, perhaps more guided, way than the Review Officer. As the evidence demonstrates, there have been swings and roundabouts in the changes brought in 2005, however the net effect for the work value of the Arbitrator is that the position still does very much what the Conciliation Officer and the Review Officer did.

2. The District Court Registrar

165 The applicants do not say that the position of Arbitrator is equivalent to that of District Court Registrar, but that it performs similar functions, having a similar role.

166 Mr Orrell did not pursue this comparison because it was not really urged upon him by the applicants in their submission to him. However, in considering that comparison, I conclude that where the Arbitrator does similar things to those which the District Court Registrar does, as noted within the Mercer CED evaluation, the scope of the effect of the Arbitrator role is significantly less than that of the District Court Registrar. The District Court Registrar is required to exercise powers in relation to the broad area of civil law within the District Court's jurisdiction compared with the Arbitrator who exercises powers within a very narrow and constrained area. That area of law is limited to the *WCIM Act*, with the addition of some other areas of law and legal principles many of which confront decision-makers in the public sector generally.

167 The role of Arbitrator is also circumscribed by the Schedules to the *WCIM Act* which set out how certain payments are to be calculated including schedule 2 which is a table of compensation payable according to the nature of injury or impairment. Schedule 3 contains specified industrial diseases. The legislation itself provides detailed guidance and formulae to be applied. In addition, the Commissioner has set out detailed Rules which govern the manner in which matters are to be dealt with.

168 I recognise that the District Court also has its Rules and that the areas of law which the District Court Registrars apply may have prescribed amounts.

169 If the point which the applicants wish to be taken from this comparison is that roles are similar, then I accept that point. However, that does not resolve the issue of classification level as the scope and effect of the Arbitrator's role is significantly more restricted than that of the District Court Registrar.

3. State Administrative Tribunal Ordinary Members

170 The applicants have put very little, if any, evidence to substantiate a claim that this is an appropriate comparison. I note that the Form 10 – Notice of Appeal filed by the applicants sought this comparison, and that it was the one pursued when Mr Orrell undertook his assessment. The applicants have focused on the comparison with the District Court Registrar and the Chief Assessor of Criminal Injuries Compensation before me, yet they did not pursue those comparisons before Mr Orrell.

171 As Mr Hooker pointed out, the State Administrative Tribunal deals not merely with the *State Administrative Tribunal Act 2004* (WA) but also with literally dozens of enabling acts, and its scope of activities and breadth of influence is far broader than the Arbitrator's. Therefore, like the role of the District Court Registrar, but in different ways, the State Administrative Tribunal Ordinary Member role is broader than the role of Arbitrator. However, without more it is difficult to decide that this is a proper position to compare with the position of Arbitrator.

4. Assessor of Criminal Injuries Compensation

172 It is not my intention to examine the duties and powers of this position because there was no evidence of how the level of remuneration of this position is set, except that this is a statutory office, the salary is set by the Governor on recommendation from the Minister for Public Sector Management. There is nothing before me to say why it has been aligned to the salary of a magistrate. I am unable to conclude that it is appropriate to compare the Arbitrator position with this position without that information.

The Requirement to Act Judicially

173 The applicants say that the requirement on the Arbitrator to act judicially demonstrates the specialist nature of the position.

174 I have noted what Gregor C had to say when he dealt with an application by *Peter Brash and Others v WorkCover* in his decision of 8 July 1997. The applicants in that case occupied the positions of Review Officers under the Conciliation and Review arrangement referred to earlier in these Reasons. Theirs were the positions Ms Girogi used for comparison purposes. Gregor C found that there are many officers within the public service who are required to act judicially and that the Review Officer position was not unique in that regard.

175 Where the same argument of uniqueness or specialisation is relied upon by the applicants in this case, I respectfully agree with Gregor C. I have found that notwithstanding some swings and roundabouts, the higher level of the skills, responsibility and the work requirements of the Arbitrator are very much the same as the predecessor Review Officer.

176 I also note the definition of "judicially" set out in *Words and Phrases Legally Defined* (4th ed) Lexis Nexis, 2007 at P1296 as being:

> **"JUDICIALLY**
>
> **Australia** [Role of Refugee Review Tribunal.] 'In carrying out that assessment, involving as it does a determination of great importance to an applicant, the Tribunal must act "judicially" and according to law. In so acting the Tribunal does not exercise judicial power, but by reason of the importance of its task, the Tribunal must observe the "practical requirements of fairness" appropriate for the exercise of judicial power. As Sedley J stated in R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 WLR 242 at 258:
>
> > In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge v Baldwin [1964] AC 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.
>
> 'While the expression "acting judicially" is not now often used when referring to administrative decision making, it usefully comprehends concepts relevant to this appeal. (See: Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 per Deane J at 365).
>
> 'Failure of the Tribunal to act "judicially" will necessarily stamp the review procedure as one which did not accord an applicant practical fairness or justice. To act "judicially" and according to law the Tribunal must carry out its decision-making function rationally and reasonably and not arbitrarily. (See: Bond per Deane J at 366-367). That is to say, the Tribunal cannot determine the matter by a "tossing a coin" or by making a "snap decision" or by acting on instinct, a "hunch" or a "gut feeling".' WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 74 at [19]-[21]; BC200401353, per Lee and Moore JJ."

177 Therefore I find that the requirement to act judicially is to "observe the practical requirements of fairness", to "carry out its decision-making functions rationally and reasonably and not arbitrarily", not by "tossing a coin" or making a "snap decision", acting on "instinct" or "a hunch" or "gut feeling". This corresponds with the conclusion Mr Butler reached in his assessment of the position.

178 The requirement on the Arbitrator to act judicially is the same requirement which applies to many administrative decision-makers. It does not of itself demonstrate that the position is of a specialist nature.

179 I have considered all of the material before me. I can understand why the applicants might argue that the position of Arbitrator is under-classified if one looks at the so-called comparison positions in a superficial way. These applications relate to the classification of the positions, not to the salary.

180 Having examined the position in context, taking account of the work value of the position, the supposed shortcomings and flexibilities of the BIPERS assessments, the positions with which the applicants say comparison ought to be made, I am not persuaded that the position is under-classified at Level 9.

181 I noted earlier that the applicants appeared to have two purposes in making reference to the comparison positions. The applicants' second purpose is to support their claim that there should be a recommendation that the position be within the jurisdiction of the Salaries and Allowances Tribunal.

182 The Salaries and Allowances Tribunal sets the salaries of positions specified in the *Salaries and Allowances Act 1975* (WA) and in other legislation. Those positions include officers holding offices included in the Special Division of the public service (s 6(d)).

183 Given that I am not satisfied that the position of Arbitrator is under-classified at Level 9 within the General Division of the public service, it would be inappropriate to recommend that it be dealt with by the Salaries and Allowances Tribunal.

184 I have noted that since the original allocation of classification, the position of Arbitrator has been recognised as a specified calling and its classification adjusted accordingly. Given that these applications relate to the original decision regarding the classification, I have not considered, nor been asked to consider the applications in the context of that allocation of specified calling.

185 It has not been demonstrated that there is error in the position of Arbitrator being classified at Level 9 or that it ought to have been classified at a higher level.

186 The applications will be dismissed.

2010 WAIRC 00184

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHAN MARITZ WILLERS
	APPLICANT
	-v-
	WORKCOVER, WESTERN AUSTRALIAN AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 24 OF 2007
CITATION NO.	2010 WAIRC 00184

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00185

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUBREY WARREN BIRKELBACH JR
	APPLICANT
	-v-
	WORKCOVER WA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 25 OF 2007
CITATION NO.	2010 WAIRC 00185

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00186

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	D'ARCY KEVIN SPIVEY
	APPLICANT
	-v-
	WORKCOVER WESTERN AUSTRALIA AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 26 OF 2007
CITATION NO.	2010 WAIRC 00186

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00187

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANIA SHARP
	APPLICANT
	-v-
	WORKCOVER WESTERN AUSTRALIA AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 27 OF 2007
CITATION NO.	2010 WAIRC 00187

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00188

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVE MARTYN WHITFORD-HARVEY
	APPLICANT
	-v-
	WORKCOVER, WESTERN AUSTRALIAN AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 28 OF 2007
CITATION NO.	2010 WAIRC 00188

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00189

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER BRASH
	APPLICANT
	-v-
	WORKCOVER, WESTERN AUSTRALIAN AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 29 OF 2007
CITATION NO.	2010 WAIRC 00189

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00190

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WENDY MARGARET POWLES
	APPLICANT
	-v-
	WORKCOVER WA AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 30 OF 2007
CITATION NO.	2010 WAIRC 00190

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN LEE WARING
	APPLICANT
	-v-
	WORKCOVER WESTERN AUSTRALIA AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 31 OF 2007
CITATION NO.	2010 WAIRC 00191

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00192

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACQUELINE FUREY
	APPLICANT
	-v-
	WORKCOVER WESTERN AUSTRALIAN AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 32 OF 2007
CITATION NO.	2010 WAIRC 00192

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUDITH MARGARET WICKHAM
	APPLICANT
	-v-
	WORKCOVER WESTERN AUSTRALIA AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 33 OF 2007
CITATION NO.	2010 WAIRC 00193

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00194

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLES ALLAN BRYDON
	APPLICANT
	-v-
	WORKCOVER, WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 34 OF 2007
CITATION NO.	2010 WAIRC 00194

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 00195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE MELVILLE
	APPLICANT
	-v-
	WORKCOVER WESTERN AUSTRALIAN AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 APRIL 2010
FILE NO	PSA 43 OF 2007
CITATION NO.	2010 WAIRC 00195

Result	Application dismissed
Representation	
Applicant	Mr P Fraser of counsel
Respondent	Mr R Hooker of counsel

Order

HAVING heard Mr P Fraser on behalf of the applicant and Mr R Hooker on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 70/2008	Mr Barrie York	WorkCover Western Australia Authority	Scott Acting SC	Dismissed	27/11/2009
PSA 71/2008	Mr Valentin Fernandez	WorkCover Western Australia Authority	Scott Acting SC	Dismissed	27/11/2009
PSA 72/2008	Mr Kerry Dunlop	WorkCover Western Australia Authority	Scott Acting SC	Dismissed	27/11/2009
PSA 73/2008	Mr Christopher Forsyth	WorkCover Western Australia Authority	Scott Acting SC	Dismissed	27/11/2009
PSA 74/2008	Ms Jacqueline Frances Wallace	WorkCover Western Australia Authority	Scott Acting SC	Dismissed	27/11/2009

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2010 WAIRC 00121

REFERRAL OF DISPUTE RE TERMINATION OF CONTRACTS OF UNION MEMBERS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

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

APPLICANT

-v-

PMP PTY LTD

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE THURSDAY, 18 MARCH 2010

FILE NO/S RFT 22 OF 2009

CITATION NO. 2010 WAIRC 00121

Result Discontinued

Representation

Applicant Mr N Hodgson and Ms M Papa

Respondent Mr S Edwards (of counsel)

Order

WHEREAS the applicant filed a referral to the Road Freight Transport Industry Tribunal (the Tribunal) under s 40 of the *Owner-Drivers (Contracts and Disputes) Act 2007* on 3 November 2009; and

WHEREAS on 9 November 2009 the Tribunal convened a conciliation conference in respect of the matter; and

WHEREAS at the conclusion of the conference the applicant was given time to consider its position with respect to the application; and

WHEREAS the Tribunal contacted the applicant on a number of occasions requesting it advise its intentions with respect to this application; and

WHEREAS on 5 March 2010 the applicant advised the Tribunal that the matter had been resolved and requested the file be closed; and

WHEREAS on 8 March 2010 the respondent advised that it had no objection to the file being closed;

NOW THEREFORE, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007* hereby orders –

THAT the application be and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]