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FULL BENCH—Appeals against decision of Commission—

2011 WAIRC 00332

APPEAL AGAINST A DECISION OF THE COMMISSION GIVEN ON 17 JANUARY 2011 IN MATTER NO. PSACR 26/2008

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2011 WAIRC 00332
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	:	MONDAY, 21 MARCH 2011
DELIVERED	:	FRIDAY, 13 MAY 2011
FILE NO.	:	FBA 2 OF 2011
BETWEEN	:	DIRECTOR GENERAL OF HEALTH AS THE DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1972 FOR THE HOSPITALS FORMERLY COMPRISING THE METROPOLITAN HEALTH SERVICES BOARD IN THE PERSON OF DR PHILLIP MONTGOMERY, EXECUTIVE DIRECTOR, ROYAL PERTH HOSPITAL, SOUTH METROPOLITAN AREA HEALTH SERVICE Appellant AND HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) Respondent

ON APPEAL FROM:		
Jurisdiction	:	**Public Service Arbitrator**
Coram	:	**Commissioner J L Harrison**
Citation	:	**[2011] WAIRC 00039; (2011) 91 WAIG 259**
File No	:	**PSACR 26 of 2008**

CatchWords	:	Industrial law (WA) - Jurisdiction of Public Service Arbitrator - Construction of s 80E(1) and s 80E(2)(a) of the *Industrial Relations Act 1979* (WA) - Principles that apply to pre-contractual representations considered - Arbitrator erred in construing express terms of contract of employment of a government officer - Industrial matter before the Arbitrator raised not only the express terms of contract of the employment but whether the appellant had acted in a manner that was fair, just or reasonable.

Legislation	:	*Industrial Relations Act 1979* (WA) s 23, s 26(1)(a), s 29(1)(a), s 29(1)(b)(ii), s 44, s 44(1), s 44(9), s 49, s 49(5)(c), s 49(6a), s 80E(1), s 80E(2), s 80E(2)(a), s 80I(1)(b), s 80I(1)(c), s 80L(1).
Result	:	Decision at first instance suspended and remitted to the Arbitrator
Representation:		
Counsel:		
Appellant	:	Mr R J Andretich (of counsel) and with him Mr J Misso (of counsel)
Respondent	:	Mr D H Schapper (of counsel)
Solicitors:		
Appellant	:	State Solicitor's Office
Respondent	:	Derek Schapper

Case(s) referred to in reasons:

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Carello v Jordan [1935] QSR 294

Chief Executive Officer, Department of Agriculture and Food v Ward & Wall [No 1] [2008] WAIRC 00079; (2008) 88 WAIG 156

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337

Director-General Department of Justice v Civil Service Association of Western Australia Inc (Jones) [2005] WASCA 244; (2005) 149 IR 160

Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

SMITH AP:

The Appeal

1 This is an appeal to the Full Bench pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision of the Public Service Arbitrator given on 17 January 2011 in PSACR 26 of 2008: [2011] WAIRC 00039. The order appealed against is an order requiring the appellant to pay Mr Edward Scull, one of the respondent's members, an increase in salary.

2 The respondent's member is an employee of the appellant who is employed as the head of the Department of Medical Engineering and Physics at Royal Perth Hospital. Mr Scull was appointed to the position on 23 December 2002. It is common ground that the terms and conditions of his employment are set out in a common law contract of employment. His salary commenced at $126,622 with $1,892 by way of a professional expenses allowance, and his conditions of service were to mirror the *Hospital Salaried Officers Award 1968 (No 39 of 1968)* (the Award) and the *Hospital Salaried Officers Metropolitan Health Services Enterprise Agreement 2001* (the 2001 Agreement) and any subsequent industrial agreement. Whilst the appellant's representative, (Mr Stephen Seeds, who was at that time the Manager of Human Resource Services and Industrial Relations at Royal Perth Hospital) and Mr Scull agreed in correspondence that Mr Scull's salary would be maintained by percentage in respect of any increases in rates in the Award or industrial agreement, following a work value review of positions that reported to him a dispute arose as to whether Mr Scull was entitled to, or should be entitled to, further increases in remuneration to maintain relativity with those positions.

3 The matter came before the Commission in an application for a compulsory conference under s 44 of the Act. As the matter was not resolved by conciliation, the matter was referred for hearing and determination and as required by s 44 a memorandum of matters referred for hearing was issued by the Commission on 23 June 2010. For the purposes of this appeal, it is important to set out the memorandum in full which was as follows:

> 1. The applicant claims that the respondent has acted in a manner which is not fair, just and or reasonable by refusing to award an increase in remuneration for the position of Head of the Department of Medical Engineering and Physics at Royal Perth Hospital (Post number: 103229) ('the position') occupied by Mr Edward Scull consequent upon the respondent implementing outcomes of the Health Professions Work Value Review ('the HPR') to the position, pursuant to the provisions of the *Hospital Salaried Officers Metropolitan Health Services Enterprise Agreement 2001* (PSAAG 1 of 2002) ('the Agreement').
>
> 2. The applicant seeks the following orders:
>
> (a) THAT the recognised value of the position of Head of the Department of Medical Engineering & Physics at Royal Perth Hospital (Post number: 103229) be restored to and maintained at its value in the *Hospital Salaried Officers Metropolitan Health Services Enterprise Agreement 2001* and peer professions at the time Mr Scull accepted appointment to the position.

(b) THAT salary levels foreshadowed in Column 3, (headed '(3) Salary claimed') of the Table included on page 2 of the report 'Head of Department Medical Physics Royal Perth Hospital – Review of Remuneration' Ref RSD8800 dated 2 September 2009, be implemented as being those applicable to the position of Head of the Department of Medical Engineering & Physics at Royal Perth Hospital (Post number: 103229).

3. The respondent denies that there is any basis for the relief claimed on behalf of Mr Scull and argues that the application be dismissed.

CONTENTIONS

4. The applicant contends as follows:

(a) Mr Scull was appointed to the position under a Contract of Service dated 2 October 2002 at a salary commensurate with an undertaking given at interview that the position would be remunerated at a level equivalent to that of the previous incumbent.

(b) The offer of appointment to the position was accepted on an understanding between Mr Scull and the respondent that:

(i) the conditions of service and salary increases of the position would mirror those applied to the *Hospital Salaried Officer's Award 1968* (No 39 of 1968) ('the Award') and would be implemented in a manner consistent with its application to other specified callings; and

(ii) any variations under the Award applicable to the post of Head of the Department would be equally applicable to Mr Scull's position as the incumbent of that post; and

(iii) the recognised value of the position at appointment would be maintained with respect to the Award and its peer professions.

(c) The respondent has not acted in accord with the contract of service in relation to implementation of the HPR review that was conducted pursuant to the provisions of the Agreement.

5. The respondent contends as follows:

(a) By letter dated 9 December 2002 the respondent offered Mr Scull the position on the following terms which are material to this application:

(i) '… offer is to be made with conditions of employment that mirror those prescribed in the Hospital Salaried Officers' Award No. 39 of 1968 and the Hospital Salaried Officers' Metropolitan Health Service Employment Agreement and any subsequent agreement.'

(ii) The commencing salary was $126,622 plus a professional expenses allowance of $1892.

(iii) Mr Scull's commencement date in the position was 2 October 2002.

(b) The Contract of Service between Mr Scull and the respondent stated:

'Conditions of service and salary increases are award free but to mirror the Hospital Salaried Officers' Award No. 39 of 1968 and the Hospital Salaried Officer's Metropolitan Health Service Enterprise Agreement 2001 and any subsequent agreement.'

(c) Under cover of a memo dated 23 December 2002 Mr Scull accepted the above offer and sought clarification in respect to a number of matters including, relevantly, his understanding that his remuneration would be 'maintained by percentage' in respect to any material variations to the Award or the Agreement.

(d) By memo dated 6 January 2003 the respondent acknowledged Mr Scull's acceptance of the offer and advised him that the offer did not include an automatic adjustment to his remuneration following a material change to the Award or the Agreement to maintain the relativities existing at the time of appointment however, should positions that report to his 'be reclassified or receive additional remuneration' and Mr Scull be of the view that this has resulted in a significant increase in work value for his position he could seek to renegotiate his contract.

(e) The Order made by the Commission in application P18 of 2003 did not provide for any increase in remuneration for positions of Mr Scull's level of classification nor did it, in accordance with the terms of his employment, give rise to an entitlement to any increase in remuneration.

(f) The position occupied by Mr Scull, although not initially classified, has subsequently been classified as being at Level 11 under the Award at the time of his appointment and at Level 12 HSU following an assessment carried out in or about May 2009 in the context of the HPR.

(g) There was no occasion to increase the remuneration of Mr Scull following the HPR as he has always been paid in excess of the level of classification of the position he occupies and that remains the current position.

(h) The respondent considered Mr Scull's request that his remuneration be renegotiated and rejected it on 5 October 2009.

(i) The respondent denies that there is any basis for the relief claimed on behalf of Mr Scull and asks for the application to be dismissed on the following grounds:

(i) If the applicant's claim is based upon contract there is no jurisdiction for the Public Service Arbitrator to entertain it pursuant to s 29AA(4) of the Industrial Relations Act 1979 ('the Act'), as the Contract of Service between the respondent and Mr Scull was 'award free' and the remuneration of Mr Scull has always exceeded the prescribed amount in s 29AA(5) of the Act.

(ii) Further and in the alternative:

aa. if an industrial instrument applies to Mr Scull's employment for the purposes of s 29AA(4) of the Act, the Award and the Agreement have settled the industrial matter regarding the appropriate salary levels for health professionals employed by the respondent;

bb. if it is alleged that the respondent has not met the terms of the Award or the Agreement, or any subsequent agreement, or an order of the Commission, the appropriate forum in which to apply for enforcement of these industrial instruments is the Industrial Magistrate's Court.

cc. the appropriate level of classification of Mr Scull's position under the Award and the Agreement was properly determined following the HPR and that level of classification is not in dispute; and

dd. the respondent has always paid Mr Scull more than the remuneration for this level of classification.

(iii) Further and in the alternative, if the Public Service Arbitrator has jurisdiction to entertain a claim based upon the Contract of Service between the respondent and Mr Scull, the respondent has not breached the Contract of Service and there is no basis for the relief claimed by the applicant.

4 Prior to the hearing of the matters in dispute the parties filed an agreed statement of facts which provided as follows:

1 The conditions of service and salary increases defined in the Contract of Service provided by the Hospital for the position No.103229, Head of Department of Medical Engineering & Physics ('the position') were described as 'Award free' but were to 'mirror the *Hospital Salaried Officers Award* No.39 of 1968 ('the Award') and the *Hospital Salaried Officer's Metropolitan Health Service Enterprise Agreement 2001* ('the Agreement') and any subsequent agreement."

2 The present occupant of the position, Mr Edward Scull ('the incumbent') was appointed to the position on 2 October 2002 at a commencing salary of $126,622 plus $1892 (Professional Expenses Allowance).

3 As a result of work conducted in relation to the Agreement the parties pursuant to application P18 of 2003 sought to amend the Award to reflect increases in the work value of health professions in what are commonly referred to as 'specified callings'.

4 On 24 November 2005 the incumbent made application to the Hospital to have a salary adjustment applied to the position in consideration of the outcome of the Health Professions Work Value Review ('the HPR') as it applied to the position.

5 On the 12 May 2009 the incumbent was advised that:

> *The review of the position occupied by Mr Scull (Head of Department, Medical Engineering and Physics, Royal Perth Hospital) was finalised and the employer (has) determined that;*
>
> *(a) the classification of the position be regarded as Level 11 HSU at the time of the appointment of Mr Scull in 2002, and also that*
>
> *(b) the current classification level, based on work value increases which applied to the Health Professions Work Value Review, be Level 12 HSU.*

6 The Health Industrial Relations Service advised the Chief Executive, South Metropolitan Area Health Service in a report (Ref: RSD8800) dated 2 September 2009 of the substance of the claim for review of remuneration of the position and recommended that 'the claim be rejected'.

7 On the 5 October 2009 the Applicant and the incumbent were advised that:

> *The Area Chief Executive Officer, South Metropolitan Area Health Service has given consideration to your (ie. the incumbent's) request for the renegotiation of your remuneration, in light of the Health Professional Review, and has determined that the claim be rejected.*

5 After hearing the evidence and the parties the Public Service Arbitrator made the following order:

1. THAT the salary of the position of Head of Department, Medical Engineering and Physics (position number 103229) at Royal Perth Hospital held by Mr Edward Scull be increased to reflect the relativity of this position to other senior positions within the Department of Medical Engineering and Physics at the level it was when Mr Scull commenced employment in the position.

2. THAT the salary levels contained in Column 3 of the table in the Internal Memorandum to the Chief Executive South Metropolitan Area Health Service from Mr Gregory dated 2 September 2009 be applied to the position of Head of the Department, Medical Engineering and Physics at Royal Perth Hospital held by Mr Scull.

Applicant's Evidence

6 Mr Scull gave evidence in a witness statement and orally. He was interviewed for appointment to the position on or about 26 June 2002. At that time he was acting in the position and he was aware that the salary applying to the post and its incumbent, Dr Richard Fox, was linked to the relevant Australian Medical Association (WA) Incorporated (AMA) Industrial

Agreement and any movements in the salary of the position would match those of the relevant AMA industrial instrument. Mr Scull was also aware that Dr Fox was employed on an individual contract.

7 On 25 July 2002 Mr Scull was advised his application for the position had been unsuccessful and the position had been offered to another person. Shortly thereafter, Mr Scull was advised that the person to whom the position had been offered had not accepted and the hospital made Mr Scull a provisional offer of appointment to the position. On 7 August 2002 Mr Scull wrote to the appellant's representative, Dr Phillip Montgomery, the Acting Director of Clinical Services, that he intended to accept the position and that he understood that the terms and conditions of employment offered to him would reflect advice given to him at his interview that the position would remain as a clinical staff appointment with the conditions of service for the position being equivalent to that of the previous incumbent.

8 On 26 August 2002 Mr Scull was informed that a formal contract for the position could not be offered to him at that stage because an appeal of the process had been lodged. At the same time he was informed that it had been determined that in the position he would receive a permanent allowance to Level 12 of the Award and the 2001 Agreement, his remuneration was to be $92,921 and his conditions of service were to be as per the Award and as such, any relevant award increases would also be applicable. This was different to what Mr Scull had been offered during his interview. Mr Scull testified that it was evident during the interview that the conditions of appointment agreed to by the committee, including the salary and conditions of service of the appointee, and the continued recognition of the appointee as having clinical staff status and retention of the position within the clinical divisional structure of the hospital, were a measure of the value placed on the position by the hospital, at that time.

9 On 2 October 2002 Mr Scull was notified that the appeal against his appointment to the position had been unsuccessful and he was offered the position.

10 On 3 October 2002 Mr Scull received an offer of appointment which was made in accordance with the provisions of the Award and the 2001 Agreement. The offer indicated the classification level for the post was to be Level 10 with a permanent personal allowance to Level 12 ($92,921). Level 10 was the same level as his substantive position as senior bioengineer and so Mr Scull saw this as a substantial reduction in the value and the standing of the position. When Mr Scull was acting in the position he was paid $92,921 (Level 12.1) by means of a higher duties allowance of $11,818 per annum, and the fact that he was being paid a higher duties allowance suggested to him that the classification of the position was at least Level 12, which was contrary to the offer made to him on 3 October 2002.

11 Mr Scull met with the Chief Executive Officer, Mr Glen Palmer, the Director of Clinical Services, Dr William Beresford and the Deputy Director of Clinical Services, Dr Phillip Montgomery, on 21 October 2002 to discuss the contract offered to him. During this meeting it was agreed that the terms of his offer of appointment would be amended to reflect what was offered to him during his interview, namely conditions of service equivalent to those of the previous incumbent.

12 Importantly, Mr Scull prepared a summary of events prior to and post his appointment to the position, containing information relevant to his appointment and his terms and conditions of appointment. The last entry in the document was made in early November 2002. This document was provided to the appellant's representative in early November 2002 which was prior to the acceptance by Mr Scull of the final offer of appointment to the position. In the summary under the heading 'Expectation' Mr Scull stated as follows:

> As there has been;
>
> 1. no change to the duties and responsibilities of the position,
> 2. no indication in advertising and information relevant to the post, that it would be otherwise and
> 3. <u>because of assurances given at interview, to myself and others</u>, [my emphasis]
>
> it is expected that appointment will be to a permanent post with salary and conditions commensurate with (ie. equivalent to) the previous incumbent. It is further expected that;
>
> a. the appointment is to be to a substantive position commensurate with the salary and conditions of the post.
> b. the post is linked to the AMA Industrial Agreement 2002 as per the previous incumbent,
> *c.* the relativity of the post with respect to other senior scientific, physics and engineering posts under the HSOA Award is protected within the arrangement.
> d. the post will not be subject to a probationary requirement in view of previous service to the Hospital and extensive experience, acting in the post.
> e. the appointment will be backdated to the date at which the post was vacated and at which the acting appointment was assumed OR there is an assurance that the salary paid for the acting period is at the level of appointment and back paid accordingly.
> f. that the post to which the HOD is responsible is defined in the contract. (preference is that this resides with the Director of Clinical Services responsible for the Surgical Division.)
> g. that the appointee will accept election to the Clinical Staff Association when offered.

13 On 9 December 2002 an amended contract was sent to Mr Scull. The offer did not specify the classification of the position. Mr Scull received the offer on 20 December 2002.

14 The letter which contained the contract of service dated 9 December 2002 expressly stated as follows (formal parts omitted):

> On behalf of the Metropolitan Health Services – Royal Perth Hospital, I am pleased to advise that your application for the position of Head of Department was successful and subsequently wish to make the following offer of appointment and salary increase.

This offer is to be made with conditions of employment that mirror those prescribed in the Hospital Salaried Officers' Award No. 39 of 1968 and the Hospital Salaried Officers' Metropolitan Health Service Enterprise Agreement 2001 and any subsequent agreement.

The attached sheet provides details of your contract of service.

Under this contract of employment you will be initially located at Royal Perth Hospital, Wellington Street Campus or Shenton Park Campus. However, as an employee of the Metropolitan Health Services, you may be required to work at other sites should the need arise. Any variation to hours worked will be as per the Hospital Salaried Officers' Award No. 39 of 1968 and the Hospital Salaried Officers' Metropolitan Health Service Enterprise Agreement 2001.

Royal Perth Hospital is an accredited organisation that strives to maintain high standards in all areas. Therefore regulations are laid down in order that efficiency and sound practices are sustained. In each Department/Division there are copies of the following documents:

- RPH Hospital Policies and Procedures Manual
- Public Sector Code of Ethics
- Metropolitan Health Service Code of Conduct

It is your responsibility to ensure that you are familiar with the instructions contained therein and abide by them as part of your contract of employment.

It is a requirement for all staff to carry out all their lawful duties. If for any reason you are either unable or unwilling to perform all of your duties, the performance of some of your duties will not be acceptable. You will not be paid any salary until such time as you perform all of your duties, unless you are otherwise specifically authorised in writing by the Director of Surgical Division. This, of course, does not apply to non-performance of duties whilst on approved leave from the workplace.

Please sign where required to confirm the acceptance of your contract and return the signed documents immediately to Human Resource Services.

We would like to take this opportunity to congratulate you on your appointment to the position, and hope you find your role both interesting and enjoyable.

ROYAL PERTH HOSPITAL

CONTRACT OF SERVICE

Amendment

Ref: permcont

PERSONAL DETAILS

SURNAME:	SCULL
GIVEN NAMES:	Edward
ADDRESS:	[Address]
TELEPHONE NUMBER:	[Telephone number]
DATE OF BIRTH:	25/08/1944
SEX:	Male

CONTRACT DETAILS:

JOB TITLE:	Head of Department
DEPARTMENT:	Medical Physics
COMMENCEMENT DATE:	02/10/2002
POSITION NO:	103229
HOURS PER FORTNIGHT:	76
NUMBER OF DAYS PER FORTNIGHT	10
COMMENCING SALARY (pa):	$126,622 plus $1,892 (Professional Expenses Allowances)

CONDITIONS OF SERVICE AND SALARY INCREASES ARE 'AWARD FREE' BUT TO MIRROR THE HOSPITAL SALARIED OFFICERS AWARD No. 39 OF 1968 AND THE HOSPITAL SALARIED OFFICER'S (sic) METROPOLITAN HEALTH SERVICE ENTERPRISE AGREEMENT 2001 AND ANY SUBSEQUENT AGREEMENT

15 Dr Montgomery explained to Mr Scull that under the revised offer, his conditions of service had to be award free because the salary offered was in excess of the salary range prescribed under the Award at that time and by 'mirroring' the Award and the 2001 Agreement that for all intents and purposes the conditions under the Award and the 2001 Agreement would apply to Mr Scull's appointment and this was in lieu of writing an individual contract for the position as provided to the previous incumbent.

16 Mr Scull testified that he accepted the appointment on 23 December 2002 in accordance with the amended offer dated 9 December 2002. However due to a lack of detail provided within the contract, he sought to clarify a number of issues that were the subject of discussion prior to the offer of appointment.

17 In a memorandum dated 23 December 2002 Mr Scull wrote to Mr Seeds as follows (formal parts omitted):

> Please find enclosed a signed copy of the amended contract, dated 9th.December (sic), accepting the offer of appointment to the post of Head of Department of Medical Physics, Royal Perth Hospital.
>
> I also include, for the record, a copy of correspondence recently sent to the Chairman of the Clinical Association Executive, accepting their invitation to become a full member of the Clinical Association of Royal Perth Hospital.
>
> In accepting the appointment as Head of Department, I wish to clarify matters related to the contract which were discussed prior to the offer; (sic)
>
> 1. It is my understanding that the conditions of service and salary increases related to the post are 'award free' but that they mirror (ie, are the same as) as the Hospital Salaried Officers Award No39 of 1968 and the current Hospital Salaried Officers Metropolitan Health Service Enterprise Agreement 2001 and any subsequent agreement.
> 2. I understand that by 'any subsequent agreement' this will include any further Enterprise Agreements between the HSOA and the MHS and any amendments or variations struck within the agreement(s) or outside the agreement(s) that relate to the professions represented under the Award, including Medical Physicist, Biomedical Engineer and Bioengineer.
> 3. I understand that the relativity of the Head of Department post will be maintained by percentage with respect to any variations subsequently agreed under 2 above unless otherwise negotiated.
> 4. I understand that it will be in my interest to check that the Head of Department post is included in any variations that occur as a result of the above.
> 5. It was my understanding that the previous Head of Department was eligible to apply to the Clinical Staff Education Fund for assistance to attend conferences, seminars etc.. I will assume that this is to continue, unless otherwise informed, and I would seek your advice as to who will advise the Fund in this regard.
> 6. The previous incumbent of the HOD post made applications for leave through a 'consultant staff' application authorised by the Director of Clinical Services (DCS). It is proposed to adopt the normal staff leave application, to be authorised by the DCS or the Deputy DCS, which ever is responsible for Surgical Division, unless otherwise instructed.

18 Mr Seeds responded to Mr Scull in a memorandum dated 6 January 2003 as follows (formal parts omitted):

> Thank you for your memorandum, and the enclosure of your signed copy of your contract accepting the position of Head of Department of Medical Physics, Royal Perth Hospital. Consequentially, I would like to take this opportunity to clarify the matters that were discussed prior to the offer, that you have raised in your memorandum in relation to your permanent appointment.
>
> I refer to your memorandum dated, 23 December 2002, and agree with your understanding of points one and two, and note that they have been reflected in your appointment letter and contract.
>
> In response to the point number three, it is important to note that there is no automatic adjustment to salary as a result of internal changes in relativities. Should positions that reports (sic) to yours be reclassified or receive additional remuneration, and you are of the view that this has resulted in significant increase in work value for your position then you will be free at that time to renegotiate your contract of service with the Hospital. You will however be entitled to any salary increments that are generally applicable to the HSOA MHS Enterprise Agreement.
>
> In relation to point number four, the Hospital has entered into the system all increases that are due under the current HSOA MHS Enterprise Agreement, which will be granted to you. However, as explained as future Enterprise Agreements increases are unknown it was agreed as a 'salary check' that you would monitor any increases to ensure that they flowed to you.
>
> In relation to point number five. You are eligible to apply to the Clinical Staff Education Fund (CSEF) for assistance to attend conferences, seminars, etc., this is by virtue of your acceptance as a member of the Clinical Association, a decision which was made at the Clinical Association Executive meeting held in October 2002. Ms Marion Schultz, Administrative Assistant will notify Dr Philip Montgomery, who is the Chairman of CSEF.
>
> For your information, please note that your applications to the CSEF will need to be made on the appropriate forms, and each and every application will be judged individually in accordance with CSEF Guidelines, the same as for every other consultant staff member. The forms and more information are available on Servio, under Clinical Services.
>
> Lastly, in relation to point number 6, a new process is to be implemented. It has been decided that leave application approval process is to be authorised by the Director of the Surgical Division, as this is where the Head of Department position functionally reports. However, the Deputy Director of Clinical Services can authorise the application in the absence of the Director of the Surgical Division.
>
> Should you have any questions in relation to any of the matters clarified in this memorandum, please do not hesitate to contact me on [telephone number].

19 Mr Scull responded to that memo from Mr Seeds in an email sent on 8 January 2003 which provided as follows (formal parts omitted):

> thanks for your correspondence dated 6th.January re appointment of Head of Department.
>
> I note your response to point three (your paragraph 3) which seems to have missed the point I was hoping to make. On review, I may not have been clear in my intent.

> I wished to make the point that the position of Head of Department, while being a senior management post is also a senior scientific/engineering post within the Department with duties, included in the JDP, which relate to the conduct of scientific investigations, research and development.
>
> Accordingly I would expect that, if there were to be a review of class positions in (or related to) the Department (eg. Medical Physicists, Scientists or Engineers), the position of Head of Department would be included in such a review, to be considered on merit related to changing work value, etc.. I would not expect the position of HOD to be set aside from such a review, if it eventuated, on the basis that the position is purely a management post and is therefore not part of the physics/engineering team.
>
> I trust this makes the point more succinctly and I would value your response.

20 Mr Seeds then responded to Mr Scull's email on the same date (formal parts omitted):

> Thank you for clarifying this matter as I did misunderstand it.
>
> If there were to be a review of class positions in (or related to) the Department (eg. Medical Physicists, Scientists or Engineers) I think that it would be appropriate to look at the HOD positions if the positions being reviewed are at the top tier level of the Depts organisation structure as there may be some impact on the HOD position
>
> So I do not disagree with your sentiments

21 Mr Scull testified that as a result of the final email received from Mr Seeds that he understood that if there was to be a general movement in classification or remuneration of senior staff within the department, that the head of Department position would be considered under the same conditions applying to those arrangements. He said, however, that this did not happen. As a result of the assurance that he received from Mr Seeds in that exchange, on 24 November 2005 he lodged a request to have his remuneration adjusted in a manner commensurate with adjustments made to other specified callings in the department as a result of the Health Professional Work Value Review conducted in accordance with the 2001 Agreement.

22 The Health Professional Work Value Review sought to amend the Award to reflect significant increases in the work value of health professionals in what are referred to as 'specified callings' classifications and the subsequent reclassification of positions in recognition of work value changes (application P 18 of 2003: [2006] WAIRC 03473; (2006) 86 WAIG 34).

23 Mr Scull claimed that the appellant's rejection of his claim to have his remuneration adjusted in respect of the Health Professional Work Value Review is inconsistent with the previous decision to award an outcome based on work value change in respect of his position and this was unfair and has resulted in a substantial reduction in the value of his position. He also contended that this was contrary to the basis upon which he accepted his appointment to the position whereby the value of the position would retain its relativity to other senior scientific, physics and engineering posts under the Award.

24 Importantly, when cross-examined. Mr Scull:

(a) agreed that not all the expectations included in the summary of pre and post appointment discussions for the position were met; and

(b) said that the offer he signed on or about 23 December 2002 together with the subsequent correspondence he had with Mr Seeds about the terms of contract constituted the terms under which he could accept appointment to the position.

The Respondent's Evidence

25 Mr Seeds gave evidence by way of a witness statement and orally. Mr Seeds stated that the advertisement for the position stated the salary was negotiable up to $107,000 per annum plus salary packaging dependant on qualifications and experience. The essential selection criteria for the position was drafted to make it available to either applicants with a Bachelors degree in physics, engineering or similar qualifications or a medical degree.

26 Mr Seeds became directly involved in the process of appointing Mr Scull to the position at the point in time when the contract of service was being finalised. Some time in August 2002 Mr Seeds prepared a memorandum to Dr Montgomery advising him of the basis for the salary at which the position was advertised. He recommended to Dr Montgomery that in finalising the new contract of service with Mr Scull, the position be classified below Level 12 of the Award whilst maintaining a personal remuneration to Mr Scull of a Level 12 salary. The remuneration offered to Mr Scull was at Level 12 of the 2001 Agreement as he was not a medical practitioner and this rate of pay was the highest classification available under the 2001 Agreement. Mr Seeds also said that Mr Scull's classification and remuneration in comparison to other non-clinicians was significantly higher, with other more senior heads of Department who were remunerated at Level 10 under the 2001 Agreement.

27 After Mr Scull rejected the offer made to him on 3 October 2002 on the basis that Dr Fox had been paid a significantly higher remuneration under the AMA award and following discussions within the hospital; and after considering Mr Scull's representations in relation to his salary; Mr Seeds was instructed by the Director of Clinical Services and the Deputy Director of Clinical Services to issue a revised contract to Mr Scull which included a rate of pay in excess of the salary scales provided for in the 2001 Agreement.

28 Mr Seeds drafted Mr Scull's contract of service to state that future salary increases would be award free but would mirror the Award and the 2001 Agreement so that Mr Scull would receive a salary in excess of the salary scale provided for under the 2001 Agreement as well as the prescribed percentage increases in salary rates that were payable at prescribed dates under the 2001 Agreement. Mr Seeds provided a revised letter of appointment to Mr Scull and a revised contract of service. Mr Scull signed a copy of the contract and returned it on 23 December 2002.

29 Mr Seeds testified it was not his intention for Mr Scull's contract to provide that the relativity between Mr Scull's position and positions classified under the Award would be automatically maintained so he reiterated in the email exchange that the only automatic increases in Mr Scull's salary which the hospital had agreed to would be general periodic adjustments across all

salary rates as provided for under the Award and the 2001 Agreement. In accordance with this agreement all of the percentage increases applicable under the Award and the 2001 Agreement and subsequent industrial agreements were applied to Mr Scull's salary over the course of his employment in the position.

30 Mr Seeds said that when he received the memorandum from Mr Scull dated 23 December 2002 he was surprised and puzzled about the content of point 3 in Mr Scull's memorandum because as far as he was aware the prospect of maintaining relativity between the position and positions under the 2001 Agreement was not a term of Mr Scull's contract with the appellant. Nor was he aware that this issue was discussed at any point by the hospital's officers in the negotiations about Mr Scull's contract. Mr Seeds considered the wording of his response very carefully as he considered it to be material to the way in which Mr Scull's contract of service with the appellant would be interpreted and applied by both parties. After Mr Scull sought further clarification that the position would be included in any review of the classification of positions such as Medical Physicist, Scientist or Engineer within or related to the department in the email dated 8 January 2003, Mr Seeds in a return email confirmed that it would be appropriate to consider the position as part of any such classification review, should such a review occur. Mr Seeds said that the hospital was of the view that Mr Scull's salary should be reviewed if the classification of all or some of the staff that reported to Mr Scull changed drastically, for example, if the reclassification of subordinate staff meant that they were to earn salaries equivalent to Mr Scull's salary this would clearly be inappropriate from a human resource management perspective.

31 The appellant rejected Mr Scull's request, set out in a letter dated 24 November 2005, that his position be granted a number of salary increases to maintain relativity in line with the Health Professional Work Value Review. A memorandum addressed to Mr Scull dated 10 July 2006, signed by Dr Montgomery, was sent to Mr Scull in which Mr Scull was informed that the 17.28% salary adjustment sought was not in accordance with the terms of his contract with the appellant and that the explanatory memorandum Mr Seeds sent to Mr Scull on 6 January 2003 confirmed that the Health Professional Work Value Review did not apply to Mr Scull's position.

32 The work value of Mr Scull's position was however later reviewed by Mr Tony Pepper, a consultant at Austral Training and Human Resources. As a result of the review Mr Scull's position was reclassified at a Level 12 position under the *Health Services Union - WA Health State Industrial Agreement 2008* (the 2008 Agreement). Mr Seeds said that the classification of this position was consistent with the classification of the position of head of Department, Medical Technology and Physics Department at Sir Charles Gairdner Hospital. However no adjustment was made to Mr Scull's remuneration as Mr Scull was being paid in excess of the remuneration for a Level 12 professional officer under the 2008 Agreement. Mr Scull was therefore advised on 5 October 2009 that his request to renegotiate his remuneration in light of the Health Professional Work Value Review was rejected.

33 Mr Seeds said that following the review and reclassification of Mr Scull's position the decision was made not to adjust Mr Scull's remuneration as his current salary was considered appropriate. Mr Scull had received all salary increases generally applied to the rates under the Award, the 2001 Agreement and the 2008 Agreement and his current salary is $182,557, which exceeded the amount provided under the salary scales of the 2008 Agreement. The 2008 Agreement provides a salary range for a Level 12 from 1 July 2010 from $130,554 to $140,358.

34 When cross-examined, Mr Seeds conceded that he did not attend Mr Scull's interview for the position, nor was he involved in discussions with anyone at the hospital about the terms of Mr Scull's contract at the time of the interview.

35 Mr John Ross also gave evidence on behalf of the appellant. Since 2004 Mr Ross has been employed in the WA Health Department Industrial Relations Service as a Senior Industrial Relations Consultant. In 2008 he was appointed to the position of Principal Industrial Relations Consultant. Between 2004 and 2010 Mr Ross project managed the Health Professional Work Value Review.

36 Mr Ross gave evidence that as Mr Scull's position was not within the scope of the Health Professional Work Value Review claim, the working party did not review Mr Scull's position or his contract of employment within that inquiry. Mr Ross said that Mr Scull's position was anomalous, as the salary for the position was in excess of the salary applicable to the position under the 2001 Agreement. Mr Ross stated that as with all anomalous positions if it had been within the scope of the Health Professional Work Value Review claim, Mr Scull's position would have been referred to the Classification Review Committee with a recommendation that it be placed on salary maintenance, for a determination as to whether or not any future salary increases in the Award or the relevant agreement would apply, until such time as the salary for Level 12 positions under the relevant agreement reached the salary currently paid to Mr Scull.

Reasons for Decision of the Public Service Arbitrator

37 The increase in pay sought by Mr Scull was in addition to the increases paid to him which were in line with general wage increases given to employees covered by the Award and the industrial agreements. The Public Service Arbitrator characterised the issue in dispute between the parties as whether Mr Scull's contract of employment with the appellant provides that Mr Scull's salary should be increased by an average of the percentage of pay increases awarded to senior staff in the department that report to Mr Scull as a result of the Health Professional Work Value Review, in order to retain the relativity of the position to other peer professions.

38 The Public Service Arbitrator held that the task before the Commission was to determine the terms of the contract of employment and to ascertain whether the claim constituted a benefit which has been denied under the contract of employment, having regard to the obligation on the Commission to act according to equity, good conscience and the substantial merits of the case. When characterising the industrial dispute before her as a dispute about the terms and conditions of contract, the Public Service Arbitrator referred to a number of decisions which establish principles to be applied by the Commission when considering claims of contractual benefits under s 29(1)(b)(ii) of the Act: ***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307.

39 The Public Service Arbitrator found that terms of Mr Scull's contract of employment were contained in the following documents:

(a) Letter of appointment dated 9 December 2002;

(b) Contract signed by Mr Scull on or about 23 December 2002;

(c) The memoranda and emails exchanged between Mr Seeds and Mr Scull between 23 December 2002 to 8 January 2003.

40 The Public Service Arbitrator observed that the memoranda and emails referred to in (c) arose as a result of the terms of the contract being unclear and silent on a number of conditions relevant to Mr Scull's appointment to the position and were conditions that Mr Scull had discussed and reached agreement with the appellant prior to accepting appointment to the position.

41 The Public Service Arbitrator found that during discussions between Mr Scull and the appellant's representatives that occurred prior to the final contract and letter of appointment being given to Mr Scull, an agreement was reached that the salary, status and other entitlements associated with the position would equate to the conditions of employment of the incumbent in the position whose contract was linked to a classification under the AMA award. The Public Service Arbitrator also found that she accepted Mr Scull's evidence that as part of these discussions, Mr Scull had reached an agreement with the appellant's representatives that the status of the position would be maintained which included maintaining the relativity of the salary of the position with respect to other senior positions within the department if work value reviews of those senior positions resulted in salary increases.

42 Also of importance, the Public Service Arbitrator made a finding that the summary prepared by Mr Scull and submitted to the appellant in early November 2002 was not a document that was part of pre-contractual negotiations between Mr Scull and the appellant's representatives which should be disregarded. Instead she found that the summary contained a record of what had been clarified and agreed between the parties prior to Mr Scull accepting appointment to the position. In particular, the Public Service Arbitrator found that the statement in the summary that it was expected that 'the relativity of the post with respect to other senior scientific, physics and engineering posts under the HSOA Award is protected within the arrangement' reinforced Mr Scull's understanding that he had an agreement with the appellant's representatives that the relativity of any salary increases of senior positions to the position by way of work value increases would be retained when he signed the contract.

43 The Public Service Arbitrator then had regard to the uncontradicted evidence that:

(a) on 24 November 2005 Mr Scull had asked the appellant's representatives to adjust the relativity of his salary with respect to other senior positions within the department in consideration of the outcome of the Health Professional Work Value Review;

(b) After the application was lodged in the Commission on 23 September 2008 the appellant's representatives arranged for a review of the work value of the position to be undertaken, as it was award free and not linked to any classification in the Award;

(c) After a classification review report was completed in March 2009 the appellant determined that the classification of the position was at Level 11 when Mr Scull was appointed to the position and based on work value increases to the position, the position should now be classified as a Level 12 position. However, the appellant determined that Mr Scull's remuneration was higher than that of a Level 12 employee under the relevant industrial agreement and rejected Mr Scull's claim for an increase to his salary.

44 After having regard to this evidence the Public Service Arbitrator found that:

(a) Mr Scull was not entitled by the terms of the memorandum dated 6 January 2003 to have his salary automatically adjusted as a result of work value changes to positions that reported to Mr Scull and was dependent on work value changes to Mr Scull's position;

(b) At that time Mr Seeds accepted the proposition put to him by Mr Scull that if internal relativities with respect to senior positions within the department changed and the value of work of the position increased then Mr Scull could renegotiate his salary with the appellant; and

(c) As the value of the work required of Mr Scull's position had increased from a Level 11 to a Level 12; and

(d) The appellant through his representatives had agreed to retain the status of the position prior to Mr Scull's appointment to the position;

the salary of the position should be increased to reflect the relativity of the position to other senior positions within the department at the level it was when Mr Scull commenced employment in the position.

The Appellant's Submissions

45 Counsel for the appellant made a very strong submission on behalf of the appellant that the matter at first instance solely proceeded before the Public Service Arbitrator as a claim for contractual benefits. In support of this contention the appellant's counsel took the Full Bench to an exchange between counsel for the appellant, the respondent and the Public Service Arbitrator at pages 4 – 5 of the transcript of the hearing at first instance. Apart from an issue raised in respect of estoppel, the respondent's outline of submissions filed in the matter at first instance dealt with the respondent's claim in respect of Mr Scull solely on the basis as to whether the terms and conditions of Mr Scull's contract entitled him to the remuneration which was claimed.

46 The appellant says in its written submissions that the letter of offer dated 9 December 2002 made no mention of the salary specified in the offer being maintained at the same relativity to other senior positions as existed at the time of the appointment, or there being any right to a review of the remuneration payable.

47 The appellant says that when the documents which were found to constitute the contract of employment are examined, the finding at [91] of the Public Service Arbitrator's reasons for decision that the appellant had agreed to retain the status of the position prior to Mr Scull's appointment to the position was not a condition of Mr Scull's contract of employment was directly contrary to the content of the documents found to constitute the contract between the appellant and the respondent. All that Mr Scull was entitled to if anything, is where senior scientific positions were reclassified, was the opportunity to renegotiate his contract where a significant increase in work value accrued to his position as the result of changes in work value in those senior positions that reported to him.

48 The appellant contends there was no evidence that an offer of employment was made that contained a term that the salary of Mr Scull would be maintained according to the relativities which existed at the time of his appointment to the salaries of those senior positions reporting to him. Further, that the remuneration of Mr Scull's position was not related to any classification under the Award or industrial agreements. Nor was there any provision which provided a right to increased remuneration.

49 At law, the appellant says that whatever may have been discussed during interviews those discussions are merely pre-contractual representations and are not admissible. They are superseded by and merged in the contract itself. Furthermore, pre-contractual representations can only become binding terms of the contract if they are promissory in nature: ***Codelfa Construction Pty Ltd v State Rail Authority of NSW*** (1982) 149 CLR 337 (352) (***Codelfa***).

50 The appellant says that neither party sought seriously to argue the claim should be determined as a matter of fairness and equity. The appellant also says that such a claim did not appear in the papers and if the Full Bench is of the opinion that the matter should be determined on the basis of fairness and equity then as suggested by the respondent in their written submissions the matter should be referred back to the Public Service Arbitrator for further hearing and determination as the appellant had not put its case on that basis in any meaningful sense.

51 The appellant says that Mr Scull's entitlement under the contract was that his conditions to remuneration were to mirror those of the Award and industrial agreements and he received those general increases payable under these industrial instruments. It was not as if his remuneration was stagnate that the terms of the Award and the industrial agreements applied to him in all respects except in relation to his remuneration.

52 In any event, the appellant says that for a person like Mr Scull to come to the Commission and ask for more when the Commission has issued an award and industrial agreement which settles the industrial matter of salary increases it is not open for Mr Scull to come back and ask the Commission to set a higher remuneration as a matter of contract or even as a matter of fairness and equity.

53 The appellant's counsel also made a submission that if there is to be a dispute about Mr Scull's remuneration that the Public Service Arbitrator's jurisdiction arises under s 80E(2) of the Act which allows the Public Service Arbitrator to allocate a salary to the post that the government officer occupies. The appellant says that that allocation of salary to an office can only be allocated according to the industrial instruments that apply to that position and to the employee. If the industrial instruments are applied, Level 12 is the highest level of classification which is the classification that the review produced for Mr Scull. Consequently, the appellant says that the order made by the Public Service Arbitrator was contrary to s 80E(2) of the Act. However, it is conceded by the appellant that the point that they wish to make in relation to s 80E(2)(a) is not raised in the appellant's ground of appeal.

The Respondent's Submissions

54 The respondent says the appeal should be dismissed on two grounds. Firstly, the application to the Public Service Arbitrator was not an application under s 29(1)(b)(ii) of the Act to recover a benefit under a contract, but was an application made under s 44 of the Act and as such the Public Service Arbitrator in making the decision was not constrained by the express terms of the contract. Secondly and in the alternative, the respondent says the Public Service Arbitrator correctly construed the terms and conditions of the contract of Mr Scull.

55 In the event that the Full Bench is not persuaded by either of those arguments the respondent says the Full Bench should find that the Public Service Arbitrator has only determined the contractual position and if it is determined that she erred in law, then it follows that the discretionary merit of the aspect of the application remains undetermined and the decision of the Public Service Arbitrator should be suspended and the case remitted for further hearing and determination.

(a) The appeal misses the point

56 The respondent points out that the appeal is based on the sole ground that the Public Service Arbitrator at first instance failed to give effect to the terms of the contract between Mr Scull and the appellant. It also points out that the application was made under s 44 of the Act and the matter in dispute was whether the refusal of the appellant to increase Mr Scull's remuneration as a result of the work value review of the position was 'a failure of good faith', unjust, or harsh, unfair and oppressive. The respondent says that when one has regard to the particulars provided by the respondent and the outline of submissions filed by the respondent at first instance that whilst consideration of the matters in dispute necessarily involved determining the contractual position of the parties, proper disposition of those matters was not limited to giving effect to the contractual position. For practical purposes the matter fell into two parts which required the Public Service Arbitrator to:

(a) determine whether the contract required an increase in Mr Scull's remuneration as a result of the reclassification; and

(b) if not, determine whether as a matter of merit, the equity, good conscience and substantial merits of the situation required an increase in Mr Scull's remuneration. This required an exercise of discretion.

57 The respondent concedes that whilst there was some ambiguity and blurring between the two issues at first instance it is clear that both issues were before the Public Service Arbitrator for determination. It is submitted that the Public Service Arbitrator has discretionarily determined the matter as a matter of merit unconstrained by the terms of the contract and that this is reflected in the decision the Public Service Arbitrator at [91] – [92].

58 The respondent says the effect of the findings of the Public Service Arbitrator was that in light of the fact that the work value of the position was reviewed and it was found that the work value of the position had changed from a Level 11 to a Level 12; and as there was an agreement to retain the status of the position that Mr Scull's salary should be increased to reflect the relativity of the position to other senior positions within the department at the level it was when Mr Scull commenced employment in the position, the salary of Mr Scull should be increased to maintain that relativity.

59 Consequently, the respondent says the appeal is misconceived in that it proceeds on the erroneous basis that the Public Service Arbitrator has merely construed the contract and given effect to it by applying a composite determination of the terms of the contract and them considering the circumstances justified an increase in order to do equity between the parties. On this ground the respondent says the appeal should be dismissed.

(b) The Public Service Arbitrator correctly construed the contract

60 In the alternative, the respondent says that if it be the case that the Public Service Arbitrator only construed the contract, the appeal asserts that the error is said to arise because the Public Service Arbitrator ordered that:

(a) the relativity of Mr Scull's position be increased to reflect its relativity with other senior positions within the Department of Medical Engineering and Physics at the level it was when Mr Scull commenced employment in the position; and

(b) the salary levels contained in column 3 of the table in the internal memorandum to the Chief Executive South Metropolitan Area Health Service from Mr Gregory dated 2 September 2009 be applied to Mr Scull's position;

when the terms of the contract as found by the Public Service Arbitrator:

(c) expressly excluded automatic maintenance of the relativity referred to; and

(d) provided only for renegotiation of salary in the event of a change in relativity.

61 The respondent argues that when the offer was made by the appellant's representatives on 9 December 2002, Mr Scull's memorandum dated 23 December 2002 could not be characterised at law as an acceptance of the offer of employment but a counter-offer. What Mr Scull was saying was 'I am accepting your offer but with these additional conditions'. Then there was further interchange between the parties by memorandum and email by way of qualification of the terms and conditions of the contract and all of those documents properly constitute the terms and conditions of the contract between the parties.

62 The relevant terms of the contract as found by the Public Service Arbitrator may be summarised as follows:

(a) The status of the position as at the date of contract would be retained.

(b) Although the position was award free, it would relate to the Award and industrial agreements and enjoy any general increases in rates to the Award and the industrial agreements.

(c) Any review of the classifications/positions which reported to Mr Scull would include a review of his position.

(d) Should the classifications/positions which reported to Mr Scull be reclassified or receive additional remuneration Mr Scull would be free to renegotiate his contract.

63 As to the maintenance of the 'status' of the position, the respondent says it should be construed to mean 'relative social or professional position' or 'standing'. Consequently, it is argued that on a stand-alone basis, the condition that the status and position of the date of the contract would be retained would entitle Mr Scull to maintenance of relativity where the classification/positions which reported to Mr Scull were reclassified or receive additional remuneration. However, automatic maintenance is excluded by the condition in (d) above, that is, should the classifications/positions which reported to Mr Scull be reclassified or receive additional remuneration Mr Scull would be free to renegotiate his contract. As both (a) and (d) are terms of the contract they must be construed such that, as far as possible, they each have effect. It is submitted that whilst (d) excludes an increase as of right where other positions have been reclassified it does not exclude the operation of (a) where the proper classification of Mr Scull's position itself has changed. Thus, if a review resulted in reclassification of some or all of the positions reporting to Mr Scull but not of Mr Scull's position itself, Mr Scull would not be entitled to an increase by virtue of (a) because of the operation of (d). However, as Mr Scull's position itself has been reclassified from a Level 11 to a Level 12 on the basis of work value, it is submitted that (a) does entitle him to an increase, or, in the language of the contract, to retain the status of the position. That is, his actual remuneration should be increased by the percentage increase constituted by the change from a Level 11 to a Level 12. Such an increase would give effect to the contractual requirement that the status be retained. That retention of status is relative to his position's award ranking, but not relative to the ranking of other positions.

64 The appellant's decision not to increase Mr Scull's remuneration was based on an internal memorandum by Mr Gregory dated 2 September 2009. Mr Gregory's conclusion in the memorandum was that: 'The employer is contractually obliged to consider Mr Scull's claim. The claim has no apparent merit in the context of recognition of work value changes'. Accepting this to be correct, the claim does however have merit in the context of retention of the status of the position, which the employer is contractually obliged to do. However, it is not correct to say that the claim has no merit in the context of recognition of work value changes. The work value of the position was recognised by the review of the position to have increased from a Level 11 to a Level 12. That review was accepted by the employer. In accepting the review, the employer merely made an administrative adjustment to the formal linking of Mr Scull's position to award a Level 12, in lieu of a Level 11. As Mr Scull's remuneration was over the Award and industrial agreements, that adjustment had no effect on his actual remuneration and was simply absorbed. There is no provision for absorption in the Wage Fixing Principles: (2010) 90 WAIG 588.

65 Further, the contractual requirement to review Mr Scull's remuneration in the event of work value changes is a requirement to conduct that review bona fide and in good faith. In view of the fact that the review found that there had been a significant work value increase to the position there was no basis for the appellant's representatives to then find that '[t]he claim has no merit in the context of recognition of work value changes'. On the contrary, bona fide and good faith recognition of changes in

work value compels the conclusion that the actual remuneration be increased appropriately, not just passed off by an administrative sleight of hand.

(c) The Public Service Arbitrator failed to determine the merit aspect of the claim

66 In the event that the Full Bench finds that the Public Service Arbitrator wrongly found that Mr Scull had a contractual right to an increase of his remuneration as a result of the work value review of his position then the matter should be remitted back to the Public Service Arbitrator at first instance for determination of the discretionary merit aspect of Mr Scull's claim. For the purposes of s 49(6a) of the Act, the respondent says the reasons why it should be remitted back rather than determined by the Full Bench are:

(a) There may be further evidence to be adduced on the broader equity question;

(b) The matter has a complex and intricate history with which the Public Service Arbitrator at first instance is well acquainted and it is preferable in such a case for a discretionary decision on the merits be made by the Public Service Arbitrator so constituted; and

(c) Given that the outstanding issue requires the exercise of the Public Service Arbitrator's discretion, the parties' appeal rights would be preserved by remission back. If not remitted back those rights would effectively be lost because the Full Bench would itself exercise the discretion effectively at first instance.

Conclusions

(a) Jurisdiction of Public Service Arbitrator

67 The exclusive jurisdiction of the Public Service Arbitrator is provided for in s 80E(1) of the Act which is as follows:

> 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.

68 The powers of the Public Service Arbitrator are very wide. They are to inquire into and deal with any industrial matter: ***Director-General Department of Justice v Civil Service Association of Western Australia Inc*** [2005] WASCA 244; (2005) 149 IR 160 (***Jones***) [29] (Wheeler and Le Miere JJ). The expression 'exclusive jurisdiction' in s 80E(1) of the Act was likely intended to do no more than exclude the general jurisdiction of the Commission, pursuant to s 23 of the Act, to inquire into and deal with industrial matters generally: ***Jones*** [27] (Wheeler and Le Miere JJ).

69 Section 80E(2) of the Act provides for the jurisdiction that is to be included in s 80E(1) of the Act. Section 80E(2) of the Act states:

> 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.

70 Pursuant to s 80E(5) of the Act, the Public Service Arbitrator has power to review, modify, nullify or vary any act, matter or thing done by an employer of a government office that is within the jurisdiction of the Public Service Arbitrator and under s 80L(1) of the Act the provisions of Part II Division 2 of the Act applies to the exercise of the jurisdiction of the Public Service Arbitrator which includes the powers under s 44 of the Act.

71 Whilst the general jurisdiction of the Public Service Arbitrator under s 80E(1) can include claims under s 29(1)(b)(ii) of the Act: ***Chief Executive Officer, Department of Agriculture and Food v Ward & Wall [No 1]*** [2008] WAIRC 00079; (2008) 88 WAIG 156 [92] (Ritter AP), the application before the Public Service Arbitrator in this matter is not a claim under s 29(1)(b)(ii) of the Act, as it is not a claim made by an employee. It is an industrial matter referred by the respondent as an organisation of employees under s 80F(1) of the Act whereby the jurisdiction of the Public Service Arbitrator was invoked under s 80E(1) of the Act to inquire into and deal with an industrial matter. In inquiring into and dealing with the industrial matter, a compulsory conference was convened by the Public Service Arbitrator pursuant to s 80G(1) and s 44(1) of the Act and the matter was referred for hearing under s 44(9) of the Act.

(b) The scope of the industrial matter before the Public Service Arbitrator

72 Despite the valiant submissions made on behalf of the appellant, the industrial matter before the Public Service Arbitrator is not a claim that is made and sought to be determined solely on grounds that attach to the determination of a claim in contract. This is not only evident from paragraph 1 of the memorandum of matters referred for hearing and determination but also from the written outline of submissions filed by the respondent on 30 July 2010. In paragraph 1 of the memorandum of matters referred for hearing and determination it is stated:

> The applicant claims that the respondent has acted in a manner which is not fair, just and or reasonable by refusing to award an increase in remuneration for the position of Head of the Department of Medical Engineering and Physics at Royal Perth Hospital (Post number: 103229) ('the position') occupied by Mr Edward Scull consequent upon the respondent implementing outcomes of the Health Professions Work Value Review ('the HPR') to the position, pursuant to the provisions of the *Hospital Salaried Officers Metropolitan Health Services Enterprise Agreement 2001* (PSAAG 1 of 2002) ('the Agreement').

73 In [57] and [58] of the applicant's outline of submissions, after setting out the history of the matter at some length and referring to the fact that the appellant's representatives had refused to apply any salary increase as a result of the Health Professional Work Value Review to senior specific callings in the Department headed by Mr Scull, the respondent stated [AB 181]:

> We submit that this is fundamentally unfair and stands to be corrected. This is submitted because the effect of not recognising Mr Scull's claim in respect of the HPR and it not being fairly applied to the position occupied by him, has resulted in a nett overall reduction of the value of his position; a value established by the hospital under the contract applying to the position and fundamental to his accepting appointment to the position.
>
> It is submitted that to deny Mr Scull the benefit of the effects of the HPR in conjunction with increases that flow from 'salary increments that are generally applicable to the HSOA MHS Enterprise Agreement' (ABD 16) is harsh unjust and unreasonable.

74 The respondent's outline of submissions also made a claim for relief in respect of a pre-acceptance bargain on grounds of estoppel in respect of which the Public Service Arbitrator did not find it necessary to consider.

75 It is however clear from the appellant's submissions that the appellant only sought to address the matter before the Public Service Arbitrator on grounds that there was no breach of contract and the elements of estoppel had not been made out.

(c) What were the terms of contract and did the Public Service Arbitrator err?

76 When construing the terms of a contract regard cannot be had to pre-contractual negotiations unless there is some ambiguity in the terms of the contract. This rule was explained by Mason J in ***Codelfa*** where his Honour said (352):

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.
>
> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.

77 A pre-contractual representation can however become binding if it was promissory in nature and thus not representational. In ***Hospital Products Ltd v United States Surgical Corporation*** (1984) 156 CLR 41 Gibbs CJ (61) explained:

> A representation made in the course of negotiations which result in a binding agreement may be a warranty — i.e., it may have binding contractual force — in one of two ways: it may become a term of the agreement itself, or it may be a separate collateral contract, the consideration for which is the promise to enter into the main agreement. In either case the question whether the representation creates a binding contractual obligation depends on the intention of the parties. In *J. J. Savage & Sons Pty. Ltd. v. Blakney* and *Ross v. Allis-Chalmers Australia Pty. Ltd.*, it was said that a statement will constitute a collateral warranty only if it was 'promissory and not merely representational', and it is equally true that a statement which is 'merely representational' — i.e., which is not intended to be a binding promise — will not form part of the main contract. If the parties did not intend that there should be contractual liability in respect of the accuracy of the representation, it will not create contractual obligations. (footnotes omitted)

78 It is common ground that the Public Service Arbitrator did not err in finding that the terms and conditions of Mr Scull's contract of employment were contained in the letter of appointment dated 9 December 2002, the contract signed by Mr Scull on or about 23 December 2002 and the memoranda and emails exchanged between Mr Seeds and Mr Scull between 23 December 2002 to 8 January 2003. When regard is had to that finding and the terms contained in these documents are analysed, it is clear that the terms of the contract in respect of salary increases were as follows:

(a) The position was not covered by the Award or any relevant industrial agreement.

(b) Any percentage increases that applied to the Award, the 2001 industrial agreement and any subsequent agreement would be applied to the salary paid to Mr Scull.

(c) If senior positions that report to the position held by Mr Scull were reclassified or were to receive additional remuneration which resulted in significant work value for the position held by Mr Scull, Mr Scull could renegotiate his contract.

(d) Any review of senior positions in the Department which were positions that reported to Mr Scull would include a review of his position.

79 When regard is had only to these documents, it was not open to find that it was a term of the contract that the status of the position held by Mr Scull as at the date of the contract would be maintained. All of the discussions that took place between Mr Scull and the appellant's representative prior to the entering into the contract between 23 December 2002 and 8 January 2003 were pre-contractual negotiations. That is evident from the evidence given by Mr Scull and his summary. It is clear in particular from the summary, that at its highest Mr Scull 'expected' that the relativity of the salary that would attach to his position would be maintained with the salaries of those senior positions that reported to him. However, there is no record in the summary of any representation made to Mr Scull which could be construed as a representation made on behalf of the appellant that such a relativity would be maintained.

80 The evidence given by Mr Scull in his witness statement, orally and the record of negotiations in his summary does not support a finding that the appellant's representatives made any representation that could be regarded as promissory that the

relativity of his salary to those positions that reported to him would be maintained. There was no such representation. It was simply an expectation of Mr Scull.

81 For these reasons I am of the opinion that the Public Service Arbitrator erred in failing to have regard to the express terms of the contact which provided that Mr Scull was not entitled to automatically have his salary adjusted as a result of changes to the classifications or remuneration of the senior positions that reported to him as head of Department.

82 I do however agree with the submission made on behalf of the respondent that part of the industrial matter before the Public Service Arbitrator was whether consequent upon the appellant implementing the outcomes of the Health Professional Work Value Review the appellant acted in a manner that was not fair, just or reasonable by refusing to award an increase in remuneration for the position held by Mr Scull. I also agree that it is open to hear and determine the application on these grounds and for this reason it is my opinion that the appeal should be allowed and the decision remitted to the Public Service Arbitrator for further hearing and determination.

83 Whilst the issues raised by the appellant in respect of the application of s 80E(2)(a) of the Act is not directly raised by the appellant in his ground of appeal, as the issue was ventilated by counsel it is appropriate to make some observations about whether s 80E(2)(a) of the Act has any application to the facts of the matter in this appeal. Section 80E(2) of the Act makes it clear the jurisdiction under s 80E(2)(a) of the Act includes jurisdiction to deal with a claim in respect of the salary or range of salary allocated to an office occupied by a government officer. However, it is apparent that s 80E(2)(a) of the Act is not concerned with the salary that attaches to the person who holds an office but to the office. Section 80E(1)(a) of the Act contains a distinction between what may be colloquially described as a job (an office) and the person who holds that job (an officer). This distinction is found not only in s 80E(1)(a) of the Act but in other provisions of the Act and the *Public Sector Management Act 1984* (WA): (see, for example, s 80I(1)(b) and s 80I(1)(c) of the Act). The documents that contain Mr Scull's terms of contract of employment attach to him personally and do not attach to the office held by him. For this reason I am of the opinion that it is doubtful that s 80E(2)(a) of the Act has any application to the industrial matter raised in this appeal.

BEECH CC

84 I have read the reasons for decision of both the Hon. Acting President and Kenner C. I agree with them for the reasons they have given that the decision at first instance should be suspended and the matter be remitted to the learned Arbitrator for further hearing and determination on the merits.

KENNER C:

85 This appeal under s 49 of the Industrial Relations Act ("the Act") is narrow in scope and is limited to one ground. The ground is that the learned Arbitrator was in error in finding that the respondent had an entitlement to a salary increase, commensurate with relativities of his position as Head of Department of Medical Engineering and Physics at Royal Perth Hospital, to other senior positions in his Department.

86 The background to the appeal, the reasons for decision of the learned Arbitrator and the contentions of the parties on the appeal, are set out in the reasons of Smith AP which are not necessary to re-traverse.

87 It was accepted by both the appellant and the respondent, that the learned Arbitrator was correct in her finding at par 74 of her reasons at AB 48, that the terms of the contract of employment between the appellant and the respondent was set out in a number of documents.

88 These included the letter of appointment of 9 December 2002 signed by the respondent; the respondent's memorandum of 23 December 2002 to the appellant seeking "clarification" of certain matters; and memoranda and emails passing between the respondent and the appellant of 6 and 8 January 2003 in relation to the matters to be "clarified" (see AB 33-37).

89 In my view it was open to find that the negotiations between the respondent and appellant regarding his appointment to the position of Head of Department, which commenced in about April 2002, involved pre-contractual representations which were not intended to be promissory in character, objectively determined from the stance of a reasonable person: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

90 Statements of parties to negotiations reflecting their subjective intentions and reasonable expectations, consistent with the parole evidence rule, are generally not admissible, nor of assistance, in construing the terms of a contract ultimately reduced to writing. Whilst the Commission is of course, not bound by the strict rules of evidence, nonetheless such evidence can sometimes distract attention from the real issues in dispute.

91 As a matter of broad principle, where parties record their agreement in writing, and such writing does not include a pre-contractual statement later alleged to be a term, this is strongly indicative of it not being enforceable as a term of the agreement.

92 In this case, there was no doubt from the evidence before the learned Arbitrator that the respondent had a desire and an expectation, that any salary relativity between his position, then under negotiation, and other senior positions within the Department, would be maintained.

93 However, ultimately, objectively considered, it is to the terms of the relevant written instruments, embodying the terms of the contract as finally agreed, that primary attention must be paid in ascertaining the rights and entitlements of the parties: *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 per Kirby J at 70.

94 The terms of the written agreement between the parties, does not reflect any undertaking that the respondent's salary relativity will be maintained with other senior officers of the department. Indeed, Mr Seeds' reply of 6 January 2003 to the respondent, expressly denied that there was any such commitment other than an opportunity to renegotiate the contract, if certain preconditions were met.

95 There was also no reference in the written agreement as to the preservation of the status of the respondent's position, relative to others, whatever ultimately, that might entail.

96 In contract law parlance, it is settled that an offer and acceptance must precisely correspond. A variation from the offer, in an acceptance, may result in any such acceptance being invalid. Any purported acceptance which accepts an offer in general terms, but with additions and qualifications, may in fact constitute a counter offer, open for acceptance by the other party: *Carello v Jordan* [1935] QSR 294.

97 It might be open to have concluded that the respondent's memorandum of 23 December 2002 to the appellant, which sought "clarification" of some matters, in reality, constituted a counter offer which was not accepted by the appellant in its reply of 8 January 2003. Regardless of this however, the parties, by their conduct, entered into a contractual relationship of employment and have continued to do so for some years to date. In these circumstances, the respondent must be taken to have accepted the terms as proposed by the appellant at the time.

98 Accordingly, with respect, I consider that the learned Arbitrator was in error in concluding that the status of the respondent's position, and hence salary relativity to others in his Department, would be preserved, as a contractual term. As these findings were integral to the learned Arbitrator's further consideration of whether any salary adjustment should apply to the respondent, the appeal should be allowed.

99 However, that is not the end of the matter. Whilst the appellant attempted to argue that the only issue before the learned Arbitrator was the terms of the respondent's contract with the appellant, and whether it afforded him a contractual entitlement to a salary increase, in my view, that was not the totality of the dispute at first instance.

100 The application originally made by the respondent was for a compulsory conference pursuant to s 44 of the Act. The application referred to the review of health professionals work value in accordance with the provisions of the Hospital Salaried Officers Metropolitan Health Services Enterprise Agreement 2001.

101 Grounds advanced in support of the application, included allegations that the appellant had failed to deal with the respondent's position in good faith and the appellant had dealt with the respondent in a manner which was harsh, unfair and oppressive: AB 5-8.

102 The Memorandum of Matters Referred for Hearing and Determination under s 44(9) of the Act, appearing at AB 15-17, makes it plain at par 1, that the dispute referred for arbitration included allegations that the respondent "has acted in a manner which is not fair, just and or reasonable by refusing to award an increase in remuneration for the position of Head of the Department of Medical Engineering and Physics at Royal Perth Hospital (post number: 103229)".

103 Furthermore, the applicant's outline of submissions at first instance, as set out at AB 172-185, also makes reference to the unfairness, harshness and unjustness of the appellant's conduct towards the respondent, by denying him a salary review.

104 In my view therefore, the matter referred for hearing and determination under s 44(9) of the Act, was not confined to the contractual rights of the parties. This is so, notwithstanding the fact that it appeared from exchanges between the parties and the learned Arbitrator, for example at AB 65-66, a focal point was the contractual arrangements between the appellant and the respondent.

105 The referral plainly raised matters going to discretionary considerations under s 26(1)(a) of the Act, as to whether, in accordance with equity and good conscience, the respondent should be granted the relief sought.

106 In these circumstances, it would be appropriate, that under s 49(5)(c) of the Act, the decision at first instance be suspended and the matter be remitted to the learned Arbitrator for further hearing and determination on the merits.

2011 WAIRC 00349

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL OF HEALTH AS THE DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1972 FOR THE HOSPITALS FORMERLY COMPRISING THE METROPOLITAN HEALTH SERVICES BOARD IN THE PERSON OF DR PHILLIP MONTGOMERY, EXECUTIVE DIRECTOR, ROYAL PERTH HOSPITAL, SOUTH METROPOLITAN AREA HEALTH SERVICE
	APPELLANT
	-and-
	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	MONDAY, 23 MAY 2011
FILE NO	FBA 2 OF 2011
CITATION NO.	2011 WAIRC 00349

Result	Decision at first instance suspended and remitted to the Arbitrator
Appearances	
Appellant	Mr R J Andretich (of counsel) and with him Mr J Misso (of counsel)
Respondent	Mr D H Schapper (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 21 March 2011 and having heard Mr R J Andretich (of counsel) and with him Mr J Misso (of counsel) on behalf of the appellant, and Mr D H Schapper (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 13 May 2011, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is allowed.
2. The order made by the Public Service Arbitrator on 17 January 2011 [2011] WAIRC 00039; (2011) 91 WAIG 259 is suspended.
3. The matter is remitted to the Public Service Arbitrator at first instance for further hearing and determination.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2011 WAIRC 00350

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2011 WAIRC 00350
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	WEDNESDAY, 11 MAY 2011
DELIVERED	:	TUESDAY, 24 MAY 2011
FILE NO.	:	FBM 3 OF 2011
BETWEEN	:	THE ELECTRICAL AND COMMUNICATIONS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS) Applicant AND (NOT APPLICABLE) Respondent

Catchwords	:	Industrial law (WA) - Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alterations to registered rules - Qualification for membership rule - Statutory criteria satisfied - Application granted
Legislation	:	*Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 55(5), s 56(1), s 62(2); *Electricity (Licensing) Regulations 1991* (WA) reg 13(2)(c), reg 20(1)(c), reg 20(2), reg 20(4)
Result	:	Application granted
Representation:		
Applicant	:	Mr K Kutasi

Reasons for Decision

THE FULL BENCH:

Introduction

1 This application by The Electrical and Communications Association of Western Australia (Union of Employers) was filed on 2 March 2011 and is made pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant, as a

registered association under the Act, seeks the authorisation of the Full Bench for the Registrar to register an alteration to its qualification for membership rule. The alteration the applicant proposes is to r 3 of its rules. The change sought is to enlarge the categories of employers eligible for membership of the association. The category sought to be added is refrigeration and airconditioning contractors who employ a person which may include themselves and who hold a Refrigeration and Airconditioning Mechanic Licence issued under the provisions of the *Electricity (Licensing) Regulations 1991* (WA). As the proposed alteration to r 3 seeks to alter the qualifications of persons for membership, the alteration sought can not be registered by the Registrar unless the registration is authorised by the Full Bench. After hearing Mr Kutasi, secretary of the applicant, the Full Bench made the following order:

> The Registrar is hereby authorised to register the alteration to r 3 of the rules of the applicant as published in the Western Australian Industrial Gazette on 23 March 2011 ((2011) 91 WAIG 432).

2 These reasons set out the reasons why the Full Bench formed the view that the proposal to register the alteration to r 3 should be authorised by the Full Bench.

The Application

3 In this application the applicant seeks to alter r 3 of the rules of the applicant by adding the following words that are underlined and in bold:

> Membership shall be open to any person who is either an Electrical Contractor or a Communications Contractor and whose is substantially engaged in the work usually performed by either an Electrical Contractor or a Communications Contractor **or a Refrigeration and Airconditioning Contractor.**
>
> For the purposes of this clause:
>
> a) Electrical Contractor means a person who holds an Electrical Contractors Licence and who employs at least one person (which may include themselves) who is, a person who holds an Electrical Worker's Licence issued under the provisions of the Electricity (Licensing) Regulations 1991 (WA); and
>
> b) Communications Contractor means a person who employs a person (which may include themselves) or persons who perform, work which is regulated by the Australian Communications & Media Authority under the provisions of the Telecommunications Act 1997 (Cth); **and**
>
> **c) Refrigeration & Airconditioning Contractor means a person who employs a person (which may include themselves) who is a person who holds a Refrigeration & Airconditioning Mechanic Licence, issued under the provisions of the Electricity (Licensing) Regulations 1991 (WA).**

4 The reason for the proposed alteration is to enable businesses that employ employees who hold restricted electrical licences in the refrigeration and airconditioning trade to join the association. Mr Kutasi informed the Full Bench that refrigeration and airconditioning businesses do not have a specific industry body which represents their interests. They were until 2010 represented by an unregistered refrigeration and airconditioning contractors' association. This association was wound up in 2010. Since the winding up of the unregistered association the applicant has been regularly approached by former members of the unregistered association seeking to become members of the applicant. The applicant wishes to extend its services and representation to a section of its wider industry that is currently without a voice. Mr Kutasi also informed the Full Bench that the refrigeration and airconditioning industry has close affiliation and similar interest to that of electrical contractors, as both are licensed by the Electrical Licensing Board and many of the current members of the applicant hold licences to carry out electrical work and refrigeration and airconditioning work.

The Applicant's Rules about Alteration

5 Pursuant to s 62(2) of the Act, the requirements of s 55(4) of the Act must be satisfied before the Full Bench can approve a rule alteration application to alter the eligibility rules of an organisation. Section 55(4) of the Act provides that the Full Bench shall refuse an application by an organisation under this section unless it is satisfied that:

(a) the application has been authorised in accordance with the rules of the organisation;

(b) reasonable steps have been taken to adequately inform the members —

(i) of the intention of the organisation to apply for registration;

(ii) of the proposed rules of the organisation; and

(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,

and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;

(c) in relation to the members of the organisation —

(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or

(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;

(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and

(e) rules of the organisation relating to elections for office —

(i) provide that the election shall be by secret ballot; and

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

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

6 The first requirement pursuant to s 55(4)(a) of the Act, is that the Full Bench is required to refuse the rule alteration application unless it has been authorised by the organisation in accordance with its rules. Pursuant to r 28, the rules of the applicant can be amended. Rule 28 provides:

> Subject to the provisions of this Rule, the Rules may be amended by a resolution passed at a general meeting of the members of the Association.
>
> No amendment of the Rules shall be made unless:
>
> a. Notice of the meeting is given to all members at least one month prior to the date upon which the meeting is held;
>
> b. That notice sets out the proposed amendment of the Rules and the reasons for the amendment;
>
> c. The notice of meeting explains that, notwithstanding the fact that the resolution may be passed at the meeting, any member may object to the proposed amendment by forwarding a written objection to the Registrar of the Western Australian Industrial Relations Commission to reach him no later than 14 days after the date of the meeting; and
>
> d. The resolution is passed by at least two thirds of those members attending the meeting, either in person or by proxy, who are eligible to vote.

7 Pursuant to r 21, the quorum for any Special General Meeting is 15 members and under r 20 a Special General Meeting may be called at the instance of the President or any 10 members.

8 No procedure is prescribed under the rules for providing notice of a meeting to members.

9 The facts supporting the applicant's submission that it complied with the rules of the applicant and the statutory requirements of the Act are set out in the statutory declaration of Mr Kutasi and the documents attached to his statutory declaration which evidence the following matters:

(a) On 19 October 2010 a meeting of the management committee of the applicant was held. The President was in attendance at the meeting of the management committee along with six other members of the applicant. All members at that meeting including the President passed a resolution to call a Special General Meeting to amend r 3.

(b) Notice of the Special General Meeting together with the proposed alteration to the rules and explanatory memoranda were distributed to all members of the applicant by ordinary post on or about 10 January 2011. The notice informed the members of the applicant that there was to be a Special General Meeting on 17 February 2011 at 9.00 am. The notice also specified the resolutions that were to be considered. These were as follows:

> 2. Resolution 1: To amend the rules and constitution of the Electrical and Communications Association of Western Australia as described in the tracked document marked 'proposed amendments to the rules and constitution of the Electrical and Communications Association of WA'.
>
> 3. Resolution 2: That the Association commences an application in the WA Industrial Relations Commission to alter the Rules of the Association in accordance with the requirements outlined in Resolution 1; and that the application is made at the earliest opportunity.

(c) Attachment 1 to the notice set out the alteration sought to r 3 in the form that was later published in the Industrial Gazette on 23 March 2011(2011) 91 WAIG 432.

(d) In the explanatory memorandum attached as attachment 2 to the notice was stated:

> The Electrical and Communications Association of Western Australia ('the Association') is proposing changes to the Association's rules.
>
> These changes are intended to allow refrigeration and air conditioning contractors to join the Association in light of the recent demise of their own industry association.
>
> The Association believes that refrigeration and air conditioning contractors are a close natural fit with electrical and communications contractors, as many members of the Association already do this work in addition to their mainstream electrical or communications installation services.

(e) The Special General Meeting of the applicant was held on 17 February 2011 in accordance with the notice given to members. Twenty-one members attended the Special General Meeting. The two resolutions set out in the notice to the members were put to those present at the meeting and both motions were passed unanimously.

10 After having regard to this evidence we were satisfied that the application has been authorised in accordance with the rules of the applicant. We were satisfied that:

(a) The requirements of r 28 were satisfied;

(b) By the participation of the President in making the resolution at the Committee of Management meeting on 19 October 2010, the Special General Meeting can be said to have been called by the President;

(c) Reasonable steps had been taken to accurately inform the members of the intention of the organisation to apply for the registration of the proposed alteration to r 3 of the rules;

(d) Each member had been provided with a notice that set out the proposed alteration to the rules and the reason for their variations; and

(e) Each member had been given notice that they could object to the alterations of the rules by forwarding a written objection to the Registrar no later than 14 days after the date of the meeting.

11 We are also satisfied that the members of the applicant have been afforded a reasonable opportunity to make an objection and we noted that no member of the applicant had objected to the making of the application or to the proposed alteration of r 3.

12 For these reasons we are satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act have been complied with. We are also satisfied that the requirements of s 55(5) of the Act do not arise as there is no evidence before the Full Bench that the proposed new category of membership overlaps with any other registered organisation under the Act. Section 55(4)(e) and s 56(1) of the Act relate to procedural rules for election for office, including secret ballots. The applicant's rules currently provide for the procedures required by these provisions of the Act and the alteration sought to r 3 does not deal with the matter specified in those provisions. Consequently, no issue arises in this matter in relation to the requirements of those provisions of the Act.

13 We are also of the opinion that the amendment sought will be effective. The application refers to a holder of a "Refrigeration and Airconditioning Mechanic's Licence issued under the provisions of the *Electricity (Licensing) Regulations 1991* (WA)". It was clarified during the hearing, and we record here, that those Regulations do not themselves provide for a Refrigeration and Airconditioning Mechanic's Licence. The Regulations prescribe in reg 20(1)(c) for the issuing of a restricted electrical worker's licence (a "restricted licence"). Regulation 20(2) provides that an electrical worker's licence is subject to such restrictions and conditions, if any, as may be specified in the licence. In turn reg 20(4) provides:

(4) Subject to subregulation (5) a restricted licence authorises the holder of the licence to carry out electrical work (including testing) associated with or for the purposes of the holder's trade or calling.

14 Strictly, a Refrigeration and Airconditioning Mechanic's Licence is a type of restricted licence allowing the holder to carry out electrical work associated with refrigeration and airconditioning work. The Electrical Licensing Board has the function pursuant to reg 13(2)(c) of the Regulations to issue a restricted licence and it is in that respect that, in the language of the application, a Refrigeration and Airconditioning Mechanic's Licence is issued under the provisions of the *Electricity (Licensing) Regulations 1991* (WA). We approve the application on that understanding.

2011 WAIRC 00330

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE ELECTRICAL AND COMMUNICATIONS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	APPLICANT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 11 MAY 2011
FILE NO.	FBM 3 OF 2011
CITATION NO.	2011 WAIRC 00330

Result	Application granted
Appearances	
Applicant	Mr K Kutasi

Order

This matter having come on for hearing before the Full Bench on Thursday, 12 May 2011, and having heard Mr K Kutasi on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, orders that:—

The Registrar is hereby authorised to register the alteration to r 3 of the rules of the applicant as published in the Western Australian Industrial Gazette on 23 March 2011 ((2011) 91 WAIG 432).

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Unions—Application for registration—

2011 WAIRC 00397

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2011 WAIRC 00397
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	:	WEDNESDAY, 2 MARCH 2011, THURSDAY, 3 MARCH 2011,
DELIVERED	:	FRIDAY, 10 JUNE 2011
FILE NO.	:	FBM 7 OF 2009
BETWEEN	:	WESTERN AUSTRALIAN PRINCIPALS' FEDERATION Applicant AND STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA (INC) JENNIFER BROZ EDMUND FREDRICK BLACK TREVOR VAUGHAN Objectors

Catchwords	:	Industrial Law (WA) - Section 53(1) application to register new organisation - Objections based on validity - Section 55(4) - Whether applicant could establish application for registration was authorised in accordance with the rules - Whether notice of AGM could be given if no president or inaugural council - Rules invalid - Whether the applicant has less than 200 employees - Validity of joint membership agreements considered - Objections made out
Legislation	:	*Fair Work (Registered Organisations) Act 2009* (Cth) – s 151; *Industrial Relations Act 1979* (WA) – s 6(e), s 7, pt II div 4, s 52, s 53, s 53(1), s 55(4), s 55(4)(a), s 55(4)(e), s 56(1), s 63(1), s 64B, s 64D, s 73(12)
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr T H F Caspersz (of counsel) and with him Ms J McWilliams (of counsel)
Objectors	:	Mr T J Dixon (of counsel)
Solicitors:		
Applicant	:	Jackson McDonald
Objectors	:	Slater & Gordon Lawyers

Case(s) referred to in reasons:

Andricciola v Italian Community of Keilor [1996] 1 VR 421

Aztech Science v Atlanta Aerospace (Woy Woy) [2005] NSWCA 319

Bradley Egg Farm Ltd v Clifford [1943] 2 All ER 378

City of Gosnells v Roberts (1994) 12 WAR 437

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337

Dickason v Edwards (1910) 10 CLR 243

Dimes v Proprietors of Grand Junction Canal (1852) 3 HLC 759; [10 ER 301 (313)]

Firth v Staines [1897] 2 QB 70

Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70

Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] 210 CLR 181

Myer Queenstown Garden Plaza Pty Ltd v Corporation of the City of Port Adelaide (1975) 11 SASR 504

Professional Engineers Case (1984) 65 WAIG 4

Quarante Pty Ltd v The Owners of Strata Plan No 67212 [2008] NSWCA 258

Re Australian Logging Federation (1978) 203 CAR 225

Re Keily; Re Transport Workers' Union of Australia [1992] FCA 158; (1992) 42 IR 4

The Electrical and Communications Association of Western Australia (Union of Employers) [2007] WAIRC 01193; (2007) 87 WAIG 2899

Thompson v Reynolds [2009] WAIRC 00024; (2009) 89 WAIG 287

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] 219 CLR 165

Trustees of the Roman Catholic Church v Ellis [2007] NSWCA 117; (2007) 70 NSWLR 565

Watson v J & AG Johnson Ltd (1936) 55 CLR 63

Western Australian Principals' Federation v State School Teachers' Union of Western Australia (Inc) [2008] WAIRC 01285; (2008) 88 WAIG 1812

Wise v Perpetual Trustee Co Ltd [1903] AC 139

Case(s) also cited:

Cameron v Hogan (1934) 51 CLR 358

Carlton Cricket and Football Social Club v Joseph (1970) VR 487

Dargavel v Cameron [2002] FCA 1234

Postal Delivery Officers Union, AIRC Print S3192 (18 February 2000)

Qantas Supervisors and Salaried Staff Association (1983) 289 CAR 700

Qantas Supervisors and Salaried Staff Association (1982) 275 CAR 113

Society of Australian Surgeons – re Application for registration as an organisation of employees – PR934448 [2003] AIRC 810 (10 July 2003)

The Association of Computer Professionals, Australia (1976) 178 CAR 1932

The State School Teachers' Union of WA (Incorporated) [2008] WAIRC 1597; (2008) 88 WAIG 2234

VIPA – Independent Pilots Group [2009] AIRC 68

Reasons for Decision

SMITH AP:

The Application

1 This application before the Full Bench was made pursuant to s 53(1) of the *Industrial Relations Act 1979* (WA) (the Act). The Western Australian Principals' Federation (the Federation) seeks the authority of the Full Bench to become registered as an organisation of employees. The employees who comprise the Federation are principals and deputy principals of State Government schools in Western Australia. The application was filed on 26 November 2009. The State School Teachers' Union of W.A. (Incorporated) (SSTU) filed a notice of objection on 13 January 2010. On the same day three individuals also filed notices of objection.

2 Attached to the Federation's application is what the Federation says are its rules. Pursuant to r 4 the eligibility for membership of the Federation is described as follows:

> 4. ELIGIBILITY FOR MEMBERSHIP
>
> (a) The Federation shall consist of persons in the following categories:
>
> (i) Principals (as defined in Rule 3) employed or usually employed by the Department as Principals or Deputy Principals (or in the role traditionally designated as Principal or Deputy Principal (howsoever those positions may be described)) in Western Australian Public schools and colleges; and
>
> (ii) Any person elected to an office in the Federation.

3 Principals are defined under r 3:

> 'Principal' includes persons employed in the position of Principal or Deputy Principal or in the role traditionally designated as Principal or Deputy Principal (howsoever those positions may be described) but does not include Heads of Departments.

4 The SSTU's notice of objection sets out four grounds of objection as follows:

> 1. For the purposes of s 55(4) of the *Industrial Relations Act 1979* (WA), there is no valid application for registration as *inter alia* any purported decisions of the Western Australian Principals Federation ('WAPF') made under its Constitution or putative Rules were invalid.
>
> 2. For the purposes of s 53(1), the WAPF is not an unregistered organization consisting of not less than 200 employees associated for the purpose of protecting or furthering the interests of employees.

3. The Rules of the WAPF do not conform with the requirements of s 55(4)(e) of the *Industrial Relations Act 1979* (WA).

4. For the purposes of s 55(5) and the Objects in s 6 of the *Industrial Relations Act 1979* (WA), the State School Teachers' Union of Western Australia (Inc) ('SSTUWA') is a registered organisation whose rules relating to membership enable it to enroll [sic] as a member some or all of the persons eligible, pursuant to the putative rules of the WAPF, to be members of the WAPF. The result is that there will be overlapping eligibility for membership between the SSTU and the WAPF if the application is granted.

5 By consent, an order was made by the Full Bench on 29 January 2010 that paragraphs 1, 2 and 3 of the SSTU's objections be heard as preliminary issues. The grounds of objection raised by each of the individuals do not raise any issues which are of a technical nature and have not been dealt with in the hearing of the preliminary issues.

6 Pursuant to orders made by the Full Bench, the Federation filed a written statement in support of its application in defence of the preliminary objections and the Federation and the SSTU filed written submissions identifying the relevant issues of law.

WAPF (No 1)

7 In the matter of an application ***Western Australian Principals' Federation v State School Teachers' Union of Western Australia (Inc)*** [2008] WAIRC 01285; (2008) 88 WAIG 1812 (***WAPF (No 1)***) the Full Bench of this Commission heard a previous application by the Federation to register a new organisation. The application was dismissed on 20 August 2008 because the Federation could not establish the application for registration was authorised in accordance with the rules of the Federation. In ***WAPF (No 1)*** there were two possible constitutions of the Federation before the Full Bench. One was a constitution in the form of Exhibit E (which the objector contended was the constitution) and another was in the form of Attachment B (which the Federation contended was the constitution). The Full Bench determined that Exhibit E was the constitution because the Federation could not establish on the balance of probability that Attachment B was, in fact, the constitution: ***WAPF (No 1)*** [107]. The relevant consequence of this finding was that the differences between the documents were that the Federation could not establish on the balance of probability that the inaugural council and the officers of the Federation had been validly appointed. This was because the following clauses of Exhibit E provide as follows:

(a) 14. COUNCIL

14.1 The inaugural Council shall consist of up to twelve (12) members comprising at least four (4) representatives from each of the primary and district high school sectors.

14.2 Thereafter Council shall consist of twelve (12) members comprising at least four (4) members from each of the primary, secondary and district high school sectors.

14.3 The inaugural Council will be constituted by the following persons:

(a) Name

(b) Name

(c) Name

(d) Etc

…

(b) 15. OFFICERS OF THE FEDERATION

15.1 The Officers of the Federation shall be the President, Vice President and Treasurer. The Vice President shall be drawn from a different sector to the sector of which the President is a member.

15.2 The inaugural Officers of the Federation will be:

(a) President - Name

(b) Vice President - Name

(c) Treasurer - Name

15.3 The inaugural Officers will hold office until an election is held under clause 14.6 or until 31 December 2008, whichever is the earlier.

(c) 16. EXECUTIVE

16.1 The Executive shall consist of:

(a) President;

(b) Vice-President

(c) Treasurer;

(d) An executive member from the primary sector;

(e) An executive member from the district high school sector; and

(f) An executive member from the secondary sector.

16.2 The inaugural executive members representing the sectors shall be:

(a) Executive member primary sector - Name

(b) Executive member district high school sector - Name

(c) Executive sector secondary sector - Name

16.3 The inaugural executive members representing the sectors will hold office until an election is held under clause 14.6 or until 31 December 2008, whichever is the earlier

16.4 Members of the Executive shall attend all meetings of the Executive and Council and carry out all resolutions of the Executive and Council as the case may be.

16.5 Subject to the Constitution, the Executive shall, between meetings of the Council, have power to conduct and manage the affairs of the Federation in accordance with the Constitution.

8 The material difference between cl 14, cl 15 and cl 16 in Attachment B and these clauses in Exhibit E was that Exhibit E simply referred to each office of the executive and the council by the word 'Name' and Attachment B stated the names of each office holder in each clause. For example, in Attachment B Noel Strickland was named as a member of the inaugural council in cl 14.3, the president in cl 15.2 and as the president as part of the executive in cl 16.1.

9 At all material times, the Federation is and remains an unincorporated association that was not bound by any statutory requirement in regard to the contents of its constitution, the holding of meetings or to the procedures to be followed by it. It is common ground that the Federation is and was a body of members who had and have agreed to contractually bind themselves under the constitution as an association.

The Evidence

10 Noel James Strickland gave his evidence in chief in a witness statement. In his witness statement he stated as follows:

(a) He is the president of the Federation and the Federation was formed on 18 January 2007.

(b) As a result of the decision of the Full Bench in ***WAPF (No 1)*** the Federation was left in the position where:

(i) The rules purported to be adopted at a special general meeting held on 6 March 2007 were not the rules of the Federation;

(ii) It was not clear whether the inaugural council of the Federation had been validly appointed; and

(iii) There was some doubt as to the content of the constitution of the Federation.

(c) Under cl 12.1 of its constitution, the Federation must hold an annual general meeting (AGM) each calendar year, not more than four months after the end of each financial year.

(d) On 9 September 2008, in his capacity as a member of the Federation, he gave notice to the president of the Federation pursuant to cl 12.6 of the constitution proposing nine resolutions to be put to the 2008 AGM. These resolutions were seconded by another member of the Federation, Nick Jakowyna.

(e) The material parts of the notice stated as follows:

To: The President of the Western Australian Principals' Federation (the 'Federation')

We the undersigned:

NOEL STRICKLAND (as proposer) and NICK JAKOWYNA (as seconder), both financial members of the Federation

Hereby give notice pursuant to clause 12.6 of the Constitution of the Federation that we propose the resolutions set out hereunder to be put to the Annual General Meeting of the Federation which, pursuant to clause 12.1 of the Constitution, is required to be held on or before 31 October 2008.

RESOLUTIONS TO BE PASSED

1. Mr Noel Strickland be and is elected as Chairperson of this Annual General Meeting.

2. The resolutions purported to have been passed at the Special General Meeting on 6 March 2007 are hereby revoked and have no force and effect.

3. The document headed 'Constitution of the Western Australian Principals' Federation' **attached to this notice marked 'A'** is confirmed to be a true copy of the document adopted as the Constitution of the Federation at a meeting of the inaugural members of the Federation held on 18 January 2007 and is confirmed and ratified to be the Constitution which is and was at all relevant times binding on members of the Federation (hereafter referred to as the Constitution).

4. The Constitution is amended with retrospective effect to 18 January 2007 by:

a. deleting clause 14.6; and

b. deleting the words 'until an election is held under clause 14.6 or' and ', whichever is the earlier' from clauses 14.5 and 16.3.

5. The inaugural Council of the Federation upon its formation is confirmed to have been:

a. Noel Strickland, who is also the inaugural President;

b. Ken Austin, who is also the inaugural Vice President;

c. Nick Jakowyna who is also the inaugural Treasurer;

d. Denise Hilsz who is also the inaugural Executive Member- Primary Sector;

e. Peter Fitzgerald who is also the inaugural Executive Member - District High School Sector;

f. Neil Hunt who is also the inaugural Executive Member - Secondary Sector;

g. Kevin Brennan; and

h. Peter Holcz.

6. The decision of the inaugural Council to appoint Ron Bamford to replace Peter Holcz as a member of Council from 27 March 2008 is hereby ratified and affirmed with retrospective effect from and after 27 March 2008.

7. Clause 14.3(h) of the Constitution is hereby amended to delete the name Peter Holcz and replace it with the name Ron Bamford with retrospective effect from and after 27 March 2008.

8. All resolutions passed by the inaugural Council and inaugural Executive are hereby ratified and affirmed with retrospective effect to the date on which they were passed.

9. The Constitution as amended is repealed and replaced in its entirety by the 'Rules of the Western Australian Principals' Federation' in the form of the document attached hereto marked 'B', such Rules to take effect from the conclusion of this meeting.

(Relevantly the document which was attached as Attachment A to the notice as the constitution of the Federation was not a copy of Exhibit E but a copy of Attachment B which was found not to be the constitution of the Federation in ***WAPF (No 1)***).

(f) A council meeting of the Federation was held on 9 September 2008. Mr Strickland attended the meeting along with Kevin Brennan, Neil Hunt, Nick Jakowyna and Ron Bamford. Peter Fitzgerald attended by telephone link. Ken Austin and Denise Hilsz tendered their apologies. At this meeting Mr Strickland informed those present that a council meeting would be held on 17 September 2008 to consider seven resolutions to, among other things, call their 2008 AGM in accordance with the constitution of the Federation. He then handed out a copy of the notice of meeting of council to be held on 17 September 2008 to those attending the meeting.

(g) In the notice to council members dated 9 September 2008, notice was given by Noel Strickland as the president of the Federation that a meeting of council would be held on 17 September 2008. On his instruction, Joan Weston, the administrative officer of the Federation, emailed the notice of the council meeting (and all attachments) to all of the other council members who either attended by telephone or who were not present. The relevant items on the agenda were as follows:

The meeting has been called to consider and, if so decided, pass the following resolutions:

1. An Annual General Meeting of the Federation will be called at 4:00 pm on 20 October 2008 at the Theatre, Perth Zoological Gardens, 20 Labouchere Rd in South Perth.

2. The business of the Annual General Meeting shall be to:

1. Receive and confirm the minutes of the previous AGM

[As this is the first AGM of the Federation there are no such minutes.]

2. Receive and approve the Annual Report and Audited Balance Sheet and Financial Statements to 30 June 2008.

3. Receive and confirm the declaration of the Poll for elections of the Federation.

[No Poll will have been conducted, so *no declaration will be made.]*

4. Consider and vote on the nine resolutions proposed by Noel Strickland and seconded by Nick Jakowyna pursuant to a notice given by them in accordance with Clause 12.6 of the Constitution, which notice is attached hereto marked '1'.

5. Appoint Darelle Pola BCom, CPA ASA as the auditor of the Federation.

3. Council hereby appoints Darelle Pola BCom, CPA ASA as the auditor of the Federation for the purposes of finalising the Audited Balance Sheet and Financial Statements of the Federation to 30 June 2008.

4. The membership list attached hereto marked '2' is confirmed to be the list of all current members of the Federation.

5. A Notice of Annual General Meeting substantially in the form of the document attached hereto marked '3' shall be sent to all members on or before 19 September 2008 by mail with a copy to be attached to an email to members who have elected to receive notices by email.

6. Council authorises Noel Strickland, as President, to settle the final form of the Notice of the Annual General Meeting and to sign the Notice on behalf of Council.

7. Council hereby approves the draft Proxy Form attached hereto marked '4' for use at the Annual General Meeting and authorises the President to include a copy of that form with the Notice of Annual General Meeting when that is sent out.

(h) Mr Strickland attended the meeting of council held on 17 September 2008. There was a quorum and council passed all seven resolutions set out in the notice. (The notice of the AGM referred to in resolution 5 contained a copy of the notice and attachments set out in [10(e)] of these reasons.)

(i) On 18 September 2008, Mr Strickland approved and caused to be sent to members a notice for the 2008 AGM to be held on 20 October 2008. The notice provided members with an agenda of the matters that would be

considered at the AGM as well as notice of the resolutions that he and Nick Jakowyna had proposed. The notice of the AGM was signed by Noel Strickland as president and stated that the AGM would be held on 20 October 2008 and the material part of the agenda for the meeting was as follows:

1 Receive and confirm the minutes of the previous AGM

[As this is the first AGM of the Federation there are no such minutes.]

2. Receive and approve the Annual Report and Audited Balance Sheet and Financial Statements to 30 June 2008.

3. Receive and confirm the declaration of the Poll for elections of the Federation.

[No Poll will have been conducted, so no declaration will be made.]

4. Consider and vote on the nine resolutions proposed by Noel Strickland and seconded by Nick Jakowyna pursuant to a notice given by them in accordance with Clause 12.6 of the constitution, which notice is attached hereto.

In the notice all members were informed they were entitled to attend the meeting in person or by proxy and that a proxy form had been approved by council and was attached to the notice and should be returned to the president of the Federation by no later than close of business on 16 October 2008. (Attached to the notice was a copy of the notice and attachments set out in [10(e)] of these reasons.)

(j) On his instruction, Joan Weston posted the notice of the AGM and attachments to every member of the Federation at the member's nominated address and also emailed a scanned copy of the notice and all the attachments to the members at their nominated email address.

(k) The 2008 AGM was held on 20 October 2008. Twenty-six members attended in person and 311 members were present by proxy. All resolutions proposed at the AGM were duly approved. In particular, the AGM resolved to replace Exhibit E with Attachment A as the constitution and then to adopt the rules of the Federation to entirely replace the constitution (which was Attachment A) from the conclusion of the meeting. A copy of these rules was filed in the Commission and attached to this application.

(l) On 5 November 2008, pursuant to the powers of the president to call a special meeting of council in r 19(h) of the rules, Mr Strickland called a special meeting of council. He instructed Joan Weston to send a copy of a notice of a special council meeting by email to all the council members. The purpose of the meeting was to pass resolutions to lodge with the Commission an application to register the Federation as an organisation under the provisions of the Act.

(m) On 12 November 2008, a special council meeting was held. A quorum was present and council duly passed all of the proposed resolutions.

(n) On 12 November 2009, under the authority given to him at the special council meeting held on 12 November 2008, Mr Strickland approved and caused to be sent out to members a notice that the Federation intended to file its application for registration as a trade union under the Act.

(o) On 12 November 2009, Joan Weston posted the notice of application to every member of the Federation at the member's nominated address. On 17 November 2009, Joan Weston emailed all members at their nominated email address attaching a copy of the rules.

(p) The Federation currently has 721 members. Mr Strickland says therefore in accordance with s 53(1) of the Act the Federation may be registered by authority of the Full Bench.

(q) On 24 November 2009, Mr Strickland instructed Jackson McDonald Lawyers to file the application on behalf of the Federation for registration as a trade union under the Act. He did so under the authority given to him at the special council meeting of 12 November 2008.

11 When Mr Strickland gave oral evidence he stated the following:

(a) After the decision of ***WAPF (No 1)*** although he was aware that all the business of the Federation conducted between 6 March 2007 and 20 August 2008 had been found to be invalid by ***WAPF (No 1)***, they were left confused by the Full Bench's decision. In particular he was confused as to whether the constitution of the Federation was Attachment B or Exhibit E in ***WAPF (No 1)***. However the decision of ***WAPF (No 1)*** the document headed 'constitution' provided to members of council and to members of the Federation prior to the AGM in 2008 was a copy of Attachment A (which had been found by ***WAPF (No 1)*** not to be the constitution of the Federation). From and after the decision of the Full Bench in ***WAPF (No 1)*** he continued to act pursuant to the terms of Attachment A.

(b) He explained why the eligibility for membership rules of the Federation had been narrowed in the rules filed in this application. Exhibit E and Attachment A contemplated that school administrators were eligible for membership. As they have nothing to do with the role of a principal this category was excluded in the rules. He said when they checked the list of membership prior to the AGM that there were no registrars or other administrators other than deputy principals on the list.

(c) He conceded that at the council meeting held on 17 September 2008 council were acting as the council appointed under the constitutional document which was attachment A. He also agreed that the members of the council at that time were the inaugural members of the council. In the minutes of the council meeting held on 17 September 2008 it is recorded that Mr Strickland informed the meeting that it was not clear that council must call the AGM but he believed it was appropriate for council to do so to ensure the AGM was held as required, particularly given

the notice of proposed resolutions that he and Nic Jakowyna had tabled. It is also recorded that he explained that under cl 12.6 of the constitution that the proposed resolutions were able to confirm the constitution that was adopted on 18 January 2007 (Attachment A), to confirm that appointment of council and officers of the Federation, to remedy procedural defects identified by the Full Bench in ***WAPF (No 1)*** and to introduce new rules to entirely replace the constitution.

(d) One of the resolutions considered at the meeting of council on 17 September 2008 was for the council to authorise Noel Strickland, as president, to settle the final form of the notice of the AGM and to sign the notice on behalf of the council. This resolution was carried unanimously. The council also unanimously approved a copy of the draft proxy form. At that time the total number of members of the Federation was close to 760.

(e) He readily conceded that no business was conducted by the council by reference of Exhibit E.

(f) Resolution 5 at the AGM was put forward by Mr Strickland on the basis there was some confusion as to the appointment of the initial office bearers and the members of council and the resolution was to confirm the appointment of various people who were initially elected on 18 January 2007 to their respective positions (Exhibit B, page 265). When cross-examined about this resolution, Mr Strickland conceded that the requirement under the Exhibit E constitution that the original council had to be comprised of four members from the primary sector and four members from the district high school sector was not addressed. As to resolution 8, which was passed to ratify and affirm all resolutions passed by the inaugural council and the inaugural executive with retrospect to the effect of the date on which they were passed, Mr Strickland agreed that there was no notice given to the members of exactly what were those particular decisions that were subject of resolution 8. He also conceded that the resolutions referred to by the inaugural council were resolutions passed under the original constitution as well as the rules that were adopted in March 2007 (which were found to be invalid by the Full Bench in ***WAPF (No 1)***).

(g) When resolution 9 was put at the AGM which was to replace the Attachment A constitution with the rules, Mr Strickland explained to the meeting that the resolution was in the opinion of council, a resolution that required, under the provisions of cl 31 of the constitution at least 75% of members present in person or by proxy to vote in favour in order to pass the resolution. When the resolution was put to the meeting, all 27 persons present at the AGM voted in favour of the resolution and of the 307 people who voted by proxy only three of those voted against the resolution and one abstained from the vote. The minutes record that one who abstained from the vote voted by proxy. When asked whether the persons who returned the proxies were checked against the Federation's database of members Mr Strickland said he understood that that occurred. When asked about whether members of the Federation voted at the AGM were direct members as opposed to members who had joined through the joint membership agreements, Mr Strickland said that the only direct members were inaugural members. Mr Strickland then said that most of the inaugural members had signed the joint membership agreements and they were paying the fees through the joint membership agreements and that all other persons who voted at the AGM were considered to be a member of the Federation as a result of entering into the joint membership agreements.

(h) The list of members that they kept had the names and the school that the person is at and their role. He did not personally check the computer database against the list of persons who were eligible to vote.

(i) As to the payment of membership fees under the joint membership agreements, Mr Strickland said that (with the exception of the Western Australian Secondary School Executive Association (WASSEA) agreement until recently), every quarter an amount is paid from each associated body to the Federation. Each of the bodies are billed on the number of members that the Federation has and each associated body pays the fee for the members. It is up to the associated body to chase the fees. Recently WASSEA changed to making quarterly payments for all members. Prior to that, they made payments for each individual member of WASSEA.

(j) All applications for membership of the Federation are required by cl 6.3 and cl 6.4 of the constitution to be provided to Mr Strickland, as president of the Federation, for approval. When asked about the procedure he applies to approve an application he said he had never rejected any application for membership but has not notified any applicant in writing of his decision to approve an application as required by cl 6.5 of the constitution. When assessing whether each application for membership the person applying was eligible, Joan Weston checked whether each person was a current deputy principal or a current principal.

(k) Membership fees of the joint memberships were solely determined by council. He also said that no member had ever been removed as a member on the basis that they were six weeks in arrears of the payment of annual subscription.

(l) Mr Strickland conceded that the rules applied a different provision for deeming a person to have resigned than the requirements of the constitution. Under the rules where a person resigns their membership from an associated body the membership of the Federation could continue. However under the constitution, if a person resigned from an associated body they were deemed to have resigned from the Federation. Mr Strickland said however he did not believe that anyone had resigned independently but he was unable to say how many people had resigned from associated bodies in the period from February 2007 until the 2008 AGM.

12 In cross-examination Mr Strickland was taken to the minutes of a general meeting of council of the Federation held on 28 October 2009. One of the purposes of that meeting was to amend r 44 (Transitional Arrangements) of the rules of the Federation. One of the amendments was to amend r 44(g) (which provided that the inaugural council including the executive and the president would hold office until 31 December 2009) to provide that members of the executive and the inaugural council would hold office until 31 December 2010. This amendment to the rules was made by council at the meeting held on

30 November 2009. The resolution was carried unanimously. An election of office holders then occurred in late 2009 for each of those offices.

Particulars of the SSTU Objections

13 Pursuant to orders made by the Full Bench on 29 January 2010, the SSTU particularised its grounds of objections as follows:

l(a) There is no valid application for registration for the purposes of s 55(4) of the *Industrial Relations Act 1979*

Particulars

(i) The operative Constitution of the WAPF was Exhibit E in FBM 3 of 2007: see *Re Western Australian Principals' Federation* [2008] WAIRComm 1285 (20 August 2008) for example at [107]-[108] on p 42[1]; *cf* [3] of the Witness Statement of Mr Strickland dated 25 November 2009.

(ii) There was no 'Council' of the WAPF which had been validly appointed, constituted or elected in accordance with the operative Constitution: see *Re Western Australian Principals' Federation* [2008] WAIRComm 1285 (20 August 2008) for the reasons set out at [107]-[116]; *cf* [3(b)] of the Witness Statement of Mr Strickland dated 25 November 2009. An election was required to elect a Council and Executive in accordance with clauses 22 and 23 (and clause 14.6 if relevant): *Re WAPF* at [109]-[112]. Such an elected Council was required to be constituted as provided in clause 14.2 of the operative Constitution: *Re WAPF* at [113]-[114]

(iii) As a result of (i) and (ii) above, the Full Bench found in *Re WAPF* (including at [115]-[116], [132] and [157) [sic] no valid business could have been transacted at the special general meeting on 6 March 2007, including the adoption of the Rules.

(iv) By reason of (i) to (iii) above, the Notices of Meeting and subsequent Resolutions made by 'Council' relating to *inter alia* the meetings of 26 August 2008, 9 and 17 September 2008 (referred to from [5]-[12] of Mr Strickland's Statement) were invalid.

(v) Further, as there was *inter alios* no Council President validly appointed or elected in accordance with the operative Constitution of the WAPF, all the relevant decisions made and actions carried out by 'Council' or members of the 'Executive' leading up to and including at least those made or carried out in relation to the putative AGM on 20 October 2008 were invalid.

(vi) By reason of (i) to (v) above, the AGM on 20 October 2008 was not a valid meeting of the WAPF under its operative Constitution.

(vii) Further or in the alternative, as the voting on the Motions at the putative AGM were not carried out in accordance with the relevant provisions of the operative Constitution (including *inter alia* clauses 12.5, 12.6 and 21.2), the resolutions made on 20 October 2008 were invalid and of no effect.

(viii) Further or in the alternative, the matters purportedly resolved at the putative AGM (including *inter alia* Resolutions [2] to [8]) were not capable of 'ratification' or having the retrospective effect intended in the circumstances. To the extent that the matters purported to be 'ratified' or decided upon were otherwise necessary for the purposes of the application, then the putative resolutions were ineffective in curing the existing invalidities.

(ix) Further or in the alternative, Resolution 8 was not the subject of sufficient explanation in the Notice required pursuant to *inter alia* clause 12.6 of the Constitution: *cf Re WAPF* at [156]. To the extent that the matters purported to be 'ratified' or 'affirmed' were otherwise necessary for the purposes of the application, then the resolution was ineffective in curing existing invalidities.

(x) For any or all of the reasons set out in (i) to (ix) above, it follows that the putative members of the WAPF did not validly authorise the replacement of the Constitution with the Rules at the AGM on 20 October 2008.

(xi) For any or all of the reasons set out in (i) to (x) above, the application to the Commission for Registration authorised by 'Council' at the Special Council Meeting purportedly constituted under the Rules on 12 November 2008 was not validly authorised, with the consequence that there was no valid application for the purposes of s 55(4) of the IR Act.

1(b) The Western Australian Principals' Federation is not an unregistered organisation consisting of not less then [sic] 200 employees associated for the purpose of protecting or furthering the interest of employees for the purpose of s 53(1) of the *Industrial Relations Act 1979*[2]

Particulars

(i) The WAPF consists of no directly enrolled members other than the founding members present at the meeting on 18 January 2007 where the Constitution (being Exhibit E in FBM 3 of 2007) was adopted.

(ii) Any additional membership of the WAPF purports to exist only by way of joint membership agreements with various associations (including *inter alios* the WAPPA, the WASSEA, the WADHSA, and the APF), in circumstances where the additional members were existing members of those other associations (which in some cases had different eligibility criteria to the WAPF, and no power under their constitutions to enter into such agreements).

(iii) The joint membership agreements were purportedly entered into by Council pursuant to clause 8.3 of the Constitution. For the reasons particularised in Ground l(a) above, there was no Council in existence at the material times with the consequence that:

a. the joint membership agreements are void and of no effect; or further or in the alternative

b. the level of any subscription fees payable to the WAPF was subject to agreement with the relevant association and otherwise contrary to the requirements in clauses 10.2 and 10.3 of the Constitution, the consequence of which is set out in clause 10.4

(iv) In relation to the matters in (iii) above, nothing at the AGM of 20 October 2008 (including Resolution 8) purported to, or could in the circumstances, cure the resulting defects or invalidities.

(v) Further or in the alternative, the application was made at a time following the purported adoption of the Rules at the AGM on 20 October 2008. No joint membership agreements were made, ratified or otherwise novated by the WAPF since that time.

(vi) As a result of the matters set out in (i) to (v) above, the WAPF had enrolled less than 200 members at the time of the application on or about 26 November 2009.

(vii) Further or in the alternative, the joint membership agreements purport to create membership 'under the rules of the Federation';

a. with no requirement (or resultant liability) to pay subscriptions to the Federation: eg clauses 3(a) and 4(a)[3];

b. with no requirement to provide the details required to notify members under the Constitution or Rules, or to verify eligibility to join;

c. at (any) level of annual subscription, determined by agreement with the relevant association: eg clause 3(c);

d. in circumstances where the member is able to cancel membership under the arrangement by giving notice to the association (and not the WAPF).

(viii) The proper construction of s 53 of the IR Act requires that the words *'an unregistered organisation consisting of not less then* [sic] *200 employees associated for the* [relevant] *purpose'* be understood as requiring at the very least an association of persons who have agreed to and exhibited an intention to create legal relations *inter se:* see for example *Re WAPF* at [70]-[71]

(ix) The membership by way of the joint membership agreements does not, in the circumstances including as set out in (vii) above, satisfy the requirements on a proper construction of section 53 of the IR Act.

1(c) The Rules of the Western Australian Principals' Federation do not comply with the requirements of s 55(4)(e) of the *Industrial Relations Act 1979*[4]

Particulars

(i) Clause 44 of the Rules required an election to have taken place in 2009. This would have at least involved:

a. Council appointing a returning officer at Council's 'first meeting after the adoption of [the] Rules': Rule 44(i); and

b. The calling for nominations for Council not later than 1 September 2009: Rule 31(i).

(ii) No election took place in 2009, and the steps referred to in (i) above did not take place.

(iii) On 28 October 2009, a General Meeting of Council was notified of an intention to amend Rule 44 pursuant to Rule 42. Council's vote on the proposed resolutions was to take place on 25 November 2009: *cf* Rule 42(b).

(iv) There was no reference in the notice sent to members to the failure (on 12 November 2008) of Council to appoint a returning officer, or any attempt to overcome that failure.

(v) An AGM held on 30 November 2009 purported to resolve *inter alia* to amend the Rules to in effect dispense with the requirement for elections in 2009 and appoint the members of the Council (including 5 new members) and the Executive until at least 2011.

(vi) There was no power in the Council the AGM to amend Rule 44, which applies 'notwithstanding anything provided elsewhere in the Rules', in the manner it did by way of Resolution 4 on 30 November 2009.

(vii) To the extent that the Rules permit (or have been interpreted by Council to so permit, pursuant to Rule 19(e)(xiv)) elections to be dispensed with by rule amendment voted on by a bare majority at an AGM, including in the manner described above, then the Rules do not comply with ss 55(4)(e) and 56(1) of the IR Act. (footnotes omitted)

The Chronology

14 The following is a chronology of material meetings and events:

(a) On 18 January 2007, there was a meeting of the inaugural members of the Federation. At the meeting, inaugural 'office bearers' and members of the 'council' and the 'executive' of the Federation were appointed by the members. The members then 'adopted' a constitution, later described and referred to as Attachment B in ***WAPF (No 1)***. It

included in specified places the names of the inaugural 'office bearers' and the members of the 'council' and the 'executive'.

(b) On 20 February 2007, there was a meeting of the 'council' of the Federation. The 'council' resolved to call a special general meeting for the purpose of making an application to the Commission for the registration of the Federation.

(c) On 26 February 2007 and in accordance with the resolution and the constitution, notice was sent by email to the members of the Federation of a special general meeting on 6 March 2007, primarily to replace the constitution with the rules of the Federation and to authorise the making of an application to the Commission for registration.

(d) A 'special general meeting' was duly convened on 6 March 2007. The meeting 'authorised' the replacement of the constitution with the rules and the making of the application to the Commission. The rules were as stated in Exhibit J in ***WAPF (No 1)***.

(e) An application for registration was filed in the Commission on 9 March 2007.

(f) Joint membership agreements in February/March 2007 were entered into by the Federation with WASSEA, Western Australian District High School Administrators' Association (WADHSAA) and Western Australian Primary Principals' Association (Inc) (WAPPA).

(g) ***WAPF (No 1)*** was handed down by the Full Bench on 20 August 2008.

(h) On 9 September 2008, there was a meeting of the 'council' of the Federation.

(i) On 17 September 2008, there was a meeting of 'council' of the Federation at which it was resolved to:

(i) authorise Noel Strickland, as 'president', to settle the final form of the notice of the AGM and to sign the notice on behalf of council;

(ii) approve the draft proxy form.

(j) On 20 October 2008, an 'AGM' was held at which a number of resolutions passed which included:

(i) accepting Attachment A as the constitution (resolution 3);

(ii) replacing the Attachment A constitution with new rules (Attachment B) (resolution 9).

(k) On 28 October 2009, a general meeting of 'council' was held at which it was resolved to amend r 44 which changed the requirement to hold elections from 2009 to 2010.

(l) On 12 November 2008, there was a special 'council' meeting. The meeting authorised the application to register the Federation as an organisation.

(m) This application for registration was filed in the Commission on 26 November 2009.

(n) On 30 November 2009, an 'AGM' was held at which the resolutions made by council to amend r 44 on 28 October 2009 were ratified.

The SSTU's Submissions

Objection 1 – There is no valid application for registration for the purposes of s 55(4) of the Act

15 In the SSTU's opening outline of submissions and oral submissions the SSTU makes the following submissions:

(a) The Full Bench in ***WAPF (No 1)*** found that the operative constitution of the Federation was Exhibit E: [107] – [108]. The significance of the Full Bench's finding is inter alia that Exhibit E, which was adopted at the inaugural meeting of the Federation on 18 January 2007:

(i) was ineffective to establish an inaugural council, identify the members of that body or provide any means for an inaugural council to be simply appointed;

(ii) the adoption of the constitution did not appoint an inaugural council, inaugural officers, nor an executive.

(b) The inaugural council was also required to be constituted as provided for in cl 14.2 of Exhibit E: ***WAPF (No 1)*** [113] – [114]. Consequently there was a failure to nominate any persons to occupy the positions on the council, and accordingly there was no president, no positions filled on the executive and no officers of the Federation. Nor was the inaugural council established on 18 January 2007 because it did not have four members from each of the primary, secondary and district high school sectors as required by cl 14.2 of Exhibit E. It was the evidence of Mr Strickland that this issue had never been addressed. In relation to the high school sector, one of the resolutions passed at the 2008 AGM was one of the members of inaugural council was substituted for Mr Bamford and he was from the same sector, but that only brought the number to three so they did not satisfy cl 14.1 or cl 14.2. Even if there was a council it failed on that provision of Exhibit E because there is a requirement that there be four members of council from each sector.

(c) The consequence of the adoption of Exhibit E was that an election was required to elect the council and executive in accordance with cl 22, cl 23 and cl 14.6: ***WAPF (No 1)*** [109] – [112]. This did not occur.

(d) After the decision in ***WAPF (No 1)*** was delivered on 20 August 2008, Mr Strickland on 9 September 2008 purported to give notice to 'the president' of the Federation pursuant to cl 12.6 of the constitution proposing nine resolutions be put to the 2008 AGM. On the evidence of Mr Strickland, the Federation was left in a position where it was not clear whether the inaugural council of the Federation had been validly appointed. To the contrary, the situation could not have been clearer, the Full Bench had found that the constitution which was adopted at the inaugural meeting was ineffective to establish an inaugural council: ***WAPF (No 1)*** [108]. This

finding had many consequences which gave rise to further invalidities. Mr Strickland has also given evidence that there was some doubt as to the content of the constitution of the Federation. To the contrary, the clear finding of the Full Bench was that the constitution was Exhibit E. There was no attempt to hold an election.

(e) Notwithstanding the finding by the Full Bench that the constitution was Exhibit E, the Federation proceeded as if Attachment A was the operative constitution and that the council and officers (somehow) existed. There was no attempt to call an election. The constitution recognised through the council that there were no appointees and certainly there was no president. However immediately after ***WAPF (No 1)*** the council met, Mr Strickland took his place as president and they continued to transact business in order to remedy what they saw as issues that had arisen. The Federation has proceeded on an erroneous basis. The doctrine of ratification cannot cure what occurred. Where you have a failure to have a properly convened meeting in accordance with the rules of an organisation no valid business can be transacted at a meeting of the organisation and all resolutions made are invalid and of no force or effect: ***Andricciola v Italian Community of Keilor*** [1996] 1 VR 421.

(f) By applying the same reasoning as that of the Full Bench in ***WAPF (No 1)*** to the present case, the consequences of this error are that the putative members of the Federation did not validly authorise the replacement of the constitution with the rules at the AGM on 20 October 2008:

(i) The notices of meeting and subsequent resolutions made by 'council' relating to inter alia the meetings on 26 August 2008, 9 and 17 September 2008 were invalid. No valid business could have been transacted at these meetings as there was no council: ***WAPF (No 1)***; ***Myer Queenstown Garden Plaza Pty Ltd v Corporation of the City of Port Adelaide*** (1975) 11 SASR 504 (528) (Wells J).

(ii) As there was inter alios no president or council members validly appointed or elected in accordance with Exhibit E, all the relevant decisions made and actions carried out by 'council' or members of 'the executive' leading up to and including at least those made or carried out in relation to the putative AGM on 20 October 2008 were invalid.

(iii) As a result of the failure to appoint or elect the council, the AGM on 20 October 2008 could not have been a valid meeting of the Federation under Exhibit E.

(iv) As the voting on the motions at the putative AGM on 20 October 2008 was not carried out in accordance with the relevant provisions of Exhibit E, the resolutions made on 20 October 2008 were invalid and of no effect. Exhibit E obviously proceeds on the basis of a valid appointment or election of a council and a president prior to the AGM. Clause 21 of Exhibit E requires that proxy forms be approved by council and the votes be directed to the president. This could not have occurred. Clause 11.2, cl 12 and cl 13 the constitution required a council to be in place prior to an AGM taking place. These provisions also contemplate that the president be properly appointed. In cl 12.6 of Exhibit E, the council sets the agenda for an AGM, and under cl 12.6 a member wishing to propose a motion must give notice in writing to the president of a Federation. Unless you have a president in place, a motion cannot be directed to anyone.

(v) The matters purportedly resolved at the putative AGM were not capable of 'ratification' or having a retrospective effect intended in the circumstances. To the extent that the matters purported to be 'ratified' or decided upon were otherwise necessary for the purposes of the application, the putative resolutions were ineffective in curing the existing invalidity.

(1) Resolution 3 purported to change what occurred at the inaugural meeting on 18 January 2007. The 'ratification' sought in resolution 3 was to in effect change history as found by the Full Bench in ***WAPF (No 1)***. This is not within the ambit of the doctrine of ratification.

(2) The concept of ratification is properly part of the law of agency. To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sort to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and, thirdly, at the time of the ratification the principal must be legally capable of doing the act himself: ***Firth v Staines*** [1897] 2 QB 70 (75).

(3) An unincorporated association has no legal personality. For legal purposes an unincorporated association is nothing more than the aggregate of all its members at a particular time: ***Watson v J & AG Johnson Ltd*** (1936) 55 CLR 63 (67) (Latham CJ), (68) (Starke J), (71) (Dixon J); ***Trustees of the Roman Catholic Church v Ellis*** [2007] NSWCA 117; (2007) 70 NSWLR 565 [48] – [51]. One of the fundamental rules is that a principal cannot ratify a contract, unless at the time the contract was entered into, the principal was in a position to enter into the contract on its own behalf. Ratification is impossible unless 'the principal' was in existence at the date of the act sought to be ratified. It follows that there can be no 'ratification' of the acts done by the inaugural members (ie, the principals) of the Federation by a different group of members in 2008.

(g) This is not a case where a duly appointed agent has exceeded authority in any event. The acts sought to be 'ratified' involved a valid adoption of the constitution in 2007.

(h) The members at the 2008 AGM would not have had the authority to adopt the constitution as inaugural members or to appoint an inaugural council or executive: cl 6.1, cl 14.4, cl 14.8 and cl 22.1. Accordingly, there is no power to ratify where the putative principal (members at the AGM) did not have the legal capacity to do the acts at the relevant time. An act that is void at its inception is not capable of ratification.

(i) The AGM did not have the power to ratify the acts it purported to. There is no express power given under Exhibit E to the AGM to ratify such acts retrospectively: ***Re Keily; Re Transport Workers' Union of Australia*** [1992] FCA 158; (1992) 42 IR 4 (17 – 18) (Keely J): cl 14.11.

(j) Resolution 3 was intended to effect the change from Exhibit E to Attachment A. The notice of meeting did not however address cl 31 of Exhibit E which required a notice of motion of the amendment to clearly set out the effect of the change: ***WAPF (No 1)*** [142] – [157]. No attempt was made to address the changes.

(k) Similarly, resolution 8 was not the subject of sufficient explanation in the notice. To the extent that the matters purported to be 'ratified' or 'affirmed' were otherwise necessary for the purposes of the application, then the resolution was ineffective in curing existing invalidities. A principal at the time of ratification must have 'full knowledge' of the material facts and circumstances pertaining to the agent's unauthorised act in any event: ***Quarante Pty Ltd v The Owners of Strata Plan No 67212*** [2008] NSWCA 258 [109] – [111].

(l) The persons voting at the 2008 AGM were not members of the Federation for the reasons which are addressed in ground 1(b) of the SSTU objections.

(m) For these reasons:

(i) The rules of the Federation could not have been validly adopted under resolution 9 at the 2008 AGM; and

(ii) The application to the Commission for registration authorised by 'council' at the special council meeting purportedly constituted under the rules on 12 November 2008 was not validly authorised;

with the consequence that there was no valid application for the purposes of s 55(4) of the Act.

Objection 2 – The Federation is not an unregistered organisation consisting of not less than 200 employees associated for the purpose of protecting or furthering the interest of employees

16 In written and oral submissions the SSTU makes the following submissions:

(a) The Federation consists of no directly enrolled members other than the inaugural members present at the meeting on 18 January 2007 where the constitution as Exhibit E was adopted. The joint membership agreements entered into between the Federation and various associations are dated February and March 2007. They were entered into when Exhibit E of the Federation applied and prior to any attempt to adopt the Federation rules. The SSTU contends that the joint membership schemes are invalid on three grounds including:

(i) the schemes fail at a contractual level;

(ii) the schemes fail by reference to the relevant constitutions; and

(iii) membership under the schemes is not recognised under s 53 of the Act.

Contractual grounds

(b) Pursuant to cl 8.3 of Exhibit E, the power to enter into joint membership agreements resides with council. As previously submitted there was no council capable of entering into such agreements. The agreements were signed by 'the president' notwithstanding none existed. The joint membership agreements are accordingly void and of no effect. Nothing at the AGM on 20 October 2008 (including resolution 8) purported to, or could in the circumstances, cure the resulting defects.

(c) Unless a member of an unincorporated association has agreed otherwise, the member will not be liable under contract purportedly entered into on their behalf: ***Wise v Perpetual Trustee Co Ltd*** [1903] AC 139 (149); ***Bradley Egg Farm Ltd v Clifford*** [1943] 2 All ER 378. The inaugural members have no authority to bind other members in contract, and any future members cannot purport to ratify such acts as they have no power, including under Exhibit E, to do so: cl 8.3.

(d) At the time the agent (in this case the putative council) acted, the agent must have had a competent principal (that is, the principal must have been in existence and capable of being ascertained). The members at the AGM could not have been principals for the purpose of the doctrine of ratification at the time of entering into the joint membership agreements as the agreements were said to give rise to their membership: ***Aztech Science v Atlanta Aerospace (Woy Woy)*** [2005] NSWCA 319 [70], [80].

(e) The contracts also fail on the basis that the associated bodies did not have the power to enter into the contracts on behalf of their members. The constitutions of the associated bodies do not recognise joint membership (eg WASSEA Constitution cl 5, cl 6 and cl 14; WADHSAA Constitution cl 7 and cl 10). If the contracting parties were not empowered to bind their respective associations in contract, no valid agreements could have been formed.

Constitutional grounds

(f) The joint membership agreements were ultra vires Exhibit E, including for the following reasons:

(i) Clause 8.9 of Exhibit E provides that membership is automatically deemed to resign upon the termination of a joint membership agreement. A member may elect (in writing) to remain a member: cl 8.9(b)(ii). By contrast, the joint membership agreements place the onus on the person to give written notice of resignation to the Federation upon termination of the agreement. The person otherwise remains a member: cl 5(c) of the joint membership agreements.

(ii) Clause 8.10 of Exhibit E provides that upon resignation from the associated body a person is deemed to have resigned from the Federation unless they notify the Federation that they wish to remain a member.

Contrary to this provision, the joint membership agreements provide that, upon resignation from the associated body of the agreement, the person remains a member of the Federation unless the person resigns in writing: eg cl 4(a) (WADHSAA Constitution); cl 9.1 of Exhibit E.

(g) Given that the Federation had no power under Exhibit E to enter into agreements containing such clauses, it cannot now be demonstrated by the Federation who its members were at the time of the 2008 AGM or subsequently. When Mr Strickland gave evidence he was unable to say whether some of the people who voted at the 2008 AGM had resigned from the associated body and the Federation pursuant to the joint membership agreements continued to treat those persons as members but the constitution did not.

(h) As council did not exist, it could not have 'determined a separate annual subscription' pursuant to cl 10.3 of Exhibit E. The joint membership agreements suggest that, rather than the $400 annual subscription payable pursuant to cl 10.2(c), the members of the associated bodies paid no extra, however $102 per annum would be paid by the associated body to the Federation: cl 3(a) and cl 3(b). The consequence of the fact that no person paid $400 per annum subscription to the Federation for membership is that it cannot be established that there were any members other than the inaugural members. As there was no council the default amount payable was therefore $400 under cl 10.2(c) of Exhibit E.

IR Act grounds

(i) The proper construction of s 53 of the Act requires that the words 'an unregistered organisation consisting of not less than 200 employees associated for the [relevant] purpose' be understood as requiring at the very least an association of persons who have agreed to and exhibited an intention to be bound by a set of rules or to create legal relations inter se.

(j) The term employee is synonymous with member: ***Professional Engineers Case*** (1984) 65 WAIG 4 (6).

(k) Section 73(12) of the Act relevantly requires the Full Bench to cancel the registration of an organisation if it is satisfied on the application of the Registrar that the number of members of the organisation would not entitle it to registration under s 53 of the Act.

(l) The Act does not have provisions equivalent to those in the federal legislation which recognise forms of membership agreements: s 151 of the *Fair Work (Registered Organisations) Act 2009* (Cth). Such agreements only come into force upon approval and may be terminated by Fair Work Australia.

(m) The Act does not define 'member' in s 7 or s 52 however it is apparent from Division 4 of Part II of the Act that membership does not include the type of extended 'membership' contemplated by the Federation:

(i) The joint membership agreements do not require the member to provide an address or in some cases any contact details at all. This is not compliant with the requirements of s 63(1) of the Act.

(ii) The joint membership agreements do not require the member to provide any details of occupation, which makes it impossible for the Federation to know if the person falls within the eligibility rules given the differing classes of members the various associated bodies can enrol under their constitutions.

(iii) There is no requirement (or resultant liability) to pay subscriptions to the Federation (either by the member or the associated body): Exhibit E cl 8.9(b)(ii); cl 8.10 and cl 3(a)(i) and cl 3(d); cl 4(a) of the WADHSAA agreement similarly provides that a member only becomes liable directly to pay subscriptions to the Federation following resignation from the associated body. This is foreign to the concept of membership: ***Thompson v Reynolds*** [2009] WAIRC 00024 [98] – [100], [195]; (2009) 89 WAIG 287 (306, 317). The Federation could not comply with s 64B and s 64D of the Act in these circumstances as there is no obligation to pay any subscriptions to the Federation.

(iv) The level of annual subscription is determined by the agreement with the relevant association. The Federation has no unilateral power to determine subscriptions payable by its members.

(v) The putative members are able to resign from membership of the Federation under joint arrangements by giving notice to the associated body only and not to the Federation.

(vi) The absence of any corresponding provision for joint membership agreements in the associated bodies' constitutions means that payment for joint membership subscriptions under cl 8.4(d) of Exhibit E is inconsistent with cl 10.3 of Exhibit E. The associated bodies are only empowered to set subscription fees in accordance with the constitutional provisions for ordinary membership. The result is that the members of the associated bodies join the Federation for no extra consideration.

(vii) In the cases where persons are able to join without provision of contract details, the Federation is reliant on the associated body to notify its own putative members under the Federation's constitution, and cannot otherwise contact people directly.

(n) As a result in the failure of the joint membership schemes:

(i) The persons who voted at the 20 October 2008 AGM were not entitled to do so as they were not members of the Federation. The vote at the 2008 AGM was accordingly null and void; and

(ii) The Federation consisted of less than 200 employees at the time of the application on or about 26 November 2009.

Objection 3 – The Rules of the Federation do not comply with the requirements of s 55(4)(e) of the Act

(a) Section 55(4)(e) of the Act provides that the Full Bench shall refuse an application by the organisation to register an organisation unless it is satisfied that the rules of the organisation relating to elections for office provide that the election shall be by secret ballot and conform with the requirements of s 56(1) and are such that will ensure, as far as practicable, that no irregularity can occur in connection with the election.

(b) Clause 44 of the rules required an election to have taken place in 2009. This would have at least involved:

(i) Council appointing a returning officer at council's first meeting after the adoption of the rules which purportedly occurred on 12 November 2008: r 44(i); and

(ii) The calling of nominations for council no later than 1 September 2009: r 31(i).

(c) No election took place in 2009. On 28 October 2009, a general meeting of council was notified of an intention to amend r 44 pursuant to r 42.

(d) An AGM held on 30 November 2009 purported to resolve inter alia to amend the rules to in effect dispense with the requirement for elections in 2009 and appoint the members of council (including five new members) and the executive until at least 2011.

(e) As a matter of construction, there was no power in the council or the AGM to amend r 44 in the manner it did.

(f) The council interpreted its rules so that the council and the members of the executive can remain in office indefinitely by means of the facile stratagem of amendment (by the council itself) and without facing any election. This is fundamentally undemocratic.

(g) To the extent that the rules permit (or have been interpreted by council to so permit): r 19(e)(xiv) elections to be dispensed with by rule amendment voted in by council, then the rules cannot be said to comply with s55(4)(e) and s 56(1) of the Act.

The Federation's Submissions

17 In response to the preliminary objections to the application, the Federation filed written submissions on 5 October 2010. In those written submissions the Federation said as follows:

(a) The only relevant rules regarding the making of this application are the rules lodged with the Registrar together with the application. Rule 19(e)(ii) provides that the council has the power to 'apply to registration of the Federation as an organisation under the provisions of the Act' and r 19(e)(iii) provides that the council may 'authorise the president to settle and sign all such notices and forms as may be required' to make that application. Rule 44(b) confirms that the inaugural council has those powers. Rule 22(b) provides that reasonable notice of council meetings must be given. Rule 22(c) provides that the quorum consists of half of the members of the council and r 22(d) provides a simple majority is sufficient to pass the resolution of the council.

(b) The Federation concedes that substantial compliance with the rules is not sufficient: ***The Electrical and Communications Association of Western Australia (Union of Employers)*** [2007] WAIRC 01193; (2007) 87 WAIG 2899 [42].

(c) The findings of the Full Bench in ***WAPF (No 1)*** must not be overstated. In ***WAPF (No 1)***, there were two possible constitutions of the Federation before the Full Bench namely Exhibit E and Attachment B. The Full Bench determined that Exhibit E was the constitution because the Federation could not establish, on the balance of probability, that Attachment B was, in fact, the constitution: ***WAPF (No 1)*** [107]. As there were only references to the name of officers in Exhibit E and Attachment B contains the names of those persons who were appointed to those officers which meant that the Federation could not establish on the balance of probability that the inaugural council and officers of the Federation had been validly appointed.

(d) After the judgment in ***WAPF (No 1)***, the Federation remained an unincorporated association that was not bound by any statutory requirements with regard to the content of its constitution, to holding of meetings or the procedures to be followed by it. The Federation was accordingly a body of members who had agreed to contractually bind themselves under the constitution as an association. That body was no less an association following the ***WAPF (No 1)*** decision. The rules are the rules as adopted by the Federation by the passing of resolution 9 at the AGM held on 20 October 2008: annexure NSJ-6 to the witness statement of Noel James Strickland (Exhibit 1).

Clause 12.1 and cl 12.2 of Exhibit E provided that an AGM must be held each year not more than four months after the end of the financial year and 14 days' notice of the meeting must be given to all members. There was no requirement that the AGM be called, or the notice given, by the council. In contrast, cl 13.1 of Exhibit E required all special general meetings to be called by council. The business of an AGM is dictated by cl 12.5 of the constitution. There is no need, or indeed provision, for anyone to determine what the business of the AGM should be beyond that prescribed by cl 12.5. As a result, there are no formalities under the constitution for calling an AGM so long as the requisite 14 days' notice to members is given. Pursuant to cl 12.1 of Exhibit E the Federation was required to have an AGM no later than 30 October 2008 (four months after the financial year ended).

(e) The members who have purported to act as the inaugural council, all of who were founding members of the Federation, met on 17 September 2008 and resolved to give notice of an AGM. They did so as a matter of practicality: witness statement of Noel James Strickland (Exhibit 1). In the absence of any prescribed procedure

for the calling of an AGM, there is no basis to suggest that their conduct was contrary to the provisions of the constitution.

(f) Proper notice of the AGM was given:

(i) The notice was posted to all members on 18 September 2008, which is more than 14 days prior to the date of the AGM as required by cl 12.2 of the constitution; and

(ii) The proposed agenda was in accordance with the requirements of cl 12.5 of the constitution.

(g) Under cl 12.6 of the constitution, any two members may propose resolutions to be put to members at an AGM. Noel Strickland and Nick Jakowyna, acting as members and not in any other capacity, gave proper notice of nine resolutions to be put to the AGM in accordance with cl 12.6 of the constitution. In this regard:

(i) the notice was addressed to the president as required;

(ii) was signed in accordance with cl 12.6(a) of the constitution;

(iii) complied with the notice requirements of cl 12.6(b) of the constitution; and

(iv) was sent to the Federation at least 21 days prior to the AGM.

(h) A notice given under cl 12.6 of the constitution may include a resolution to change the constitution: cl 31 of the constitution. The notice of the proposed resolutions to be put to the AGM accordingly complied with the constitution and the nine resolutions were therefore validly proposed. Accordingly, when the AGM was held on 20 October 2008:

(i) it was being held as required by cl 12.1 of the constitution;

(ii) proper notice of the meeting had been given to the members of behalf of the Federation;

(iii) no provision of the constitution regarding calling the meeting had been contravened;

(iv) 337 members were present in person or by proxy for the entire meeting and 338 members were present in person or by proxy for part of the meeting;

(v) a quorum was therefore present as required by cl 12.4 of the constitution;

(vi) the resolutions put to the meeting were properly proposed under cl 12.6 of the constitution. The AGM held on 20 October 2008 was accordingly a valid AGM of the Federation.

(i) Under cl 11 of the constitution, the overall control of the affairs and operations of the Federation rests with members at annual and special general meetings. The members present at the AGM held on 20 October 2008 (whether in person or by proxy) accordingly had overall control over the Federation at the AGM.

(j) Insofar as the Full Bench needs to determine the rules of the Federation, only resolution 9 is relevant. Resolution was properly passed insofar as:

(i) proper notices of the resolution had been given under cl 12.6;

(ii) the AGM was properly constituted; and

(iii) the resolution was passed by more than 75% of the members present in person of by proxy at the AGM in accordance with cl 31 of the constitution.

(k) The effect of resolution 9 was that:

(i) the rules replaced the constitution and became the rules of the Federation from the close of the meeting;

(ii) the rules validly appointed an inaugural council having the powers and functions of the council and also appointed Noel Strickland as the president: r 44(a) and r 44(c); and

(iii) the inaugural council was granted the powers of the council under the rules from the close of AGM: r 44(a).

18 In written submissions clarifying the submissions filed by the Federation on 5 October 2010 and in oral submissions made by counsel for the Federation, the Federation says as follows:

(a) The objector seeks to put all of the actions of the Federation under a forensic microscope. The Federation was not mortally wounded to the point of non-existence by the decision of the Full Bench in ***WAPF (No 1)***. The Federation continued to operate and manage its affairs in a real and practical way, as it was obliged to do under its rules, pursuant to the contract, inter se, as between its individual members, who collectively constitute the Federation.

(b) At a meeting on 18 January 2007 (the inaugural meeting), certain persons (the inaugural members) agreed to associate themselves together as an organisation, an unincorporated association, in a legal relationship, inter se, on signing a document (schedule A) to be bound by certain rules and under the name of the Federation: ***City of Gosnells v Roberts*** (1994) 12 WAR 437 (448) (Anderson J).

(c) In ***WAPF (No 1)*** Ritter AP held the rules that the inaugural members agreed to were those contained in Exhibit E and that Exhibit E was not replaced by other rules (Exhibit J) at a meeting of members that was held on 6 March 2007. The finding that Exhibit E was not replaced by Exhibit J was premised on the finding by Ritter AP that the March 2007 meeting was not properly called in that those of the inaugural members who collectively called themselves the council. Also the meeting had been authorised by other inaugural members who:

(i) had not been properly elected as members of council in accordance with Exhibit E: ***WAPF (No 1)*** [112]; and

(ii) there was no council as such that could properly call the March 2007 meeting: ***WAPF (No 1)*** [115].

(d) As a result of the findings in ***WAPF (No 1)*** Exhibit E had been the governing instrument of the Federation and it was the instrument that was adopted by the inaugural members on 18 January 2007. It was also the express terms of the contract that continued to bind the members of the Federation.

(e) Importantly there was no finding or declaration in ***WAPF (No 1)***, nor could there have been, that Exhibit E was invalid or void itself. Nor was there a declaration that the Federation ceased to exist. Nor did the decision in ***WAPF (No 1)*** dissolve the Federation. The dissolution of the Federation could only occur pursuant to the procedure set out in cl 33 of Exhibit E by the calling of a special general meeting for the purpose of dissolving the Federation. A result of the findings by Ritter AP was that any express references in the contract (Exhibit E) to the body of inaugural council or the council or officers such as the president were devoid of meaning because no such bodies or officers were prescribed in Exhibit E. Accordingly, the express terms of Exhibit E that referred to such bodies and officers did not form part of the contract that had been made by the members when Exhibit E was first adopted by the inaugural members on 18 January 2007. The contract that existed as at the date when it was first adopted on 18 January 2007, at the date of the decision of ***WAPF (No 1)***, and thereafter, was the contract evidenced by Exhibit E absent those provisions referring to bodies and officers.

(f) There are only three documents that require detailed examination, the constitutions which are Exhibit E and Attachment A, and the Attachment B rules. Also there are only two resolutions of the AGM that require examination, resolution 3 and resolution 9. Importantly, it is contended on behalf of the Federation that pursuant to s 55(4) of the Act and by having regard to the principal object in s 6(e) of the Act to encourage the formation of representative organisations of employers and employees and their registration under the Act, there must only be strict compliance with the formal requirements of the rules of an organisation seeking to register but it is not necessary that every rule of an unincorporated body be complied with.

(g) The question of contractual intention requires the objective determination of what a reasonable person would have understood the contract to mean, as at the date that it was made, taking into account the object of the contract and the surrounding circumstances known to the parties: ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** [2001] 210 CLR 181 [11]; ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] 219 CLR 165 [40].

(h) On 18 January 2007, the contracting parties, the inaugural members, intended that the Exhibit E contract be performed. Similarly, it can be inferred that employees who subsequently became members of the Federation afterwards committed themselves to the same Exhibit E contract with the expectation that it would be performed. None of the inaugural council, the council and the officers described in the Exhibit E contract were in fact essential for the association of the members of an organisation in the form of an unincorporated association from its exception or thereafter: ***City of Gosnells***. The inaugural members made the Exhibit E contract, without providing for inaugural council, the council or officers. The question is what they intended in doing so, bearing in mind the object of the contract, which was the association of employees as an organisation consisting of members and named the Federation. Consequently, it is argued that at the time the contract was made all references to the council, the executive, the president and other officers and the things they can do can be ignored. In these circumstances, the question to be asked by the Full Bench is what a reasonable person reading the contract without any of these provisions would think the contractual intention was of the persons who had contracted together as an association. In particular how the Federation would from the close of the meeting on 18 January 2007 (when Exhibit E was adopted) operate and manage its affairs.

(i) Bearing in mind that one of the objects stated in the Exhibit E contract was to further the industrial interests of the Federation and achieve registration, a reasonable person would think that given they did not have any formal council or executive or any formal officers, they would get on with it, with people doing these tasks as best as they could. The people who were chosen accepted the responsibilities of those roles and that is what happened between 18 January 2007 and the delivery of the decision in ***WAPF (No 1)***. Albeit that it did not create an inaugural council, a council or officers at the time the contract was made, the Exhibit E contract referred to such bodies and officers, which suggests that the inaugural members intended that the management and affairs of the Federation as from then, between AGMs, would be undertaken by 'persons akin to such officers' in positions 'akin to such bodies': see also cl 11.2 of Exhibit E. Such a contractual intention would achieve the object of the contract. Otherwise, the contract would have effectively been frustrated by the fact that Exhibit E was adopted as the contract without the names of the inaugural council, the council and the officers prescribed in it. The subsequent conduct of the parties after Exhibit E was adopted as the contract, to insert the names of persons who had been so nominated and who had accepted such responsibilities before the conclusion of the meeting on 18 January 2007 when the contract was made, confirms this contractual intention, as does the fact that those persons thereafter continued to discharge those responsibilities.

(j) The decision in ***WAPF (No 1)*** did not, nor could it, alter the contractual intention. The Federation continued thereafter to undertake its affairs and operations in accordance with the contractual intention. Eventually, its members, through personal attendance or proxy at the AGM in October 2008 resolved to:

(i) regard a new contract as taking force and effect immediately namely, the constitution referred to in resolution 3 of the proposed resolutions to be put to the AGM;

(ii) regard the constitution as having applied as from 18 January 2007; and

(iii) then, to replace the constitution with the rules, effective as from the close of the AGM: resolution 9.

(k) Having done so, pursuant to the rules, the inaugural council established by the rules met in accordance with the rules and exercised its power to approve the application. Hence, the application was approved 'in accordance with the rules of the organisation' as that term is used in s 55(4)(a) of the Act.

(l) Pursuant to the terms of the contract in Exhibit E, the AGM had to be held. Members would have been in breach of the Exhibit E contract if one had not been held. Exhibit E does not set out the processes of how an AGM is convened. In the circumstances, it was open to those persons to convene the AGM in the manner that they did, consistent with the contractual intention. It is not the point that there was no council, or whether the notice of the AGM or the proxy form or membership enrolment form was strictly compliant with the strict requirement of Exhibit E, the only requirement for strict compliance pursuant to s 55(4)(a) of the Act is whether the AGM was properly held and as a result of the AGM the rules were passed. If that occurred it is only necessary to consider whether there was strict compliance with those rules that were passed to authorise the application which is now before the Full Bench. The proxy forms that were drawn up and distributed to members were drawn up in accordance with the contractual intention. In accordance with the contractual intention, the notice of the AGM was sent to all of the members. It was a reasonable notice in terms of time and form. The agenda was fully explained, as required by cl 12.2 of the Exhibit E contract. In particular, in relation to resolution 3, the notice adequately informed the recipients of the contract that it was proposed to henceforth govern the organisation and it would be agreed the attached copy of the constitution as having governed the organisation as from 18 January 2007. This is what a reasonable person's position of a member who was the recipient of the notice would have understood the proposed resolution 3 to mean. There was no need to explain any differences between the constitution (Attachment A) and the Exhibit E contract insofar as they concerned provisions such as cl 14.1 of Exhibit E (the formation of the inaugural council), as the members were imputed with the knowledge that, as a result of the decision in ***WAPF (No 1)***, such a provision was not a part of their contract. The corresponding provisions in the constitution were self-explanatory and, by reason of being attached to the notice, required no further explanation. Similarly, resolution 9 was adequately explained.

(m) Prior to the AGM, notice of the motion had been given by a member in accordance with the contractual intention to Mr Strickland who was the person who had undertaken the role akin to that of the president. It was sent to him at least 21 days before the AGM: cl 12.6(c) of the Exhibit E contract. It is irrelevant that a different set of rules (Exhibit J in ***WAPF (No 1)***) had been proposed to replace the Exhibit E contract at the March 2007 meeting. That set of rules never commenced operation as they were never adopted, given that the March 2007 meeting was held, in the decision in ***WAPF (No 1)***, to have never been properly called.

(n) The proxy forms distributed to members were drawn up by those persons who undertook a role akin to that of the council in accordance with the contractual intention of the members: cl 21.2 of the Exhibit E contract. The AGM was validly convened and held. Resolution 3 and resolution 9 were passed at the AGM. The end result was that the constitution (Attachment A) replaced the Exhibit E contract, and was, in turn, replaced by the rules.

(o) As to the joint membership agreements, it is argued that the plain and unchallenged evidence, is that by signing the membership forms, the employees became associated as part of the Federation and they undertook together with the other employees who were associated in the organisation to be bound by the rules of the association. The test in ***City of Gosnells v Roberts*** is that the essential characteristics of an unincorporated association is a composite body of persons in a legal relationship giving rise to joint rights and obligations or mutual rights and duties. Consequently this group formed part of the essential characteristics of an unincorporated association and it matters not how they came to associate themselves. What does matter, as a matter of fact, is whether a person has associated themselves in circumstances where there is a legal relationship giving rise to joint rights or obligations and mutual rights and duties.

(p) The Federation says its contractual intention arguments are wholly consistent with the ratio in ***Dickason v Edwards*** (1910) 10 CLR 243 in which a rule of *pro hac vice* was applied to ensure an unincorporated association could function. In that matter Griffith CJ had regard to the rules of a friendly society which required a District Chief Ranger to preside on the District Appeal Committee and the District Secretary who shall only act as chairman and secretary of such a Committee and have no vote, the casting vote of the chairman excepted. As to the requirement that the District Chief Ranger must preside, Griffith CJ held firstly that the rule assumes that the chairman may be someone else than the District Chief Ranger; and, secondly, the ordinary rule of common sense which governs all matters of this sort must apply, namely, that if a body is composed of several persons and one of them is ill or for some other reason is absent, there is no reason why the other members of the body should not go on with the business and appoint a chairman *pro hac vice* (252). The translation of the Latin phrase is 'for the time being' or 'for the event'.

By having regard to this reasoning it is argued on behalf of the Federation as at 18 January 2007 that a reasonable person would have understood the Exhibit E contract, that members of the association who nominated certain persons to carry out the responsibilities of the council of the executive and the office of president and the others were able to accept the responsibility and they got on with it *pro hac vice*. The evidence what occurred at the meeting on 18 January 2007 is set out in ***WAPF (No 1)*** at [91] – [98]. The evidence in summary was that Ms Weston who took the minutes of the meeting was present for the whole of the meeting on 18 January 2007. She saw Exhibit E being handed out to the inaugural members of the Federation at the meeting. She also said that people nominated themselves or were nominated for the position of president and the other officers. This was recorded in the minutes and as there was only one nomination for each position, the person nominated was appointed to the position specified. After the appointment of these people to the positions referred to, the meeting was suspended. Ms Weston then observed Ms Karen Findlay-Grove, a solicitor employed by Jackson McDonald, write into a document which later became Attachment A the following names:

(i) Noel Strickland, Ken Austin, Nick Jakowyna, Denise Hilsz, Peter Fitzgerald, Neil Hunt, Kevin Brennan and Peter Holcz in cl 14.3 of the draft constitution;

(ii) Noel Strickland, Ken Austin and Nick Jakowyna in cl 15.2 of the draft constitution; and

(iii) Denise Hilsz, Peter Fitzgerald and Neil Hunt in cl 16.2 of the draft constitution.

(q) It is argued that after those names were inserted, the people who consequently, ultimately and effectively managed and operated the affairs of the Federation from 18 January 2007 through to the decision of ***WAPF (No 1)*** on 20 August 2008 and thereafter with some alteration through to the AGM on 20 October 2008, to use the language of Griffith CJ in ***Dickason***, were the people appointed *pro hac vice*, because the council and officers did not exist and as a matter of contractual intention, the plain common sense rule was one which a reasonable person would think would apply and the facts and the conduct of the parties actually confirmed that. In particular those persons appointed *pro hac vice* undertook tasks to manage and operate the affairs of the Federation and facilitated the holding of the AGM at which resolutions were put, and, in particular, resolution 3 and resolution 9 which led to the authorisation of the application before this Full Bench.

(r) The AGM had to be held before 30 October 2008. As between members and those acting *pro hac vice* they would have been derelict in their duty if an AGM had not been held. Bearing in mind the doctrine of necessity and the rule of common sense referred to in ***Dickason*** someone had to put in train those things and it was natural for those persons who had assumed the responsibility in positions akin to the president and other officers and as such like, to facilitate the holding of the AGM.

(s) The Federation says that it is not a question of ratification of an agent's act or the application of the doctrine of ratification. The Federation says it is wholly irrelevant and immaterial to consider the application of the doctrine of ratification because what you have are essentially people who have made an agreement between themselves, a provision of which entitles them to meet to change that agreement, and that is the plain meaning of resolution 3. Moreover they have the power to decide between themselves that they would regard Attachment A as always having been their agreement. Then having established that the inaugural council was for the purposes of Attachment B and then under resolution 9 to replace effectively what was referred to as Attachment B in ***WAPF (No 1)*** which is now the rules which are brought before this Full Bench in this application. The Federation says that it cannot be ignored that the resolutions were passed by an overwhelming majority of the persons who were present at the AGM in excess of the quorum rule requirements in each of the documents. Consequently it was argued there is no question that the AGM was properly convened, that resolutions were put and passed, and that the rules were properly passed. Once the resolutions were properly passed there were then officers properly constituted which ended in a resolution that was properly carried to authorise the application so that s 55(4)(a) of the Act was complied with.

Conclusion

19 When this matter was argued, both the Federation and the SSTU put their arguments 'separately' in that in part the Federation's arguments put forward a construction of events that were in a sense in the alternative to the arguments put forward by the SSTU. The SSTU's arguments rely substantially upon acceptance of the principle that the rules of the Federation must be strictly complied with, which when their argument is analysed must include Exhibit E.

20 In answer to objections 1, 2 and 3 made by the SSTU, the Federation's contentions reply upon three central propositions:

(a) The first is that whilst the Federation concedes that s 55(4)(a) of the Act requires the Full Bench to be satisfied the application has been made in compliance with its rules, the Full Bench need only be satisfied that there was strict compliance with the rules that authorised the application before this Full Bench and not whether all of the rules of the Federation, including Exhibit E, have been strictly complied with.

(b) The second proposition is that when construing the requirements of the Exhibit E constitution, the Full Bench should have regard to the contractual intention of the parties which is to be ascertained by a determination of what a reasonable person would have understood the contract to mean when regard is had to the fact that no officers or council or executive had been formally appointed in circumstances where the members of the Federation intended that the terms of the contract contained in Exhibit E be performed. They say it follows that the objective contractual intention of the members must be that the management and affairs of the Federation would be undertaken by persons akin to such officers in positions akin to a council or executive.

(c) The third proposition is that suitable persons who were willing to act as officers of the Federation were appointed *pro hac vice* to carry out the duties of the offices such as the president and the duties of council and the executive. It follows from that contention, if accepted, that whilst managing and operating the affairs of the Federation, the 2008 AGM could be regarded as held in accordance with the then rules of the Federation and that resolutions 3 and 9 were validly made which in turn had the effect that the rules passed at the 2008 AGM were validly made.

21 In ***WAPF (No 1)*** Ritter AP (with the agreement of Smith SC and Scott C) said [20] – [22]:

The Meaning of 'Rules of the Organisation' in Section 55 of *the Act*

Section 55(1)(b) of *the Act* requires an organisation seeking registration under s53 to lodge with the Registrar, '3 copies of the rules of the organisation'. The same expression is also used in s55(2)(b), s55(4)(a) and (b), s55(4)(e) and s56. The requirement in s55(4)(a) is that the Full Bench shall refuse an application made under s55 unless it is satisfied that, amongst other things, the application for registration is 'authorised in accordance with the rules of the organisation'. As a matter of statutory construction the expression 'rules of the organisation' must have the same meaning in s55(1)(b) and s55(4)(a). The effect is that the application must be authorised in accordance with

the rules which have been lodged with the Registrar as being the rules of the organisation. As expressed in s55(4)(a) of *the Act* if this does not occur the Full Bench 'shall refuse' the application.

The Meaning and Effect of Section 55(4)(a) of *the Act* - *The Electrical and Communications Association of Western Australia (Union of Employers)* (2007) 87 WAIG 2899 (*Re Electrical Association*)

The objector relied upon the construction of s55(4) of *the Act* contained in *Re Electrical Association*. In my reasons at [36], [38], [39] and [42] I said, with the agreement of Wood and Mayman CC:

> '36 Despite this however, in my opinion the terms of s55(4)(a) of *the Act* mandate that the present application must be refused. Section 55(4)(a) uses the words "*shall refuse*". The use of "*shall*" imports in the context a requirement to refuse the application unless there is satisfaction in the terms described. This opinion is not inconsistent with s56 of the *Interpretation Act 1984* (WA) and "*The Wall and Ceiling Fixer's Case*", a decision of the Industrial Appeal Court; *Construction, Mining and Energy Workers Union of Australia, Western Australian Branch v The Operative Plasterers and Plaster Workers Federation of Australia (Industrial Union of Workers) Western Australian Branch and Another* (1990) 70 WAIG 281 at 286.
>
> …
>
> 38 Section 55(4)(a) of *the Act* requires the Full Bench to be satisfied the application "*has been authorised in accordance with the rules of the organisation*". In my opinion authorisation in accordance with the rules involves compliance with the process required by the rules to pass a motion to apply to alter the rules. This includes all aspects of the process including relevant notice requirements.
>
> 39 Put slightly differently, in the context of an application to alter the rules, s55(4)(a) of *the Act* requires the Full Bench to analyse and determine:-
>
> (a) What is required under the rules to authorise an alteration application.
>
> (b) What actions have been taken to purportedly comply with these requirements.
>
> (c) Whether compliance has occurred.
>
> …
>
> 42 Section 55(4)(a) does not however contain any scope for the Full Bench to be satisfied there has been substantial compliance with the authorisation process. This may cause a harsh result in a particular case and this is one of them. The terms of the legislation may however be inferred to reflect an intention that applications to alter the rules of an organisation should only be allowed if there is strict compliance with what the rules require. The contents of s55(4)(a) are part of the fairly tight supervisory role over the rules of organisations that the Commission is charged with by *the Act*.'

The observations at [39] were specific to the application to alter rules in *Re Electrical Association*. They apply however with necessary modifications to the present application.

22 Whilst in [20] Ritter AP confined his observations to the 'rules' lodged with the Registrar and not to the rules which were the only valid rules of the Federation, namely the constitution which was Exhibit E, it does not follow that his Honour's analysis in respect of the requirements of s 55(4) in ***Re Electrical Association*** has no application to a consideration by the Full Bench in this matter of the requirements of Exhibit E. In ***Re Electrical Association*** the Full Bench found that s 55(4)(a) does not contain any scope for the Full Bench to be satisfied there has been substantial compliance with the authorisation process.

23 In ***WAPF (No 1)***, when considering the meaning of the 'rules' of the Federation within s 55(4)(a) of the Act, Ritter AP found that the 'rules' were the 'rules' adopted at the special general meeting on 6 March 2007 and not the 'constitution' [59]. His Honour however then found the consequences of Exhibit E being the constitution was that there was no council and because of that fact no council could validly call the special general meeting and the resolutions passed at the meeting on 6 March 2007 were not valid [109] – [115]. Whilst not expressly considered by ***WAPF (No 1)***, it follows from this finding that the rules adopted at the special general meeting on 6 March 2007 were not the rules of the Federation for the purposes of s 55(4)(a) of the Act. It follows therefore that as an unincorporated body of persons bound together by a contract which was the constitution in Exhibit E, at law the only rules that could be said to exist on 20 August 2008 when the Full Bench delivered its reasons for decision in ***WAPF (No 1)***, was the constitution in the form of Exhibit E.

24 In ***WAPF (No 1)*** the legal consequences of each objection was considered separately. In particular, in determining the special general meeting held on 6 March 2007 did not have the power under the rules to authorise the making of an application under the Act (Invalidity 1 in ***WAPF (No 1)***) Ritter AP had regard to the evidence that when the resolution was passed to authorise the application it was done so in accordance with the constitution and found at the time the resolution was passed the constitution no longer applied. It had been replaced by the rules by an earlier resolution [58]. In making this finding Ritter AP did not have regard to his findings at [115] that the resolutions passed at the meeting were not valid. Nor did the Full Bench consider the issue whether the application had been authorised in accordance with the rules of the Federation within the meaning of s 55(4) of the Act, when Exhibit E (adopted by inaugural members on 18 January 2007) were the rules of the organisation.

25 For the rules lodged with the application now before the Full Bench to be the rules of the Federation within the meaning of s 55(4)(a) of the Act, those rules, must be rules, that at law, have force and effect. In determining whether they are effective at law, in my opinion, the rules when made must have been made in accordance with the constitution (Exhibit E). Consequently the first proposition put by the Federation fails.

26 I do however agree that when considering whether an application has been authorised in accordance with the rules of an organisation, it is not necessary for the Full Bench to consider whether at all material times, all rules of an organisation have been complied with. To cite an obviously hypothetical example, if a rule requires that an organisation have the accounts of the organisation audited within a specified period of time and the audit does not take place within that period of time, such a breach of the rules would be likely to be immaterial to the creation of the rules of an organisation or the authorisation of an application to the Commission for registration of an organisation, and as such would be irrelevant to the determination by a Full Bench whether an application had been authorised in accordance with the rules of an organisation.

27 The applicant says that the 2008 AGM was validly convened and that resolutions 3 and 9 were passed and the end result was that the Attachment A constitution replaced the Exhibit E contract, and was, in turn replaced by the rules filed with this application.

28 As to the second proposition relied upon by the Federation, if the inference sought to be drawn by the Federation is accepted, it would cure the defects in the ineffective appointments. However, I do not accept that the principles that apply to ascertain the interpretation of a written contract by the High Court in ***Maggbury*** can be applied to draw the inference contended by the Federation that the terms of Exhibit E must be construed by regard to a presumption that the members of the Federation intended that the management and affairs of the Federation be performed by persons in roles akin to the officers of the Federation and bodies who can be said to be akin to the council and the executive.

29 In ***Maggbury*** Gleeson CJ, Gummow and Hayne JJ observed at [11]:

> Interpretation of a written contract involves, as Lord Hoffmann has put it [11]:
>
> > 'the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.
>
> That knowledge may include matters of law, as in this case where the obtaining of intellectual property protection was of central importance to the commercial development of Mr Allen's ironing board [12]. (footnotes omitted)

30 Later in ***Toll***, the Full Court of the High Court said the following about the task of court in ascertaining the intention of the parties to a contract [40]:

> This Court, in Pacific Carriers Ltd v BNP Paribas [20], has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction [21]. (footnotes omitted)

31 The passage of Lord Hoffman adopted by the High Court in ***Maggbury*** makes it clear that regard is to be had to the circumstances that exist at the time the contract is made. At the time Exhibit E was made the evidence given in ***WAPF (No 1)*** when viewed objectively can only lead to an inference that inaugural members intended that officers be elected and that a council and executive be established. However, the inaugural members adopted Exhibit E as the constitution of the Federation prior to the appointment of an inaugural council, inaugural officers or executive which meant that the only manner of appointing members of the council was by way of an election in accordance with cl 22 of Exhibit E: ***WAPF (No 1)*** [109]. Although the evidence of what the inaugural members in fact intended is not admissible to establish a common intention, the fact that they called a meeting to establish the Federation of which part of what was to be done at the meeting was to appoint persons to conduct the business of the Federation is conduct that can be considered. Whilst the objects in cl 3.1 of Exhibit E were:

(a) To promote and protect the industrial interests of members in all matters relating to their employment;

(b) To promote co-operation between the Federation and all organisations representing the professional and industrial interests of members;

(c) To increase and maintain the membership of the Federation;

(d) To act for and on behalf of members and, where determined by Council, non-members, in a manner consistent with these objects and the Constitution and in the interests of members;

(e) To do all such things as the Federation may from time to time deem incidental or conducive to the attainment of any or all of the above objects;

(f) To apply the property and income of the Federation solely towards the promotion of the objects and purpose of the Federation in accordance with the Constitution; and

(g) To take all steps necessary to secure the registration of the Federation as an organisation of employees under the *Industrial Relations Act 1979* (WA),

it does not necessarily follow that it is open to infer the inaugural members intended that the management and affairs of the Federation would be undertaken by persons who at law had not been validly appointed as inaugural officers and as the inaugural council and inaugural executive.

32 When regard is had to the objects of Exhibit E and to the fact that the purpose of meeting of the inaugural members on 18 January 2007 was to form the Federation and put in place steps to become registered as an organisation of employees under

the Act and part of that process was to appoint an inaugural council and inaugural officers, the only inference open is the inference that the inaugural members intended to make those appointments in accordance with the requirements of the constitution that was adopted. This was the course the parties to contract (the inaugural members) had embarked upon. Those appointments were not however effective at law: ***WAPF (No 1)*** [108]. Yet the inaugural members of the Federation laboured under the mistaken belief that inaugural officers, the inaugural council and the inaugural executive had been appointed.

33 Exhibit E contemplated the appointment of inaugural officers, an inaugural council and an inaugural executive under cl 14, cl 15 and cl 16 by appointing persons by name to each office and later the election of office holders and council members pursuant to cl 22 and cl 23. In ***Codelfa Construction Pty Ltd v State Rail Authority of NSW*** (1982) 149 CLR 337 (352), Mason J stated:

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.
>
> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself.

34 The terms of Exhibit E contemplated that the appointments to the positions and the insertion of the names into Exhibit E would occur prior to the execution of the contract which was to be evidenced by the execution of Schedule A of Exhibit E. Clause 6.1 of Exhibit E provided:

> The inaugural members of the Federation ('the inaugural Members') will be those persons who have agreed to establish the Federation and whose signatures are affixed on Schedule A and who are, for the purposes of clause 7, allocated to the sector that appears next to his or her name.

35 Schedule A of Exhibit E provided (names and signatures of the 12 inaugural members omitted):

> In accordance with provisions of clause 6.1 the following persons, comprising the Inaugural Members of the Federation, agree to:
>
> 1. Establish the Federation;
> 2. Adopt this Constitution as the Constitution of the Federation; and
> 3. To be bound by the terms of this Constitution, which shall constitute a contract between all members.

36 As the appointments were not effective, the only inference that then follows is that the inaugural members failed to complete the necessary steps to establish the Federation. Consequently, the Federation's second contention cannot be accepted.

37 The Federation's third contention is that suitable persons were appointed *pro hac vice* at the meeting of inaugural members on 18 January 2007 to carry out the duties of the president and other officers and the duties of council and the executive. In support of this argument the applicant relies upon a 'rule of common sense' applied by Griffith CJ in ***Dickason***. In ***Dickason*** by the rules of a friendly society formed under the *Friendly Societies Act 1890* (Vic) it was provided that a member could be expelled if found guilty of conduct calculated to bring disgrace on the society. The head of the society the District Chief Ranger complained of an offence against him personally. The District Chief Ranger presided at the tribunal which heard the charge but took no active part in the proceedings. The member was found guilty and was de facto expelled from the society. The High Court found that the whole proceedings were invalid by reason of the presence of the District Chief Ranger on the tribunal as it was a rule of natural justice that a man cannot be a judge in his own cause (Griffith CJ) (250). The High Court considered whether the rule of necessity required the District Chief Ranger to act (Isaacs J) (259). The rule of necessity permits the member of a court or tribunal who has some interest in the matter to sit where there is no judge or tribunal member available to sit: ***Laws v Australian Broadcasting Tribunal*** (1990) 170 CLR 70 (88) (Mason CJ and Brennan J); ***Dimes v Proprietors of Grand Junction Canal*** (1852) 3 HLC 759 (787 – 788); [10 ER 301 (313)]. It was in that context that Griffith CJ in ***Dickason*** held (251 – 252):

> By sub-rule (*c*) the names of the witnesses proposed to be called are required to be given in writing to the 'District Chief Ranger or Chairman of the Committee' at the time of the meeting. Sub-rule (*d*) provides that the District Appeal Committee shall submit reports in writing of cases investigated by them to the District Meeting immediately following such investigation, 'and the decision of the District Meeting thereon shall be final.' Sub-rule (*e*) provides that 'No member of the District Judicial Committee or District Executive shall act on the District Appeal Committee, except the District Chief Ranger and District Secretary, who shall only act as chairman and secretary of such Committee, and have no vote, the casting vote of the chairman excepted.' Now as to the point that the District Chief Ranger must preside, I think that is negatived by two considerations. First of all, rule 29 (*c*) assumes that the chairman may be someone else than the District Chief Ranger; and, secondly, the ordinary rule of common sense which governs all matters of this sort must apply, namely, that if a body is composed of several persons and one of them is ill or for some other reason is absent, there is no reason why the other members of the body should not go on with the business and appoint a chairman *pro hac vice*. If he is not there the functions of the committee are not to cease. So that the District Chief Ranger is not bound to sit.

38 Importantly, Griffith CJ expressed the view that the rules of the society authorised a person other than the District Chief Ranger to sit so that other members of the committee could sit in his absence. ***Dickason*** is a case about the rules of procedural fairness. In particular, it is a case about the rules governing actual and ostensible bias and not about whether a person can be

treated as if they had been validly appointed to a position. It is clear from the facts in ***Dickason*** that no issue was raised as to whether any member of the committee had been validly appointed. For these reasons I am of the opinion that the reasoning of Griffith CJ in ***Dickason*** cannot be called into aid by the Federation, as the 'rule of common sense' referred to by Griffith CJ does not establish at law a general principle which at large can be applied to appointments to offices and bodies of an unincorporated association.

39 For these reasons I am of the opinion the Federation's arguments that the doctrine of contractual intention and the 'rule of common sense' in ***Dickason*** do not assist the Federation's case.

Invalidity 1 – Is there a valid application for registration for the purposes of s 55(4) of the Act

40 On 20 August 2008, the Full Bench in ***WAPF (No 1)*** handed down its decision in which it found:

(a) No inaugural council, inaugural officers, nor an executive of the Federation had been appointed because no names were inserted against the offices in cl 14.3, 15.2 and 16.2 of Exhibit E [108];

(b) No inaugural council had been appointed because it did not have four members from each of the primary, secondary and district high school sectors as required by cl 14.2 of the constitution [113];

(c) Council could not meet on 20 February 2007 as there was no council appointed or elected in accordance with the constitution. Consequently, no valid special general meeting could be called and the resolutions passed at the meeting on 6 March 2007 were not valid [115];

41 The relevant common law rules that apply to meetings were conveniently summarised by Wells J in ***Myer Queenstown Garden Plaza*** (527), (528):

1. Where a meeting of a governing body has been convened, or (as the case may be) its business has been conducted, in breach of the rules with respect to the giving of notice to all members, in due time and with proper notification of business, or with respect to the numbers required to attend the meeting, the meeting is null and void to all intents and purposes, and no business can be validly transacted at the meeting.

…

6. Where the governing document contains a provision as to a quorum, it will be construed as an imperative requirement, unless the contrary clearly appears. The strictness of this rule is derived from the fundamental proposition that if the governing instrument authorizes a stated number of members to constitute the body which is to perform a particular duty, and nothing more is said as to who is required to join in the acts of that body, it is the plain intention of the instrument that every member should participate in those acts, and the instrument will be construed accordingly. A provision as to a quorum is a relaxation of the strict rule which, on that account, must itself be construed strictly.

…

9. Where an act in law is done by an invalidly constituted meeting, that act in law is and remains void. A validly constituted meeting cannot subsequently, by an act of ratification, translate that act from one that is void to one that is valid.

10. Although the foregoing propositions represent the basic common law on the subject they will, of course, yield to contrary provisions in the governing instrument.

42 The evidence of Mr Strickland establishes that despite the findings made by the Full Bench in ***WAPF (No 1)***, immediately after the decision of the Full Bench in ***WAPF (No 1)*** the Federation acted as if officers of the Federation and council had been appointed. The Federation also acted as if Attachment A was the constitution of the Federation. Attachment A contained the same terms as Exhibit J in ***WAPF (No 1)***.

43 Whilst the Federation argues that there was no prescribed procedure for calling an AGM, the evidence of Mr Strickland establishes that at the meeting on 17 September 2008 that the putative council resolved to call the 2008 AGM. This finding of fact is not however material, as Exhibit E does not specify who is able to call an AGM. Clause 12 of Exhibit E provides:

12.1 An Annual General Meeting of the Federation shall be held in every calendar year, not more than four (4) months after the end of the financial year.

12.2 Notice of the date of the Annual General Meeting, together with an agenda, shall be circulated to all Members not less than fourteen (14) days prior to the meeting.

12.3 All Members shall be entitled to attend Annual General Meetings.

12.4 A quorum at the Annual General Meeting shall consist of twenty (20) members or 10% of the aggregate total of Members of the Federation, whichever is the lesser, present in person or by proxy. In the event of a quorum not being present within thirty (30) minutes of the notified starting time the meeting shall be adjourned to a time and place to be decided by Council. Notice of such an adjournment shall be given to Members at least seven (7) days prior to the adjourned meeting being held. At the adjourned meeting, Members present will constitute a quorum and business shall proceed in accordance with the original agenda.

12.5 The business of the Annual General Meeting shall be to:

(a) Receive and confirm, with or without modification, the minutes of the previous Annual General Meeting;

(b) Receive and approve, with or without modification, the Annual Report and Audited Balance Sheet and Financial Statements for the previous year;

(c) Receive and confirm the declaration of the Poll for the election of Officers of the Federation;

(d) Consider and, if appropriate, to adopt (with or without modification) any notice of motion (including a notice of motion proposing an amendment to this Constitution) of which due notice has been given under clause 12.6 of this Constitution;

(e) Appoint the auditors for the following year.

12.6 A Member wishing to propose a motion at any Annual General Meeting must give notice in writing to the President of the Federation, which notice must:

(a) Be signed by the Member concerned as proposer and by another Member as seconder;

(b) Set out the text of the motion which is proposed, together with a short explanation of the effect the motion will have if passed and the reason why the Member thinks the motion should be passed; and

(c) Be sent to the Federation at least twenty-one (21) days prior to the Annual General Meeting.

12.7 Council shall determine the procedures to be followed at any Annual General Meeting.

44 Pursuant to cl 12.4 of Exhibit E a quorum must consist of 20 members or 10% of the aggregate total of members, whichever is the lesser, present in person or by proxy. Voting by proxy is regulated by cl 21 of Exhibit E which provides as follows:

21.1 A Member entitled to attend and vote at the Annual General Meeting or a Special General Meeting may appoint a proxy to attend the meeting and vote on his or her behalf.

21.2 The appointment of a proxy shall be in writing in the form prescribed by Council from time to time and must reach the President of the Federation at least one (1) business day prior to the date of the meeting.

45 As discussed in ***Myer Queenstown Garden Plaza*** the requirement of a quorum must be construed strictly, unless it is provided otherwise in the rules of an unincorporated body. At the time the putative council approved the draft proxy form, there were approximately 760 members. Twenty-six members of the Federation attended the 2008 AGM in person and 311 were present by proxy. No members however could attend the AGM by proxy as no proxy form had been prescribed by council. In addition, insofar as cl 12.21 required that a proxy form reach the president at least one business day prior to the AGM, that part of the rule could not be complied with because the effect of the decision in ***WAPF (No 1)*** was that no president had been appointed. As no council had been appointed the resolution made at the meeting on 17 September 2008 to approve the proxy form was invalid and no resolution at all: ***WAPF (No 1)*** [116]; ***Re Australian Logging Federation*** (1978) 203 CAR 225 (228).

46 Whilst the quorum required to attend the 2008 AGM was 20 or 10% of the aggregate total of members and 26 members attended in person, of these 26 members, no more than 12 of those present could have been inaugural members. For the reasons that follow in respect of objection 2, it is my opinion that when the 2008 AGM was convened the only members of the Federation were the inaugural members. As set out in Schedule A to Exhibit E, the total number of inaugural members was 12. If there were only 12 members of the Federation to constitute a quorum at an AGM, 1.2 persons were required to be present. The minutes of the AGM contain statements that two inaugural members were present. They were Mr Strickland and Ms Denise Hilsz. Consequently without considering whether the 2008 AGM had been validly convened or whether business could be validly transacted at the meeting I am satisfied there was a quorum.

47 At common law unless there is proper notification of business at a meeting, no business can be validly transacted: ***Myer Queenstown Garden Plaza*** (527). This common law principle is reflected in cl 12.5(d) and cl 12.6 of Exhibit E. Clause 12.5(d) and cl 12.6 contemplates a procedure for giving notice of business at an AGM which on its terms requires strict compliance where amendments are sought to be made to the constitution. Clause 12.5(d) provides that the business of the Annual General Meeting shall be to consider and, if appropriate, to adopt (with or without modification) any notice of motion (including a notice of motion proposing an amendment to Exhibit E) of which due notice has been given under cl 12.6 of Exhibit E.

48 Clause 12.5(d) creates an obligation to give any notice of motion proposing an amendment to Exhibit E by giving 'due notice' under cl 12.6. By the use of the words 'due notice' it is clear that the procedure provided for in cl 12.6 must be complied with. When cl 12.6 is analysed, the following pre-conditions for the giving of due notice that emerge are:

(a) A member who wishes to propose a motion at any AGM must give notice in writing to the president;

(b) The notice of motion must be signed by the member who is the proposer of the motion and by another member as seconder;

(c) The notice of motion must set out the text of the motion;

(d) The notice of motion must be accompanied with a short explanation of the effect of the motion and the reasons why the member thinks it should be passed;

(e) The notice of motion must be sent to the Federation at least 21 days prior to the AGM.

49 The evidence establishes that pre-conditions (b), (c), (d) and (e) were complied with. In particular:

(i) Mr Strickland as proposer and Mr Jakowyna as seconder are members of the Federation as they are inaugural members (Schedule A to Exhibit E).

(ii) The notice of motion set out the text of the resolutions to amend the constitution and the reasons why each resolution should be passed.

(iii) The notice of motion was dated 9 September 2008. Mr Strickland's evidence establishes it was provided to the Federation on the date it was signed and was sent to members on 18 September 2008. If that evidence is accepted, it is established that the notice was 'sent to the Federation' at least 21 days prior to the AGM.

50 However, pre-condition (a) could not be met as at all material times there was no president of the Federation. Consequently the Federation cannot establish that due notice was given of the AGM, as one of the pre-conditions for an AGM to validly conduct business to change Exhibit E was that due notice must be given. Rule 12(5) when read with r 12(6) and r 31 provides for a mandatory procedure that cannot be described as merely facultative. Rule 31 of Exhibit E provides:

> This Constitution may be changed by at least 75% of members present in person or by proxy and voting at the Annual General Meeting or at a Special General Meeting called for that purpose provided a notice of motion of the amendment has been given in writing in accordance with the requirements of clauses 12.6 or 13.6 of this Constitution.

51 As due notice could not be given, no valid business could be transacted at the putative 2008 AGM. This meant that resolutions 3 and 9, among the other resolutions, had no effect so that Attachment A did not replace Exhibit E as the constitution and the Attachment B 'rules' did not become the rules of the Federation.

52 The resolutions passed at the 2008 AGM may also be invalid on grounds that an AGM could not be convened by the Federation unless there was a council. However it is not necessary to decide this issue. In the absence of council and a president an AGM may be able to be held as cl 16 of Exhibit E does not prescribe the procedure for convening an AGM. One procedural difficulty is that no procedure for an AGM could be set by council as required by r 12.7. Whilst it may be possible to conduct an AGM in the absence of a procedure set by council if all that is done is to put to a quorum motions set out in a notice paper in relation to which due notice has been given. However, it is not necessary to make a finding about whether r 12.7 creates an obligation that must be complied with or is merely facultative for an AGM to conduct valid business, as it is clear that no business could be validly conducted at the putative 2008 AGM as there was no president to whom notice of a motion or motions could be given.

53 Even if the putative 2008 AGM could be said to have been validly called upon to consider the resolutions put forward by Mr Strickland and Mr Jakowyna, Resolution 3 could not by its terms replace Exhibit E by substituting Attachment A as the constitution. Resolution 3 sought not to change Exhibit E as required by r 31 but to ratify Attachment A as the constitution from 18 January 2007. As the SSTU points out, Resolution 3 sought to change what occurred at the inaugural meeting on 18 January 2007. Resolution 3 was not a resolution to change Exhibit E by replacing it with Attachment A. As Wells J pointed out in ***Myer Queenstown Garden Plaza*** in point 9 (528) all acts done by an invalidly constituted meeting (which was constituted on 18 January 2007) remains void and cannot by an act of ratification change what occurred at the meeting on 18 January 2007. As this consequence is clear, it is not necessary to deal with the other arguments raised by the SSTU about ratification. This same reasoning applies to Resolutions 5, 6, 7 and 8.

54 For these reasons, the rules of the Federation could not have been validly adopted under resolution 9 at the 2008 AGM. It also follows that the application to the Commission authorised by the putative council at a meeting on 12 November 2008 was not validly authorised with the consequence that there is no valid application before the Commission.

Invalidity 2 – Whether the Federation is an unregistered organisation consisting of not less than 200 employees

55 There are three categories of members provided for in Exhibit E inaugural members, persons who become members through a joint membership agreement and members who made application to the president for membership. These categories are provided for in cl 6 and cl 8.1 to cl 8.4 of Exhibit E. Clause 6 provides:

> 6.1 The inaugural members of the Federation ('the inaugural Members') will be those persons who have agreed to establish the Federation and whose signatures are affixed on Schedule A and who are, for the purposes of clause 7, allocated to the sector that appears next to his or her name.
>
> 6.2 An application for membership shall be made to the President in the form approved by Council for that purpose.
>
> 6.3 The President shall have the power to approve any application for membership or to refer any application for membership to Council for consideration and decision.
>
> 6.4 The date of admission to membership shall be either:
>
> (a) The date of approval of the application by the President; or
>
> (b) The date of approval of the application by Council.
>
> 6.5 The President shall notify each applicant in writing of the decision made regarding his/her application.
>
> 6.6 An applicant whose application for membership is refused by Council, shall have refunded to him/her any amount paid by way of subscriptions or fees.

56 Clause 8.3 provides:

> Council may enter into an agreement with an Associated Body whereby persons can be members of the Associated Body and the Federation in accordance with the provisions of this clause.

57 Clause 8.4 provides:

> During the currency of any agreement made pursuant to clause 8.3, the following shall apply:
>
> (a) Applicants for membership of both the Associated Body and the Federation can apply for membership on a form approved by Council;
>
> (b) The form shall clearly state that the application is an application for membership of both the Federation and the Associated Body and that the applicant is able to choose not to join one or other of the Federation or the Associated Body;

(c) The Applicant shall be required to make payment of only one (1) membership subscription to have financial membership of both the Federation and the Associated Body;

(d) Payment of the membership subscription shall be made to the Associated Body as prescribed by the rules of the Associated Body, being a subscription determined by the Associated Body, and payment of that subscription shall constitute payment of the membership subscription due to the Federation.

(e) The Associated Body shall make agreed payments to the Federation of some or all of the subscriptions received by the Associated Body in accordance with this clause.

58 The effect of Mr Strickland's evidence in these proceedings is that there are no direct members of the Federation other than the 12 inaugural members and that all other members had joined the Federation through the joint membership agreements. Pursuant to cl 8 of Exhibit E members of an 'associated body' as defined in cl 8.2 can become members of the Federation. However among other conditions, two crucial pre-conditions for membership are that council must pursuant to cl 8.3 enter into an agreement with an associated body and under cl 8.4(a) applicants for membership can apply for joint membership on a form approved by council.

59 The putative council purported to enter into joint membership agreements with WAPPA, WASSEA, WADHSAA and the Federation sometime in early 2007. However as there was no council in existence when the agreements were made these agreements are void and have no effect. Consequently no person could become a member through the joint membership agreements as the opening words of cl 8.4(a) provide '[d]uring the currency of any [joint membership] agreement made pursuant to clause 8.3' persons can apply for membership of the associated body and the Federation. In addition, the membership form for a joint membership application is required to be approved by council. As there is no council of the Federation there can be no approved form. Even if it can be argued that cl 8.4(a) is merely permissive or facultative in terms by the use of the words 'can apply for membership on a form approved by Council', an application for membership as a joint member of an associated body cannot have effect unless council has entered into an effective agreement with the associated body.

60 As the joint membership agreements were invalid and at all material times no persons could become members of the Federation as all applications for membership of the Federation pursuant to the joint membership agreements were void and of no effect.

61 Consequently I am satisfied that the Federation is an unregistered organisation of less than 200 employees at the time of the 2008 AGM and at the time of making the application on 26 November 2009.

62 As invalidity 2 is established it is not necessary to decide the other particulars of alleged invalidities raised by the SSTU in respect of the joint membership agreements on contractual, constitutional or on grounds of the Act.

Invalidity 3 – Do the rules conform with the requirements of s 55(4)(e) of the Act

63 Given my conclusions on alleged invalidity 1 and 2 that the putative rules are invalid it is not strictly necessary to decide this alleged invalidity. However as this alleged invalidity is squarely raised as a separate ground it is appropriate to make some observations about the issue raised by the SSTU.

64 Prior to amendment by an AGM on 30 November 2009, r 44 of the rules provided:

Notwithstanding anything provided elsewhere in the Rules:

(a) There shall be an inaugural Council having the powers and functions of the Council set out in the Rules consisting of the following persons: Noel Strickland, Ken Austin, Nick Jakowyna, Denise Hilsz, Peter Fitzgerald, Neil Hunt, Kevin Brennan and Ron Bamford.

(b) For the avoidance of doubt, the inaugural Council has the power to:

(i) Apply for the registration of the Federation as an organisation under the provisions of the Act; and

(ii) Authorise the President to settle and sign all such notices or forms as may be required to make an application to register the Federation as an organisation under the provisions of the Act

(c) The inaugural President shall be Noel Strickland, who will have the powers and functions of the President set out in the Rules.

(d) The inaugural Vice President shall be Ken Austin, who will have the powers and functions of the Vice President set out in the Rules.

(e) The inaugural Treasurer shall be Nick Jackowyna, who will have the powers and functions of the Treasurer set out in the Rules.

(f) There shall be an inaugural Executive having the powers and functions of the Executive Council set out in the Rules consisting of the following persons holding the positions as indicated:

President:	Noel Strickland
Vice President:	Ken Austin
Treasurer:	Nick Jakowyna
Executive Member - Primary Sector	Denise Hilsz
Executive Member - District High School Sector	Peter Fitzgerald
Executive Member - Secondary Sector	Neil Hunt

(g) Save as provided hereunder, the inaugural Council, inaugural Executive, inaugural President, inaugural Vice President, inaugural Treasurer and inaugural Executive Members will hold office until 31 December 2009.

(h) In the event of a vacancy occurring in the positions of inaugural President, inaugural Vice President or inaugural Treasurer or as an officer of the inaugural Council or inaugural Executive Council, the inaugural Council may appoint, by resolution, an eligible member to the office for the unexpired portion of the term.

(i) At its first meeting after the adoption of these Rules, the inaugural Council shall appoint a Returning Officer for the conduct of any elections, ballots or plebiscites as may be necessary in the period up to 31 December 2009 provided that the Returning Officer shall hold office until a successor is appointed. The Returning Officer:

(i) need not be a member of the Federation;

(ii) shall not be the holder of any office in, or an employee of, the Federation; and

(iii) shall have the powers and functions of the Returning Officer under the Rules.

(j) The next Annual General Meeting of the Federation will be held in 2009 on such date as the inaugural Council may determine, provided that such date shall not be later than 30 November 2009.

(k) Darelle Pola BCom, CPA ASA is appointed as the auditor of the Federation until Council appoints an auditor under Rule 36.

(l) Elections for offices shall be held in 2009 in accordance with the Rules with the persons so elected to take office from 1 January 2010.

(m) In addition to its other powers under the Rules, the inaugural Council will have the power to ratify any agreement purported to have been entered into by or on behalf of the Federation since 18 January 2007 with retrospective effect.

(n) For the avoidance of doubt, the provisions of Rule 44 shall prevail over the provision of any other Rule to the extent that there is any inconsistency between Rule 44 and any other Rule.

65 Pursuant to r 42(a) of the rules, council has the power to propose additions and amendments to the rules by resolution carried by a two-thirds majority of the members voting at a meeting of the council.

66 On 28 October 2009, at a general meeting of council, council resolved to amend:

(a) r 44(g) and r 44(i) by deleting the year '2009' and substituting the year '2010'.

(b) r 44(l) by deleting the year '2009' in the first line and substituting the year '2010' and by deleting the year '2010' in the second line and substituting the year '2011'.

67 These resolutions (among others) were ratified by a meeting of members at an AGM on 30 November 2009.

68 The SSTU argues that there was no power in the council or the AGM to amend r 44 in the manner it did. In particular it argues that as r 44(n) provides that r 44 shall prevail over the provision of any other rule to the extent of any inconsistency, that an inconsistency arises with an attempt to change r 44 by changing the paramount clauses. The SSTU also argues that the members of the inaugural council could have continued themselves in perpetuity in office. By doing so that was not only undemocratic but also in breach of s 55(4)(e) of the Act, in particular s 56(1) of the Act.

69 In answer to these arguments, the Federation simply says that whether there was compliance with r 44 is not a justicable matter under s 55(4)(e) of the Act which is directed to the form of the rule.

70 Whilst with respect I do not agree that the issue raised by the SSTU is not a justicable matter, I am of the opinion that the SSTU's arguments at law fails. As to the first point raised by the SSTU there is nothing in r 44 of the rules that provides that r 44 cannot be varied or amended by council acting pursuant to r 42(a). So no inconsistency can be said to arise. In relation to the second point raised by the SSTU, the inaugural council did not resolve to continue themselves in office indefinitely, but only until 31 December 2010.

71 For these reasons alleged invalidity 3 is not made out.

Conclusion – Dismissal of Application

72 For the reasons given in my opinion invalidities 1 and 2 have been established. Consequently, the application should be dismissed.

SCOTT ASC

73 I have read a draft of the reasons of the Acting President. I agree and have nothing to add.

MAYMAN C

74 I have had the advantage of reading in draft form the reasons of the Acting President. I agree with those reasons and have nothing further to add.

2011 WAIRC 00398

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN PRINCIPALS' FEDERATION

APPLICANT

-and-

STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA (INC)
JENNIFER BROZ
EDMUND FREDRICK BLACK
TREVOR VAUGHAN

OBJECTORS

CORAM FULL BENCH
THE HONOURABLE J H SMITH, ACTING PRESIDENT
ACTING SENIOR COMMISSIONER P E SCOTT
COMMISSIONER S M MAYMAN

DATE FRIDAY, 10 JUNE 2011

FILE NO/S FBM 7 OF 2009

CITATION NO. 2011 WAIRC 00398

Result Application dismissed

Appearances

Applicant Mr T H F Caspersz (of counsel) and with him Ms J McWilliams (of counsel)

Objectors Mr T Dixon (of counsel)

Order

This matter having come on for hearing before the Full Bench on Wednesday, 2 March 2011 and Thursday, 3 March 2001, and having heard Mr T H F Caspersz (of counsel) and with him Ms J McWilliams (of counsel) on behalf of the applicant and Mr T Dixon (of counsel) on behalf of the respondent, and reasons for decision having been delivered on Friday, 10 June 2011, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the application be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Procedural Directions and Orders—

2011 WAIRC 00403

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

APPELLANT

-and-

LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

RESPONDENT

CORAM FULL BENCH
THE HONOURABLE J H SMITH, ACTING PRESIDENT
CHIEF COMMISSIONER A R BEECH
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 10 JUNE 2011

FILE NO/S FBA 4 OF 2011

CITATION NO. 2011 WAIRC 00403

Result Appeal discontinued

Order

WHEREAS on 25 March 2011, the appellant filed a notice of appeal to the Full Bench; and

WHEREAS on 3 June 2011, the appellant filed a notice of application for an order to discontinue this appeal; and

WHEREAS on 3 June 2011, the appellant filed a statutory declaration of service of the notice of application for an order to discontinue this appeal; and

WHEREAS on 9 June 2011, Ms E Palmer on behalf of the respondent informed the Full Bench that the respondent consents to the appeal being discontinued;

NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and the *Industrial Relations Commission Regulations 2005* reg 103A, hereby orders —

THAT this appeal be and is hereby discontinued.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

AWARDS/AGREEMENTS—Variation of—

2011 WAIRC 00326

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

DIRECT ENGINEERING SERVICES PTY LTD AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 9 MAY 2011

FILE NO APPL 20 OF 2011

CITATION NO. 2011 WAIRC 00326

Result Award varied

Representation

Applicant Mr J Wilson

Respondents No appearance

Order

HAVING HEARD Mr J Wilson on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Air Conditioning and Refrigeration Industry (Construction and Servicing) Award 10 of 1979 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 9 May 2011.

(Sgd.) S M MAYMAN,

[L.S.] Commissioner.

SCHEDULE

1. Clause 12. – Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.75 for a meal and if, owing to the

amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with each such meal by the employer or be paid $7.95 for each meal so required.

2. Clause 16. – Special Rates and Provisions: Delete subclause (2)(b) of this clause and insert the following in lieu thereof:

(b) Subject to paragraph (c) hereof where the employee's working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the worker for that loss but only up to a maximum of $159.40.

3. Clause 29. – Wages:

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

(4) (a) In addition to the appropriate rates of pay prescribed in this clause, an employee shall be paid -

(i) $46.90 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $42.20 per week if engaged on a multi-storey building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A multi-storey building is a building which, when completed, will consist of at least five storeys.

(iii) $24.80 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(5) Leading Hands:

In addition to the appropriate total wage prescribed in this clause a leading hand shall be paid -

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	26.70
(b)	If placed in charge of more than 10 and not more than 20 other employees	40.50
(c)	If placed in charge of more than 20 other employees	52.40

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

(i) $14.70 per week to such tradesperson or second-class sheetmetal employee; or

(ii) in the case of an apprentice a percentage of $14.70 being the percentage which appears against the year of apprenticeship in subclause (3) hereof, for the purpose of such tradesperson, second-class sheetmetal employee or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson, second-class sheetmetal employee or as an apprentice.

2011 WAIRC 00338

ELECTRICAL CONTRACTING INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION WA BRANCH

APPLICANT

-v-

ELECTRICAL & COMMUNICATIONS ASSOCIATION OF WA (INC) AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 16 MAY 2011

FILE NO/S APPL 10 OF 2011

CITATION NO. 2011 WAIRC 00338

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch
Respondents	Ms J Holst and with her Ms A Ekic

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and Ms J Holst and with her Ms A Ekic, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electrical Contracting Industry Award be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 May 2011.

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

SCHEDULE

1. Clause 12. – Overtime: Delete subclause (2)(e) of this clause and insert the following in lieu thereof:

(e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid $12.35 for such meal and for a second or subsequent meal if so required.

(ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.

(iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid for each meal provided and not required, $12.35.

2. Clause 18. – Special Rates and Provision:

A. Delete subclause (1), (2), (3), (4) and (5) of this clause and insert the following in lieu thereof:

(1) **Height Money**: An employee shall be paid an allowance of $2.45 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons.

(2) **Dirt Money**: An employee shall be paid an allowance of 50 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Grain Dust**: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 84 cents per hour.

(4) **Confined Space**: An employee shall be paid an allowance of 59 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(5) **Diesel Engine Ships**: The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 84 cents per hour whilst so engaged.

B. Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) **Hot Work**: An employee shall be paid an allowance of 50 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

C. Delete subclauses (9), (10), (11) and (12) of this clause and insert the following in lieu thereof:

(9) **Percussion Tools**: An employee shall be paid an allowance of 31 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(10) **Chemical, Artificial Manure and Cement Works**: An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of $12.50 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(11) **Abattoirs**: An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $16.60 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(12) **Phosphate Ships**: An employee shall be paid an allowance of 74 cents for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

D. Delete subclause (19) of this clause and insert the following in lieu thereof:

(19) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $9.90 per week in addition to their ordinary rate.

E. Delete subclause (21) of this clause and insert the following in lieu thereof:

(21) **Nominee**: A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of $61.60 per week.

3. Clause 27. – Grievance Procedure and Special Allowance: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) (a) Subject to paragraph (e) of this subclause, a special allowance of $30.50 per week shall be paid as a flat amount each week except where direct action takes place.

(b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as non-adherence to the disputes procedure Clause or affect the payment of this allowance.

(c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and $30.50 shall be paid.

(d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.

(e) An apprentice shall be paid a percentage of $30.50 being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

4. Clause 30. – Special Provisions – Western Power: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) (a) An employee to whom the provisions of Clause 21. - Distant Work of this Award, applies who work at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of $413.80 per week to meet the expenses reasonably incurred by the employee for board and lodging.

(b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while they continue to live with their spouse (including de facto partner) in accommodation provided by the employee.

(ii) The accommodation shall be of a reasonable standard.

(iii) The employee shall continue to maintain their original residence.

(iv) The employee shall satisfy the employer, upon request, that their circumstances meet the requirements of this subclause.

(v) Any dispute as to the application of this Clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 21. - Distant Work of this Award shall not apply.

5. Clause 36. – Superannuation: Delete subclause (2)(b)(i) of this clause and insert the following in lieu thereof:

(i) For Apprentices not engaged on construction work, a weekly contribution calculated as 9% of the rate of pay prescribed in the First Schedule - Wages of this Award as follows:

Four Year Term	**Three and a Half Year Term**	**Three Year Term**
1st Year $25.59	Six Months $25.59	1st Year $33.47
2nd Year $33.47	Next Year $33.47	2nd Year $43.96
3rd Year $43.96	Next Year $43.96	3rd Year $51.84
4th Year $51.84	Final Year $51.84	

6. First Schedule - Wages:

A. Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Leading Hands - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$25.70
(b)	If placed in charge of more than ten and not more than twenty other employees	$39.40
(c)	If placed in charge of more than twenty other employees	$50.80

B. Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:

(5) Tool Allowance:

(a) In accordance with the provisions of subclause (20) of Clause 18. – Special Rates and Provisions of this award the tool allowance to be paid is:

(i) $14.80 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $14.80 being the percentage which appears against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(6) Construction Allowance:

(a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid:

(i) $45.80 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $41.30 per week if the employee is engaged on a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $24.30 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Board of Reference.

C. Delete subclauses (9) and (10) of this clause and insert the following in lieu thereof:

(9) Licence Allowance:

A tradesperson who holds and in the course of their employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force at the date of this Award under the Electricity Act, 1945, shall be paid $21.80 per week.

(10) Commissioning Allowances:

An "Electrician Commissioning" as defined shall be paid at the rate of $33.30 per week in addition to rates prescribed in this schedule.

2011 WAIRC 00341

ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	CHUBB ELECTRONIC SECURITY AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 MAY 2011
FILE NO/S	APPL 17 OF 2011
CITATION NO.	2011 WAIRC 00341

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch
Respondents	Ms J Holst and with her Ms A Ekic

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and Ms J Holst and with her Ms A Ekic, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electrical Trades (Security Alarms Industry) Award, 1980 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 May 2011.

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

SCHEDULE

1. Clause 11. – Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.80 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $8.10 for each meal so required.

2. Clause 15. – Special Rates and Provisions:

A. Delete subclause (1) to (4) of this clause and insert the following in lieu thereof:

(1) **Height Money:** An employee shall be paid an allowance of $2.55 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.

(2) **Dirt Money**: An employee shall be paid an allowance of 52 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Confined Space**: An employee shall be paid an allowance of 66 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) **Hot Work:** An employee shall be paid an allowance of 52 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees celsius.

B. Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) **Percussion Tools:**

An employee shall be paid an allowance of 33 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

C. Delete subclauses (13) and (14) of this clause and insert the following in lieu thereof:

(13) An employee, holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $10.70 per week in addition to his ordinary rate.

(14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $21.70 per week.

3. Clause 28. – Wages: Delete subclauses (3), (4) and (5) of this clause and insert the following in lieu thereof:

(3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of $15.00 per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson shall replace or pay for any tools supplied by the employer if lost through their negligence.

(4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -

(i) $48.50 per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $43.80 per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $25.30 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.

(5) **Leading Hand:** In addition to the appropriate total wage prescribed in subclause (1) of this clause, a leading hand shall be paid –

(a)	If placed in charge of not less than three and not more than ten other employees	$27.50
(b)	If placed in charge of more than ten and not more than twenty other employees	$42.00
(c)	If placed in charge of more than twenty other employees	$54.00

2011 WAIRC 00339

ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION WA BRANCH
	APPLICANT
	-v-
	ACTION ELECTRONICS PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 MAY 2011
FILE NO/S	APPL 11 OF 2011
CITATION NO.	2011 WAIRC 00339

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch
Respondents	Ms J Holst and with her Ms A Ekic

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and Ms J Holst and with her Ms A Ekic, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electronics Industry Award No. A 22 of 1985 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 May 2011.

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

SCHEDULE

1. Clause 9. – Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.45 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $7.70 for each meal so required.

2. Clause 20. – Special Provisions: Delete subclauses (1), (2), (3), (4), (6), (7), (8) and (14) of this clause and insert the following in lieu thereof:

(1) **Dirt Money**: An employee shall be paid an allowance of 52 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) **Confined Space**: An employee shall be paid an allowance of 65 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) **Hot Work**: An employee shall be paid an allowance of 52 cents per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.

(4) **Height Money**: An employee shall be paid an allowance of $2.50 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

(6) **Diesel Engine Ships**: The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 88 cents per hour whilst so engaged.

(7) **Percussion Tools**: An employee shall be paid an allowance of 33 cents per hour when working pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(8) **Chemical, Artificial Manure and Cement Works**: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $13.20 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

(14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $10.30 per week in addition to their ordinary rate.

3. Clause 33. – Wages: Delete subclauses (2) and (5) of this clause and insert the following in lieu thereof:

(2) Leading Hands:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$27.20
(b)	If placed in charge of more than ten but not more than twenty other employees	$41.10
(c)	If placed in charge of more than twenty other employees	$53.40

(5) **Tool Allowance**

(a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of -

(i) **$**15.00 per week to such technician, serviceperson, installer; or

(ii) In the case of an apprentice a percentage of **$**15.00 being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of technicians, servicepeople, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

PART II – CONSTRUCTION WORK

4. Clause 5. – Special Rates and Provisions: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.

(b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of $318.30.

(c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

5. Clause 10. – Wages: Delete subclauses (5), (6) and (7) of this clause and insert the following in lieu thereof:

(5) Construction Allowances:

(a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -

(i) $47.80 per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.

(ii) $43.20 per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $25.30 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(6) Leading Hand:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$27.20
(b)	If placed in charge of more than ten but not more than twenty other employees	$41.10
(c)	If placed in charge of more than twenty other employees	$53.40

(7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of -

(i) $15.00 per week to such Technician, Serviceperson or Installer, or

(ii) In the case of an apprentice a percentage of $15.00 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,

for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

2011 WAIRC 00337

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	THE MINISTER FOR WORKS AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 MAY 2011
FILE NO/S	APPL 12 OF 2011
CITATION NO.	2011 WAIRC 00337

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch
Respondents	Mr J Chapman and with him Ms C Holmes

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and Mr J Chapman and with him Ms C Holmes on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Engineering Trades (Government) Award, 1967 Award No. 29, 30 and 31 of 1961 and 3 of 1962 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 May 2011.

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

SCHEDULE

1. Clause 14. – Overtime:

A. Delete subclause (3)(e) of this clause and insert the following in lieu thereof:

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid $11.60 for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, he/she shall be supplied with each such meal by the employer or be paid $8.15 for each meal so required.

B. Delete subclause (3)(h) of this clause and insert the following in lieu thereof:

(h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid $5.40 for breakfast.

2. Clause 17. – Special Rates and Provisions:

A. Delete subclauses (1), (2), (3), (4) and (5) of this clause and insert the following in lieu thereof:

(1) **Height Money:** An employee shall be paid an allowance of $2.45 for each day in which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.

(2) **Dirt Money**: Dirt Money of 51 cents per hour shall be paid as follows:-

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers - Large Units:

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 56 cents per hour shall be paid.

(c) Bitumen Sprayers - Small Units:

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled of damaged by the nature of the work done.

(3) Confined Space:

64 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid 32 cents per hour extra whilst so engaged.

(5) **Hot Work**: An employee shall be paid an allowance of 51 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

B. Delete subclauses (8), (9), (10), (11), (12), (13), (14), (15) and (16) of this clause and insert the following in lieu thereof:

(8) Any employee working in water over his/her boots or, if gumboots are supplied, over the gumboots, shall be paid and allowance of $1.50 per day.

(9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of 51 cents.

(10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of $3.05 for such examination and $1.10 per hour extra thereafter for fixing, renewing or repairing such work.

(11) **Ship Repair Work**: Any employee engaged in repair work on board ships shall be paid an additional $5.50 per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of $2.12 per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 18 cents per hour, with a minimum payment of $1.30 per day.

(14) **Abattoirs -**

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $17.30 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to $16.00 with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 53 cents per hour, with a minimum payment for four hours.

(16) **Morgues -**

An employee required to work in a morgue shall be paid 53 cents per hour or part thereof, in addition to the rates prescribed in this clause.

C. Delete subclause (19) of this clause and insert the following in lieu thereof:

(19) An employee required to repair or maintain incinerates shall be paid $3.25 per unit.

D. Delete subclauses (21), (22), (23) and (24) of this clause and insert the following in lieu thereof:

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 38 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(d) For the purpose of this subclause foundry work shall mean:

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with:

(aa) Non-ferrous die casting (including gravity and pressure);

(bb) Casting of billets and/or ingots in metal mould;

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $21.10 per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 68 cents per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) **Towing Allowance**: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of $4.80 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

E. Delete subclauses (26), (27), (28) and (29) of this clause and insert the following in lieu thereof:

(26) **First Aid Allowance**: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $10.30 per week in addition to their ordinary rate.

(27) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of $2.12 per hour whilst so engaged.

(28) Nominee Allowance:

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of $18.40 per week.

(29) Hospital Environment Allowance:

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:

(a) (i) $14.80 per week for work performed in a hosp ital environment; and

(ii) $5.00 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -

Princess Margaret Hospital

King Edward Memorial Hospital

Sir Charles Gairdner Hospital

Royal Perth Hospital

Fremantle Hospital

(b) $10.70 per week for work performed in a hosp ital environment at -

Kalgoorlie Hospital

Osborne Park Hospital

Albany Hospital

Bunbury Hospital

Geraldton Hospital

Mt. Henry Hospital

Northam Hospital

Swan Districts Hospital

Perth Dental Hospital

(c) $7.10 per week for work performed in a hospital environment at -

Bentley Hospital	Derby Hospital
Narrogin Hospital	Port Hedland Hospital
Rockingham Hospital	Sunset Hospital
Armadale Hospital	Broome Hospital
Busselton Hospital	Carnarvon Hospital
Collie Hospital	Esperance Hospital
Katanning Hospital	Merredin Hospital
Murray Hospital	Warren Hospital
Wyndham Hospital	

3. Clause 21. – District Allowances: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO STANDARD RATE	COLUMN IV RATE
	$ Per Week	Town Or Place	$ Per Week
6	82.50	Nil	Nil
5	67.50	Fitzroy Crossing	91.00
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	84.90
		Marble Bar	
		Wittenoom	
		Karratha	79.80
		Port Hedland	73.90
4	34.20	Warburton Mission	91.60
		Carnarvon	31.90
3	21.50	Meekatharra	34.20
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	15.30	Kalgoorlie	5.10
		Boulder	
		Ravensthorpe	20.30
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

5. First Schedule - Wages:

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

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all purpose industry allowance of $16.60.

(b) This allowance shall be paid in two instalments, as follows:

(i) $8.30 of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining $8.30 - totalling $16.60 - shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance with any movements to the wage prescribed in subclause (2) hereof, as follows:

(i) The increase shall apply to the 'plus 24 months of service' rate;

(ii) The increase is to be rounded to the nearest ten cents;

(iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

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

(8) (a) Leading Hands

A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per week:

	$
If placed in charge of not less than three and not more than ten other employees	26.70
If placed in charge of more than ten and not more than twenty other employees	40.60
If placed in charge of more than twenty other employees	52.20

(b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten other employees.

(c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	$
Manjimup, Collie	65.10
Harvey, Dwellingup, Mundaring, Yanchep	32.50
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	16.40
Jarrahdale	16.40

C. Delete subclauses (10), (11) and (12) of this clause and insert the following in lieu thereof:

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -

(i) $46.70 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) $42.00 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which, when completed will consist of at least five storeys.

(iii) $24.80 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

(11) Tool Allowance

(a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

(i) $14.80 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in this Schedule,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) hereof shall be included in, and form part of, the ordinary weekly wage prescribed in this Schedule.

(c) An employer shall provide, for the use of tradespersons or apprentices, all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through the negligence of such employee.

(12) Drilling Allowance

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional $2.44 per hour whilst so engaged.

6. Fifth Schedule – Building Management Authority Wages and Conditions:

A. Delete subclause (5)(c), (d) and (e) of this clause and insert the following in lieu thereof:

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all purpose payment of $27.90 per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all purpose allowance of $37.50 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule - Wages of this Award.

B. Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid $3.95 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2011 WAIRC 00334

GATE, FENCE AND FRAMES MANUFACTURING AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION WA BRANCH AND ANOTHER
	APPLICANTS
	-v-
	CAI FENCES PTY LTD AND ANOTHER
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 MAY 2011
FILE NO/S	APPL 9 OF 2011
CITATION NO.	2011 WAIRC 00334

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch
Respondents	No appearance

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Gate, Fence and Frames Manufacturing Award be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 May 2011.

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

SCHEDULE

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

(f) Subject to the provisions of paragraph (h) of this subclause, an employee required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $10.85 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $7.45 for each meal so required.

2. Clause 14. – Special Rates and Provisions: Delete subclauses (1), (2) and (4) of this clause and insert the following in lieu thereof:

(1) Dirt Money: An employee shall be paid an allowance of 51 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) Confined Space: An employee shall be paid an allowance of 64 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association appointed by the employer to perform first aid duties, shall be paid $10.50 per week in addition to the ordinary rate.

3. Clause 19. – Fares & Travelling Time: Delete subclause (2)(a) of this clause and insert the following in lieu thereof:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $15.65 per day.

4. Clause 20. – Distant Work: Delete subclauses (6) and (7) of this clause and insert the following in lieu thereof:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $30.40 for any weekend the employee returns to the employee's home from the job, but only if -

(a) The employee advises the employer or the employer's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $13.40 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

5. First Schedule - Wages: Delete subclauses (2) and (6) of this clause and insert the following in lieu thereof:

(2) Leading Hand: In addition to the appropriate rate prescribed in subclause (1) of this clause, a leading hand shall be paid:

	$
(a) If placed in charge of not less than three and not more than 10other employees	27.60
(b) If placed in charge of more than10 and not more than 20 other employees	42.40
(c) If place in charge of more than 30 other employees	54.70

(6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of their work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

(i) $15.40 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $15.40 being the percentage which appears against the year of apprenticeship in subclause (a) of subclause (3) of this Schedule.

For the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through their negligence.

2011 WAIRC 00335

LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH

APPLICANT

-v-

KONE ELEVATORS PTY LTD AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 16 MAY 2011

FILE NO/S APPL 14 OF 2011

CITATION NO. 2011 WAIRC 00335

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch
Respondents	No appearance

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Lift Industry (Electrical and Metal Trades) Award 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 May 2011.

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

SCHEDULE

1. Clause 12. – Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.80 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $8.10 for each meal so required.

2. Clause 16. – Special Rates and Provisions: Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:

(5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of $21.40 per week.

(6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $10.60 per week in addition to his/her ordinary rate.

3. Clause 28. – Lift Industry Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of $100.60 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.

4. First Schedule - Wages: Delete subclauses (3) and (6) of this clause and insert the following in lieu thereof:

(3) Leading Hands:

In addition to the appropriate total wage prescribed in this Clause, a leading hand shall be paid -

		$
(a)	If placed in charge of not less than three and not more than ten other employees	27.10
(b)	If placed in charge of more than ten and not more than twenty other employees	41.20
(c)	If placed in charge of more than twenty other employees	53.20

(6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of his/her work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:-

(i) $15.00 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of $15.00 being the percentage which appears against his/her years of apprenticeship in Clause 3 of this schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson or apprentice.

(b) Any tool allowance paid pursuant of paragraph (a) of this Clause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

(c) An employer shall provide for the use of tradesperson or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by his/her employer if lost through his/her negligence.

2011 WAIRC 00348

METAL TRADES (GENERAL) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	ANODISERS WA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 23 MAY 2011
FILE NO/S	APPL 15 OF 2011
CITATION NO.	2011 WAIRC 00348

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondents	No appearance

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Metal Trades (General) Award be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 23 May 2011.

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

SCHEDULE

1. Clause 3.2 – Overtime: Delete subclause 3.2.3(6) of this clause and insert the following in lieu thereof:

(6) Subject to the provisions of 3.2.3(7), an employee required to work overtime for more than two (2) hours shall be supplied with a meal by the employer or be paid $11.85 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with each such meal by the employer or be paid $8.05 for each meal so required.

2. Clause 4.8 – Wages and Supplementary Payments:

A. Delete subclause 4.8.2(1) of this clause and insert the following in lieu thereof:

4.8.2 (1) Leading Hands:

In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week –

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	27.30
(b)	If placed in charge of more than 10 and not more than 20 other employees	41.70
(c)	If placed in charge of more than 20 other employees	53.90

B. Delete subclause 4.8.6(1) of this clause and insert the following in lieu thereof:

(1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:

(a) $15.00 per week to such tradesperson; or

(b) in the case of an apprentice a percentage of $15.00 being the percentage which appears against the year of apprenticeship in 4.8.3;

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

C. Delete subclause 4.8.7 of this clause and insert the following in lieu thereof:

4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of $24.20 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities, but an employee so employed for not more than three days shall be paid on a pro rata basis.

This subclause shall not apply to employees employed by Cockburn Cement Limited.

3. Clause 5.2 – Special Rates and Facilities: Delete this clause and insert the following in lieu thereof:

5.2.1 Height Money:

An employee shall be paid an allowance of $2.50 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespeople nor to riggers and splicers on ships and buildings.

5.2.2 Dirt Money:

An employee shall be paid an allowance of 53 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

5.2.3 Grain Dust:

Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this Award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 90 cents per hour.

5.2.4 Confined Space:

An employee shall be paid an allowance of 64 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.

5.2.5 Diesel Engine Ships:

The provisions of 5.2.2 and 5.2.4 do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 90 cents per hour whilst so engaged.

5.2.6 Boiler Work:

An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any allowance to which the employee may be entitled under 5.2.2 and 5.2.4.

5.2.7 Hot Work:

An employee shall be paid an allowance of 53 cents per hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1 degrees and 54.4 degrees Celsius.

5.2.8 (1) Where, in the opinion of the Board of Reference, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may -

(a) fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(b) fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(c) prescribe such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Board sees fit.

(2) The provisions of 5.2.8(1) do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.

(3) An allowance fixed pursuant to paragraph 5.2.8(1) includes any other allowance which would otherwise be payable under this clause.

5.2.9 Tarring Pipes:

The provisions of 5.2.2 and 5.2.4 do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of 86 cents per day whilst so engaged.

5.2.10 Percussion Tools:

An employee shall be paid an allowance of 31 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

5.2.11 Chemical, Artificial Manure and Cement Works:

An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $13.20 per week. This allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

5.2.12 Abattoirs and Tallow Rendering Works:

An employee, employed in and about an abattoir or in a rendering section of a tallow works shall be paid an allowance calculated at the rate of $17.30 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause.

5.2.13 An employee who is employed at a timber sawmill or is sent to work at a timber sawmill shall be paid for the time there engaged a disability allowance equivalent to what the majority of the employees at the mill receive under the appropriate Award. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause with the exception of that prescribed in 5.2.1 - Height Money.

5.2.14 Phosphate Ships:

An employee shall be paid an allowance of 76 cents for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

5.2.15 An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than he or she would be entitled to receive pursuant to the Award which would apply if such employee was employed in the gold mine concerned.

5.2.16 An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.

5.2.17 The work of an electrical fitter shall not be tested by an employee of a lower grade.

5.2.18 Special Rates Not Cumulative:

Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely - the highest for the disabilities prevailing. Provided that this subclause shall not apply to confined space, dirt money, height money, or hot work, the rates for which are cumulative.

5.2.19 Protective Equipment:

(1) An employer shall have available a sufficient supply of protective equipment as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by employees when engaged on work for which some protective equipment is reasonably necessary.

(2) An employee shall sign an acknowledgement when issued with any article of protective equipment and shall return that article to the employer when finished using it or on leaving employment.

(3) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if the employee does, both employees shall be deemed guilty of wilful misconduct.

(4) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.

(5) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.

5.2.20 (1) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 38 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces, and noise.

(2) The foundry allowance herein prescribed shall also apply to apprentices and unapprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to the employee shall be decreased proportionately.

(3) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(4) For the purpose of this subclause 'foundry work' shall mean -

(a) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(b) where carried on as an incidental process in connection with and in the course of production to which 5.2.20(4)(a) applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -

(i) non-ferrous die casting (including gravity and pressure);

(ii) casting of billets and/or ingots in metal moulds;

(iii) continuous casting of metal into billets;

(iv) melting of metal for use in printing;

(v) refining of metal.

5.2.21 An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $10.40 per week in addition to the employee's ordinary rate.

5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant Regulation in force on the 28th day of February 1978 under the *Electricity Act 1945*, shall be paid an allowance of $21.60 per week.

PART 2 – CONSTRUCTION WORK

4. Clause 13 – Wages: Delete subclauses 13.4, 13.5 and 13.6 of this clause and insert the following in lieu thereof:

13.4 Construction Allowance

(1) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid:

(a) $48.20 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(b) $43.30 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(c) $25.50 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.

(2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

13.5 Leading Hands

In addition to the appropriate total wage prescribed in this clause a leading hand shall be paid:

		$
(1)	If placed in charge of not less than three (3) and not more than ten (10) other employees	27.30
(2)	If placed in charge of more than ten (10) and not more than twenty (20) other employees	41.70
(3)	If placed in charge of more than twenty (20) other employees	53.90

13.6 (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of –

(a) $15.00 per week to such tradesperson; or

(b) in the case of an apprentice a percentage of $15.00 being the percentage which appears against his or her year of apprenticeship in 4.8.3 of Clause 4.8 – Wages and Supplementary Payments of PART 1 - GENERAL (subject to Clause 12.2 Apprentices of PART 2) of this Award,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his or her work as a tradesperson or apprentice.

(2) Any tool allowance paid pursuant to 13.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(4) A tradesperson or apprentice shall replace or pay for any tools supplied by his or her employer if lost through his or her negligence.

5. Clause 15.1 – Special Allowances and Provisions:

A. Delete subclause 15.1.2(2) of this clause and insert the following in lieu thereof:

(2) Subject to 15.1.3 where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under 15.1.2(1) the employer shall reimburse the employee for that loss but only up to a maximum of $831.00.

B. Delete subclause 15.1.4 of this clause and insert the following in lieu thereof:

15.1.4 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the *Electricity Act 1945*, shall be paid an allowance of $21.60 per week.

6. Clause 15.4 – Special Provision – Western Power: Delete subclause 15.4.2 of this clause and insert the following in lieu thereof:

15.4.2 In addition to the wage otherwise payable to an employee pursuant to the provisions of PART 2 - CONSTRUCTION WORK of this Award, an employee (other than an apprentice) shall be paid -

(1) $2.15 per hour for each hour worked if employed at Muja;

(2) $1.26 per hour for each hour worked if employed at Kwinana;

(3) a safety footwear allowance of eleven (11) cents per hour for each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee. Failure to wear approved safety footwear or to maintain it in sound condition as determined by the employer shall render the employee liable to dismissal.

2011 WAIRC 00342

PRISON OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 17 MAY 2011
FILE NO/S	APPL 18 OF 2011
CITATION NO.	2011 WAIRC 00342

Result	Award varied
Representation (by written submissons)	
Applicant	Mr J Walker
Respondent	Mr P Budd

Order

HAVING heard by written submission from Mr J Walker for the applicant and from Mr P Budd for the respondent, I, the undersigned, pursuant to the powers conferred on me under s 40 of the *Industrial Relations Act 1979*, hereby order –

THAT the Prison Officers' Award be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 17th day of May 2011.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 52. – Motor Vehicle Allowance: Delete subclause 52.5 and insert the following in lieu thereof:

52.5 Allowance for towing Departmental caravan or trailer

In cases where Officers are required to tow the Departmental caravan on official business, the additional rate shall be 7.5 cents per kilometre. When Departmental trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 53. – Relieving Allowance: Delete subclause 53.4 of this clause and insert the following in lieu thereof:

53.4 If an Officer whose normal duties do not involve camp accommodation, is required to relieve or perform special duty resulting in a stay at a camp, the Officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $180.00 to cover incidental personal expenses; provided that an Officer shall receive no more than one lump sum of $180.00 in any period of three (3) years.

3. Clause 54. – Removal Allowance:

A. Delete (3) of subclause 54.1 of this clause and insert the following in lieu thereof:

(3) An allowance of $556.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an Officer is required to transport his or her furniture, effects and appliances provided that the Commissioner is satisfied that the value of household furniture, effects and appliances moved by the Officer is at least $3,334.00.

B. Delete (4) of subclause 54.1 of this clause and insert the following in lieu thereof:

(4) Reimbursement of reasonable expenses in kennelling and transporting pet or pets up to a maximum amount of $180.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the Officer's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

C. Delete subclause 54.6 of this clause and insert the following in lieu thereof:

54.6 Where an Officer is transferred to Government owned or private accommodation, where furniture is provided, and as a consequence the Officer is obliged to store furniture, the Officer shall be reimbursed the actual cost of such storage up to a maximum allowance of $1034.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the Employer.

4. Schedule I – Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE I - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDANTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2), TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 55.3)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$		
(1)	WA - South of 26° South Latitude	14.55		
(2)	WA - North of 26° South Latitude	21.70		
(3)	Interstate	21.70		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA – Metropolitan Hotel or Motel	305.45	152.70	101.80
(5)	Locality South of 26° South Latitude	208.55	104.30	69.50

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDANTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2), TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 55.3)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL—*continued*				
		$	$	$
(6)	Locality North of 26° South Latitude:			
	Broome	456.70	228.35	152.25
	Carnarvon	255.15	127.55	85.05
	Dampier	366.70	183.35	122.25
	Derby	342.20	171.10	114.05
	Exmouth	292.70	146.35	97.55
	Fitzroy Crossing	370.20	185.10	123.40
	Gascoyne Junction	291.70	145.85	97.25
	Halls Creek	247.20	123.60	82.40
	Karratha	445.70	222.85	148.55
	Kununurra	331.70	165.85	110.55
	Marble Bar	271.70	135.85	90.55
	Newman	338.95	169.50	113.00
	Nullagine	256.70	128.35	85.55
	Onslow	273.30	136.65	91.10
	Pannawonica	192.70	96.35	64.25
	Paraburdoo	259.70	129.85	86.55
	Port Hedland	367.15	183.55	122.40
	Roebourne	241.70	120.85	80.55
	Shark Bay	240.20	120.10	80.05
	Tom Price	320.20	160.10	106.75
	Turkey Creek	235.70	117.85	78.55
	Wickham	508.70	254.35	169.55
	Wyndham	254.70	127.35	84.90
(7)	Interstate - Capital City			
	Sydney	304.90	152.45	101.60
	Melbourne	288.55	144.30	96.15
	Other Capitals	270.10	135.05	89.95
(8)	Interstate – Other than Capital City	208.55	104.30	69.50
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	93.65		
(10)	WA - North of 26° South Latitude	128.25		
(11)	Interstate	128.25		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDANTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2), TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 55.3)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDANTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2))
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.30		
	Lunch	16.30		
	Dinner	46.50		
(13)	WA - North of 26° South Latitude:			
	Breakfast	21.20		
	Lunch	33.20		
	Dinner	52.20		
(14)	Interstate:			
	Breakfast	21.20		
	Lunch	33.20		
	Dinner	52.20		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 55.5(1))				
(15)	Each Adult	26.25		
(16)	Each Child	4.50		
MIDDAY MEAL (CLAUSE 56.11)				
(17)	Rate per meal	6.35		
(18)	Maximum reimbursement per pay period	31.75		

The allowances prescribed in this schedule shall operate from the beginning of the first pay period commencing on or after the 21 April 2010.

2011 WAIRC 00336

RADIO AND TELEVISION EMPLOYEES' AWARD NO. 3 OF 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH

APPLICANT

-v-

HILLS INDUSTRIES LTD AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 16 MAY 2011

FILE NO/S APPL 16 OF 2011

CITATION NO. 2011 WAIRC 00336

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch
Respondents	No appearance

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Radio and Television Employees' Award No. 3 of 1980 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 May 2011

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

SCHEDULE

1. Clause 9. – Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.80 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $8.00 for each meal so required.

2. Clause 29. – Wages: Delete subclauses (2) and (5) of this clause and insert the following in lieu thereof:

(2) **Leading Hands:**

In addition to the appropriate total wage prescribed in subclause (1) of this Clause a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	27.20
(b)	If placed in charge of more than ten and not more than twenty other employees	41.40
(c)	If placed in charge of more than twenty other employees	53.40

(5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of their work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-

(i) $14.90 per week to such Serviceperson, Installer or Assembler; or

(ii) In the case of an apprentice a percentage of $14.90 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause,

for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through their negligence.

2011 WAIRC 00340

WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	THE REGISTRY OFFICER, DEPARTMENT OF HEALTH, HEALTH INDUSTRIAL RELATIONS SERVICE AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 MAY 2011
FILE NO/S	APPL 13 OF 2011
CITATION NO.	2011 WAIRC 00340

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward on Behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch
Respondents	Ms J Love

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and Ms J Love, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the WA Government Health Services Engineering and Building Services Award 2004 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 May 2011.

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

SCHEDULE

1. Clause 19. – Leading Hand Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) An employee placed in charge of 3 or more other employees shall, in addition to the employee's ordinary salary, be paid -

(a) Not less than 3 and not more than 10 other employees - $39.90 per week;

(b) More than 10 and not more than 20 other employees - $53.60 per week;

(c) More than 20 other employees - $67.00 per week.

2. Clause 23. – Special Rates and Provision:

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

(1) Disability Allowances

(a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1. - Title, as at the date of registration of this Award.

(b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of $2.02 for each hour or part thereof whilst so engaged.

(c) Asbestos:

(i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority

(ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, ie. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of $0.67 per hour for each hour or part thereof whilst so engaged.

(d) Furnace Work

Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid $1.47 per hour or part thereof whilst so engaged.

(e) Construction Allowance

(i) In addition to the appropriate rate of pay prescribed in Appendix A. - Salaries of this Award, an employee shall be paid -

(aa) $44.20 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(bb) $39.80 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storey building" is a building which, when completed, shall consist of at least five stories.

(cc) $23.50 per week if engaged otherwise on Construction Work.

(ii) The rates specified in paragraph (1)(e)(i) shall be discounted by $18.30 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.

(f) Asbestos Eradication

(i) This sub-clause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.

(ii) For the purposes of this clause "asbestos eradication" means work on or about buildings, involving the removal or any other method of neutralisation of any materials which consist of, or contain asbestos.

(iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.

Without limiting the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.

(iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of $1.46 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 23.- Special Rates and Provisions

(v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (ie. 1716 "Specification of Respiratory Protective Devices") shall be worn by all personnel during work involving eradication of asbestos.

(g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.

B. Delete subclause (3)(b), (d), (e) and (f) of this clause and insert the following in lieu thereof:

(b) Permit Work

Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $17.20 for that week in addition to the rates otherwise prescribed.

(d) Scaffolding Certificate Allowance:

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid $0.54 per hour or part thereof: in addition to the rates otherwise prescribed in this Award.

(e) Nominee Allowance

A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of $17.20 per week.

(f) Setter Out:

A setter out (other than a leading hand) in a joiner's shop shall be paid $5.20 per day in addition to the rates otherwise prescribed.

3. Clause 25. – Overtime: Delete subclause (7)(a) of this clause and insert the following in lieu thereof:

(a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of $12.70 for each meal so required or may be provided with a meal ticket.

Provided that this subclause shall not apply to an employee notified on the previous day of the requirement to work such overtime.

4. Clause 47. – Car Allowance: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) A year, for the purpose of this clause, shall commence on the 1st day of July and end on the 30th day of June next following.

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

Area Details	Engine Displacement(in cubic centimetres)		
Distance Travelled Each Year on Official Business	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
Rate per kilometre (cents)			
Metropolitan Area	89.5	64.5	53.2
South West Land Division	91.0	65.4	54.0
North of 23.5 South Latitude	98.6	70.6	58.3
Rest of the State	94.3	67.5	55.6
Motor Cycle (in all areas)	31.0 cents per kilometre		

5. Clause 49. – Travelling Allowance: Delete subclause (12) of this clause and insert the following in lieu thereof:

(12) Adjustment of Rates:

The allowances prescribed in this clause shall be varied in accordance with any movement in the corresponding allowances in the Public Service Award 1992.

SCHEDULE - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT

STAY WHERE ACCOMMODATION ONLY IS PROVIDED.

(12)	WA - South of 26 ^{o} South Latitude	
	Breakfast	$16.30
	Lunch	$16.30
	Dinner	$46.50
(13)	WA - North of 26 ^{o} South Latitude	
	Breakfast	$21.20
	Lunch	$33.20
	Dinner	$52.20
(14)	Interstate	
	Breakfast	$21.20
	Lunch	$33.20
	Dinner	$52.20

DEDUCTION FOR NORMAL LIVING EXPENSES

(15)	Each Adult	$26.25
(16)	Each Child	$4.50

MIDDAY MEAL

(17)	Rate per meal	$6.35
(18)	Maximum reimbursement per pay period	$31.75

6. Clause 50. – District Allowances: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) The annual rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I	COLUMN II	COLUMN III	COLUMN IV
District	**Standard Rate**	**Exceptions To Standard Rate**	**Rate**
	$ Per Annum	**Town Or Place**	**$ Per Annum**
6	4,242	Nil	Nil
5	3,469	Fitzroy Crossing	4,672
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	4,344
		Marble Bar	
		Wittenoom	
		Karratha	4,085
		Port Hedland	3,801
4	1,748	Warburton Mission	4,696
		Carnarvon	1,647
3	1,101	Meekatharra	1,748
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	790	Kalgoorlie	263
		Boulder	
		Ravensthorpe	1,043
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause, employees with dependants shall be entitled to double the rate of district allowance shown.

7. Appendix A - Salaries: Delete subclause (1) of this Appendix and insert the following in lieu thereof:

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Above Award Payment - Subject to Absorption	Salary
Carpenter	Building Tradesperson Level 04	100	365.20	52.00	263.80	681.00	12.40	91.65	12.00	0.00	41579
	Building Tradesperson Level 05	105	383.50	54.60	263.80	701.90	13.04	91.90	12.00	0.00	42716
	Building Tradesperson Level 06	110	401.70	57.20	263.80	722.70	13.68	92.17	12.00	0.00	43484
	Building Tradesperson Level 07	115	420.00	59.80	261.80	741.60	14.22	92.42	12.00	0.00	44875
	Building Tradesperson Level 08	120	438.20	62.40	261.80	762.40	14.86	76.70	12.00	0.00	45174
	Building Tradesperson Level 09	125	456.50	65.00	261.80	783.30	15.50	77.03	12.00	0.00	46315
Painter	Building Tradesperson Level 04	100	365.20	52.00	263.80	681.00	12.40	71.03	12.00	0.00	40503
	Building Tradesperson Level 05	105	383.50	54.60	263.80	701.90	13.04	71.29	12.00	0.00	41640
	Building Tradesperson Level 06	110	401.70	57.20	263.80	722.70	13.68	71.55	12.00	0.00	42772
	Building Tradesperson Level 07	115	420.00	59.80	261.80	741.60	14.22	71.80	12.00	0.00	43800
	Building Tradesperson Level 08	120	438.20	62.40	259.80	760.40	14.86	56.04	12.00	0.00	43992
	Building Tradesperson Level 09	125	456.50	65.00	261.80	783.30	15.50	56.42	12.00	0.00	45239
Plasterer	Building Tradesperson Level 04	100	365.20	52.00	263.80	681.00	12.40	86.83	12.00	0.00	41327
	Building Tradesperson Level 05	105	383.50	54.60	263.80	701.90	13.04	87.08	12.00	0.00	42464
	Building Tradesperson Level 06	110	401.70	57.20	263.80	722.70	13.68	87.35	12.00	0.00	43597
	Building Tradesperson Level 07	115	420.00	59.80	261.80	741.60	14.22	87.60	12.00	0.00	44624
	Building Tradesperson Level 08	120	438.20	62.40	261.80	762.40	14.86	71.86	12.00	0.00	44921
	Building Tradesperson Level 09	125	456.50	65.00	261.80	783.30	15.50	72.19	12.00	0.00	46062
Plumber	Building Tradesperson Level 04	100	365.20	52.00	263.80	681.00	12.40	111.52	12.00	0.00	42615
	Building Tradesperson Level 05	105	383.50	54.60	263.80	701.90	13.04	111.77	12.00	0.00	43752
	Building Tradesperson Level 06	110	401.70	57.20	263.80	722.70	13.68	112.04	12.00	0.00	44885

	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Above Award Payment - Subject to Absorption	Salary
	Building Tradesperson Level 07	115	420.00	59.80	261.80	741.60	14.22	112.29	12.00	0.00	45912
	Building Tradesperson Level 08	120	438.20	62.40	261.80	762.40	14.86	96.55	12.00	0.00	46209
	Building Tradesperson Level 09	125	456.50	65.00	261.80	783.30	15.50	96.89	12.00	0.00	47351
Other Building	Building Employee Entrant Level	78	284.86	40.56	261.80	587.22	9.68	63.17	14.00	0.00	35164
employees	Building Employee Level 1	82	299.46	42.64	261.80	603.90	10.20	63.33	14.00	0.00	36069
not elsewhere	Building Employee Level 2	87	319.18	45.45	261.80	626.43	10.87	63.58	14.00	0.00	37292
classified	Building Employee Level 3	92	337.44	48.05	261.80	647.29	11.51	63.80	14.00	0.00	38425
	Building Employee Level 4	100	365.20	52.00	263.80	681.00	12.40	64.30	14.00	0.00	40257
Mechanical Fitter,	Engineering Employee Level 14	78	284.86	40.56	261.80	587.22	14.68	62.09	14.00	0.00	35368
Motor Mechanic,	Engineering Employee Level 13	82	299.46	42.64	261.80	603.90	15.40	62.27	14.00	0.00	36285
Refrigeration	Engineering Employee Level 12	87.4	319.18	45.45	261.80	626.43	16.47	62.51	14.00	0.00	37529
Fitter & other	Engineering Employee Level 11	92.4	337.44	48.05	261.80	647.29	17.41	62.75	14.00	0.00	38678
engineering	Engineering Tradesperson Level 10	100	365.20	52.00	263.80	681.00	18.80	77.56	12.00	0.00	41178
trades	Engineering Tradesperson Level 09	105	383.50	54.60	263.80	701.90	19.70	77.81	12.00	0.00	42328
employees not	Engineering Tradesperson Level 08	110	401.70	57.20	263.80	722.70	20.70	78.07	12.00	0.00	43479
elsewhere	Engineering Tradesperson Level 07	115	420.00	59.80	261.80	741.60	21.60	78.32	12.00	0.00	44525
classified	Engineering Tradesperson Level 06	125	456.50	65.00	263.80	785.30	23.50	62.84	12.00	0.00	46096
	Engineering Tradesperson Level 05	130	474.80	67.60	261.80	804.20	24.40	63.02	10.00	0.00	47034

	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Above Award Payment - Subject to Absorption	Salary
Electrical Fitter/ Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	263.80	681.00	18.80	98.16	12.00	0.00	42252
	Engineering Tradesperson Level 09	105	383.50	54.60	263.80	701.90	19.70	98.41	12.00	0.00	43403
	Engineering Tradesperson Level 08	110	401.70	57.20	263.80	722.70	20.70	68.67	12.00	0.00	44553
	Engineering Tradesperson Level 07	115	420.00	59.80	261.80	741.60	21.60	98.92	12.00	0.00	45599
	Engineering Tradesperson Level 06	125	456.50	65.00	261.80	783.30	23.50	83.35	12.00	0.00	47062
	Engineering Tradesperson Level 05	130	474.80	67.60	261.80	804.20	24.40	83.62	10.00	0.00	48109

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2011 WAIRC 00356

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBORAH BEVAN
	APPLICANT
	-v-
	SHARYN O'NEILL
	DIRECTOR GENERAL
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 244 OF 2009
CITATION NO.	2011 WAIRC 00356

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00358

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MURRAY BIRD
	APPLICANT
	-v-
	SHARYN O'NEILL
	DIRECTOR GENERAL
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 246 OF 2009
CITATION NO.	2011 WAIRC 00358

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00396

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN EDMUND BUTTERWORTH
	APPLICANT
	-v-
	GOVERNING COUNCIL OF CENTRAL INSTITUTE OF TECHNOLOGY
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 9 JUNE 2011
FILE NO/S	U 194 OF 2010
CITATION NO.	2011 WAIRC 00396

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 3rd day of February 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in relation to the application; and

WHEREAS on the 3rd day of June 2011 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.

2011 WAIRC 00357

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ERROL D'ROZARIO
	APPLICANT
	-v-
	SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 245 OF 2009
CITATION NO.	2011 WAIRC 00357

Result	Discontinued by leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00371

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALDINE FARR **APPLICANT** **-v-** SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 258 OF 2009
CITATION NO.	2011 WAIRC 00371

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00372

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN IACOMELLA **APPLICANT** **-v-** SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 259 OF 2009
CITATION NO.	2011 WAIRC 00372

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00344

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 00344
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	FRIDAY, 13 MAY 2011, WEDNESDAY, 6 APRIL 2011
DELIVERED	**:**	THURSDAY, 19 MAY 2011
FILE NO.	**:**	U 32 OF 2011
BETWEEN	**:**	BRETT JONES
		Applicant
		AND
		PALDELL PTY LTD T/A HATT TRANSPORT
		Respondent

Catchwords	:	Industrial law – Termination of employment – Harsh, oppressive and unfair dismissal – Whether Commission has jurisdiction – Principles applied - Employer a company as trustee for a trust – Commission satisfied employer is a trading corporation – Claim beyond Commission's jurisdiction – Application dismissed
Legislation	**:**	Industrial Relations Act 1979 (WA) s 29(1)(b)(i), Commonwealth of Australia Constitution Act s 51(xx), Corporations Act 2001 (Cth) s 57A, Trade Practices Act 1974 s 52 (superseded), Fair Work Act 2009 s 14(1)(a), s 26
Result	**:**	Application dismissed for want of jurisdiction
Representation:		
Applicant	**:**	Mr B Jones appeared on his own behalf
Respondent	**:**	Mr A Dzieciol (of counsel)

Case(s) referred to in reasons:

Mayo v W & K Holdings (NSW) Pty Ltd as trustee for the W & K Family Trust trading as W & K Constructions [2009] NSWIRComm 67

Joe Visser v Eral Pty Ltd as trustee for the Prestige Products Unit Trust trading as Compleat Angler and Camping World Rockingham (2007) 87 WAIG 2850; [2007] WAIRC 01148

Fencott v Muller [1983] HCA 12; (1982-1983) 152 CLR 570

Solo Waste Australia Pty Ltd v Inspector McDonald [2005] NSWIRComm 106; (2005) 141 IR 332

Case(s) also cited:

Aboriginal Legal Service of Western Australia (Inc) v Mark James Lawrence (2008) 89 WAIG 243; [2008] WASCA 254

Reasons for Decision

1 The short issue for decision is the correct identity of Mr Jones's former employer and whether that employer is a trading corporation.

Background

2 On 2 March 2011, Mr Jones filed a claim of unfair dismissal pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* in the Commission naming his former employer as Paldell Pty Ltd trading as Hatt Transport. The Notice of Answer filed by his former employer on 18 March 2011 says the correct name of the employer is Paldell Pty Ltd trading as Hatt Transport for the Hatt Family Trust, that it is a corporation and that the Commission does not have the jurisdiction to deal with the claim.

3 The Commission then wrote to Mr Jones on 21 March 2011 drawing this issue to his attention and referring him to the effect of the operation of the Commonwealth *Fair Work Act 2009* on the State *Industrial Relations Act 1979*. The Commission asked him whether he believes the Commission does have the jurisdiction to enquire into and deal with his claim. He replied on 27 March 2011 that his legal advice is that "it is a state matter". A conference before the Commission on 6 April 2011 did not result in any common understanding about the issue and Mr Jones has asked the Commission to proceed with hearing his claim.

The Evidence

4 At the hearing, Mr Jones appeared on his own behalf. He submitted that the legal advice he has received is that the ABN does not show a trading corporation but shows "a sole trader for a family trust." Mr Jones stated that when his wages were received in his bank account they were marked from Hatt Transport, and that his superannuation advice showed payments by Hatt Transport. He did not present any evidence and did not call any witnesses.

5 The former employer was represented by Mr Dzieciol and evidence was called from Mrs Samantha Hatt, who is the wife of the director of Paldell Pty Ltd. She does all of the administrative work in relation to that company and has done so since the company was created. The evidence of Mrs Hatt was given clearly and knowledgeably. Her evidence was not challenged in any material sense in cross-examination and I have no hesitation in accepting Mrs Hatt's evidence. Tendered into evidence were extracts from the ASIC database for Paldell Pty Ltd, the written contract of employment between Mr Jones and his employer, two letters to Mr Jones from his former employer and a copy of the M. Hatt Family Trust Deed.

6 Mr Dzieciol, properly in my view, was prepared also to tender financial statements and bank statements of Paldell Pty Ltd, however it was not necessary in the context of the evidence already before the Commission for them to be tendered.

Findings – The Identity of the Employer

7 The vast weight of the evidence shows that Mr Jones's former employer was Paldell Pty Ltd as trustee for the M. Hatt Family Trust trading as Hatt Transport. The evidence of Mrs Hatt is that the company Paldell Pty Ltd was formed in 1995 after her husband bought a truck, and that the company was formed to run a business carting steel. Her evidence is that carting steel has been the business of the company since its creation and that the only other activity undertaken by the company has been some welding, for which payment was received. Mrs Hatt's evidence is that it was Paldell Pty Ltd that employed Mr Jones and that Mr Jones's wages were paid from the company's bank account. In relation to Mr Jones's superannuation payment, it was sent on the letterhead of Paldell Pty Ltd trading as Hatt Transport.

8 There is no strong evidence that Mr Jones's former employer was not Paldell Pty Ltd. It is true that the written contract of employment, which is a formal document, does identify the employer party as "Hatt Transport" and the two letters sent to Mr Jones each has a letterhead with the name of "Hatt Transport". However, there is no evidence at all to suggest that Hatt Transport is a separate and distinct legal entity. All the evidence points to "Hatt Transport" being the trading name of the business which is carried on by Paldell Pty Ltd which is a proprietary company registered in 1995 (Exhibit 1).

9 The written contract of employment, and the two letters sent to Mr Jones which are in evidence, each has a letterhead with the business name of "Hatt Transport" prominently displayed (which is obviously entirely appropriate). In all three cases they also contain the words "Paldell Pty Ltd trading as Hatt Transport". The two letters in particular are signed by Mrs Hatt above those precise words. Therefore even if Mr Jones's own bank account shows his wages as having been received from Hatt Transport, and there is no evidence that it does, it would not prove that Hatt Transport is something other than a business name.

10 The conclusion on the evidence is inescapable that the correct identity of Mr Jones's former employer is Paldell Pty Ltd as trustee for the M. Hatt Family Trust trading as Hatt Transport. I find accordingly.

Findings – The Company as Trustee of a Trust

11 Paldell Pty Ltd is trustee for the M. Hatt Family Trust (Exhibit 5, Schedule 1). This does not mean that it is the trust that is the employer. The trust and the company are not separate legal entities (*Mayo v W & K Holdings (NSW) Pty Ltd as trustee for the W & K Family Trust trading as W & K Constructions* [2009] NSWIRComm 67 at [15]). The same conclusion was reached by my colleague Kenner C in an earlier case where a claim of unfair dismissal was brought against a company which was trustee for a unit trust (*Joe Visser v Eral Pty Ltd as trustee for the Prestige Products Unit Trust trading as Compleat Angler and Camping World Rockingham* (2007) 87 WAIG 2850); [2007] WAIRC 01148; and to which Mr Dzieciol helpfully referred. (See also *Solo Waste Australia Pty Ltd v Inspector McDonald* [2005] NSWIRComm 106; (2005) 141 IR 332 at [16] where that Commission observed that a trust is an arrangement for the holding and administration of property under which property is vested in a trustee or trustees, which is held by them on behalf of another or others for a particular purpose)).

12 Therefore, the fact that Paldell Pty Ltd is a trustee for a trust does not alter the conclusion that Mr Jones's former employer is the company. This is because the trust operates through its trustee and that is Paldell Pty Ltd. Schedule 3 of the Trust Deed of the M. Hatt Family Trust sets out the powers which may be exercised and they are to be exercised by the trustee. Relevantly, Paldell Pty Ltd is entitled to exercise the power of "carrying on any profession … trade or business and to use for those purposes such money, land or other assets whatsoever as the Trustee shall think fit …" (Exhibit 5, Schedule 3, paragraph 35). Therefore the business of Hatt Transport was run by Paldell Pty Ltd on behalf of the trust; it was not run by the trust. There is no evidence that the trust itself is capable of employing Mr Jones, and on the evidence it did not do so.

Findings – The Company as a Trading Corporation

13 Paldell Pty Ltd is a corporation: see s 57A of the *Corporations Act 2001* (Cth). Is it a trading corporation? A company that is trustee of a trust is capable of being a trading corporation, and has been held to be so for the purposes of s 52 of the *Trade Practices Act 1974* (Cth) (superseded) in *Fencott v Muller* (1982-1983) 152 CLR 570. As the facts of that matter reveal at particularly page 585, the company in that matter was a shelf company at the time that it was acquired to be trustee of a trust. In that case the company had not traded and would never trade, however the stated purposes for which the company was established as set out in its memorandum of association included the power to carry on business.

14 In this case, Paldell Pty Ltd was, on the evidence of Mrs Hatt, formed for the specific purpose of carrying on business, that is, a business carting steel. That and some welding work comprises the whole of its activities. It carts steel, or perhaps welds, for reward and there can be no serious suggestion that it is not "trading" when it does so.

15 The company was formed to become trustee of a trust. However, as the decided authorities make clear, when deciding whether a company is a trading corporation for the purposes of s 51(xx) of the *Commonwealth of Australia Constitution Act*, regard is to be had principally to the activities of the company rather than the purpose for which it was formed. In this case, the only activity of Paldell Pty Ltd is trading and there is no evidence that it engages in any other activity. Accordingly, I find that Paldell Pty Ltd is a trading corporation.

Conclusion

16 It is sufficient for the purposes of this decision to note that because Paldell Pty Ltd is a trading corporation, it is a "national system employer" under s 14(1)(a) of the *Fair Work Act 2009*. By operation of that Commonwealth Act, the power of this Commission, which it otherwise has to enquire into and deal with Mr Jones's dismissal, is overridden. In other words, the WA Industrial Relations Commission does not have the power to enquire into and deal with Mr Jones's claim of unfair dismissal by operation of s 26 of the *Fair Work Act 2009*.

17 Accordingly an order will now issue that dismisses Mr Jones's claim of unfair dismissal for want of jurisdiction.

2011 WAIRC 00343

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRETT JONES
	APPLICANT
	-v-
	PALDELL PTY LTD T/A HATT TRANSPORT
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 19 MAY 2011
FILE NO/S	U 32 OF 2011
CITATION NO.	2011 WAIRC 00343

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr B Jones appeared on his own behalf
Respondent	Mr A Dzieciol (of counsel)

Order

I, the undersigned, having given reasons for decision and pursuant to the powers conferred on me under section 27(1)(a) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby, dismissed for want of jurisdiction.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2011 WAIRC 00361

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER JONES
	APPLICANT
	-v-
	SHARYN O'NEILL
	DIRECTOR GENERAL
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 249 OF 2009
CITATION NO.	2011 WAIRC 00361

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00351

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	"K"
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION EMPLOYMENT AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 123 OF 2010
CITATION NO.	2011 WAIRC 00351

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr D J Matthews of counsel

Order

HAVING heard the applicant in person and Mr D J Matthews of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2011 WAIRC 00364

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINLEY KEMENY
	APPLICANT
	-v-
	SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 251 OF 2009
CITATION NO.	2011 WAIRC 00364

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00368

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MELANJA KWIATKOWSKI
	APPLICANT
	-v-
	SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 255 OF 2009
CITATION NO.	2011 WAIRC 00368

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00353

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GENEVIEVE MARIE-THERESE MELANIE
	APPLICANT
	-v-
	LEONARD GANDINI TRADING AS "CHAPMANS BARRISTERS AND SOLICITORS"
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	U 204 OF 2010
CITATION NO.	2011 WAIRC 00353

Result	Discontinued by Leave
Representation	
Applicant	Mr C Fayle
Respondent	Mr P Quinn

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00363

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GAVIN MORRIS
	APPLICANT
	-v-
	SHARYN O'NEILL
	DIRECTOR GENERAL
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 250 OF 2009
CITATION NO.	2011 WAIRC 00363

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00370

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEIL PURDY
	APPLICANT
	-v-
	SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 257 OF 2009
CITATION NO.	2011 WAIRC 00370

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00360

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JANET RODGERS
	APPLICANT
	-v-
	SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 248 OF 2009
CITATION NO.	2011 WAIRC 00360

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00390

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ROOTS
	APPLICANT
	-v-
	MORNING STAR FISHERIES
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 3 JUNE 2011
FILE NO/S	B 165 OF 2010
CITATION NO.	2011 WAIRC 00390

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 20th day of January 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and

WHEREAS on the 17th day of May 2011 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.

2011 WAIRC 00366

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ROSSI
	APPLICANT
	-v-
	SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 253 OF 2009
CITATION NO.	2011 WAIRC 00366

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00384

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD SEYMOUR
	APPLICANT
	-v-
	C.A.T.A. GROUP INC.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 31 MAY 2011
FILE NO/S	U 192 OF 2010
CITATION NO.	2011 WAIRC 00384

Result	Discontinued By Leave
Representation	
Applicant	Mr R Seymour
Respondent	Ms K Groves

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00359

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN VEEN
	APPLICANT
	-v-
	SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 247 OF 2009
CITATION NO.	2011 WAIRC 00359

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00355

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DENISE WHITE
	APPLICANT
	-v-
	DR RUTH SHEAN DIRECTOR GENERAL, DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 243 OF 2009
CITATION NO.	2011 WAIRC 00355

Result	Discontinued by leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00369

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEIL ALEXANDER WILSON
	APPLICANT
	-v-
	SHARYN O'NEILL DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 256 OF 2009
CITATION NO.	2011 WAIRC 00369

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00373

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GAIL WYATT

APPLICANT

-v-

SHARYN O'NEILL
DIRECTOR GENERAL
DEPARTMENT OF EDUCATION

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 260 OF 2009
CITATION NO.	2011 WAIRC 00373

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00365

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TIM YORKE

APPLICANT

-v-

SHARYN O'NEILL
DIRECTOR GENERAL
DEPARTMENT OF EDUCATION

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	B 252 OF 2009
CITATION NO.	2011 WAIRC 00365

Result	Discontinued by Leave
Representation	
Applicant	Mr J Fiocco
Respondent	Mr K Dodd

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Michelle Tonkes	Youth Focus Inc	U 26/2011	Chief Commissioner A R Beech	Discontinued
Michelle Tonkes	Youth Focus Inc	B 26/2011	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2010 WAIRC 00464

DISPUTE RE ALLEGED BREACH OF DISCIPLINE BY UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

COMMISSIONER S J KENNER

HEARD THURSDAY, 15 JULY 2010; WRITTEN SUBMISSIONS FILED FRIDAY, 16 JULY 2010, TUESDAY 20 JULY 2010.

DELIVERED FRIDAY, 23 JULY 2010

FILE NO. PSAC 20 OF 2010

CITATION NO. 2010 WAIRC 00464

CatchWords Industrial Law (WA) – Application for interim orders – Stay of disciplinary inquiry under Public Sector Management Act 1994 sought – Prospect of criminal proceedings arising out of matters being investigated – Right to silence and privilege against self incrimination – Interim orders granted – Industrial Relations Act 1979 s 44, Public Sector Management Act 1994 s 81(1), Animal Welfare Act 2002 s 19

Result Application granted. Interim order issued.

Representation

Applicant Mr S Farrell

Respondent Ms M Rinaldi

Reasons for Decision

The Application and Background

1 This matter is an urgent application for a compulsory conference pursuant to s 44 of the Industrial Relations Act 1979 ('the Act') by which the applicant seeks interim orders restraining the respondent from continuing with disciplinary proceedings brought against a member.

2 The Arbitrator listed the matter for an urgent compulsory conference on 15 July 2010. At the conference the Arbitrator was informed that the parties are in dispute in relation to disciplinary proceedings commenced by the respondent against the applicant's member Mr Batt pursuant to s 81(1) of the Public Sector Management Act 1994 ('the PSM Act'). The disciplinary proceedings arise from an incident on 19 March 2010 where it is alleged that Mr Batt, who is employed by the respondent as an Assistant Farm Supervisor at the Western Australia College of Agriculture in Narrogin, removed a dead calf from a cow's birth canal by inappropriate means which caused unnecessary distress to the cow and resulted in the cow being euthanized.

3 It is common ground that as a consequence of these events, on 23 April 2010 Mr Batt was interviewed by officers from the Royal Society for the Prevention of Cruelty to Animals ('the RSPCA') in accordance with their powers under the Animal Welfare Act 2002 ('the AW Act').

4 It is also common ground that the maximum penalties for offences under the AW Act are a fine of $50,000 and five years' imprisonment.

5 According to the submissions of the applicant, Mr Batt, whilst not having yet been charged with any offence under the AW Act, has not been informed of the outcome of the investigation undertaken by the RSPCA to date. Furthermore, it is also common ground that in addition to the investigation being undertaken by the RSPCA arising from the incident on 19 March 2010, an investigation has also been commenced by the Department of Local Government, which also has powers to prosecute offences under the AW Act. During the conference Mr Farrell informed me that an officer of the Department of Local Government dealing with animal welfare matters had informed him that the investigation into Mr Batt's conduct and whether offences under the AW Act had been committed, is ongoing.

6 Furthermore, I was informed during the conference that on 12 July 2010 the applicant contacted the investigator at the respondent and requested the disciplinary proceedings commenced against Mr Batt be put on hold pending the outcome of the investigations by both the RSPCA and the Department of Local Government. The respondent denied the applicant's request and in an email communication between the respondent and the applicant, annexed as schedule 3 to the notice of application, the applicant was informed that as there were no current criminal proceedings the respondent would continue with its disciplinary investigation into Mr Batt's conduct.

7 As a consequence of the respondent declining the applicant's request to suspend the disciplinary investigation against Mr Batt, the applicant submits that as Mr Batt faces the real possibility of criminal charges under the AW Act, any submissions made by him to the respondent through the disciplinary investigation process, could severely prejudice him in any subsequent criminal proceedings and the investigation process should be stopped.

8 The particulars alleged against Mr Batt are set out in a letter dated 2 July 2010 from the respondent and in essence, allege that he was negligent in the performance of his duties as an Assistant Farm Supervisor in his treatment of a cow in labour. The particulars set out in support of the alleged breach of discipline entail some 18 numbered paragraphs, many of which involve serious allegations that Mr Batt did not conduct himself in accordance with accepted husbandry practices; caused unnecessary distress to the cow; and failed to provide proper and competent training and instruction to students.

The Submissions

9 Given the issues arising in the application the parties were afforded an opportunity to make further written submissions in support of their positions following the adjournment of the compulsory conference. Written submissions were filed by the applicant on 16 July 2010 and by the respondent on 20 July 2010. Additionally, the applicant filed a brief written submission in reply on 20 July 2010.

10 The applicant made a number of submissions. It was contended that the test to be applied in relation to the granting of interim orders is set out by the President in *Corse v Robinson and Civil Service Association of WA (Inc)* (1996) 77 WAIG 321. Applying these principles, it was submitted that there is a substantial case to be tried in this matter. The applicant submits that a person's right to silence stems from the principle that no person is obliged to answer questions put to them by any official of the government. As found by Mustill LJ in *Smith v Director of Serious Fraud Office*, the right to silence does not denote any single right but rather refers to a disparate group of immunities which allow a person to refuse to answer questions put to him or her by persons in authority. It is submitted that at its most fundamental level, the right to silence provides that a person who believes on reasonable grounds that he or she is suspected of an offence is entitled to remain silent: (1993) AC 30 – 31.

11 Reference was made to *Hammond v The Commonwealth* (1982) 152 CLR 188 to the effect that it was held in that case that a person was not obliged to answer questions or render an explanation of matters relating to criminal proceedings in a parallel process and in particular reference is made to the judgment of Deane J at 203 in that respect.

12 The applicant referred to the decision of Pullin JA in *Chapman v The Director of Public Prosecutions for Western Australia* [2009] WASCA 66 where examination orders made under the *Criminal Property Confiscation Act 2000* were stayed on the grounds that the persons subjected to the examinations were facing criminal charges under the *Criminal Code*. The applicant also referred, in support of its contentions, to cases cited in *Chapman*, including *Commonwealth Director of Public Prosecutions v Jo and Ors* [2007] QCA 251.

13 It was submitted by the applicant that for the purposes of this matter, criminal proceedings do not commence when a charge has been laid and a person is committed to appear in court but when a complaint is made and an investigation is undertaken which may lead to the laying of criminal charges.

14 The applicant further submitted that the investigation processes pursuant to the PSM Act involved no abrogation of the common law privilege against self incrimination and there is no general privilege attached to the disciplinary process. Thus, as the submission went, there is an appreciable risk that any statements made by Mr Batt for the purposes of the disciplinary process under the PSM Act could be obtained and used for the purposes of any criminal charges that may be brought against Mr Batt. The submission was therefore, that if the disciplinary proceedings continue under the PSM Act, then Mr Batt's common law right against self incrimination would be offended.

15 As to the question of detriment, the applicant submitted that the possibility of criminal proceedings being instituted against Mr Batt is real and not remote. Furthermore, the applicant contended that if the disciplinary process is allowed to continue, it will place Mr Batt in the position where he will be required to choose whether or not to exercise his common law right not to incriminate himself. If he chooses to exercise this right, by not answering questions put to him during the course of the investigation process, Mr Batt suffers the risk of a possible negative finding against him and a penalty being imposed, given the lower standard of proof to be applied to the respondent in disciplinary proceedings under the PSM Act as opposed to any criminal proceedings. Alternatively, if Mr Batt chooses not to exercise his right to silence, then he runs the risk of those investigation responses being used against him.

16 Any detriment to the respondent arising from the current investigation, in terms of its licence to hold animals for scientific purposes at its schools under the AW Act, is outweighed, on the applicant's submission, by the potential detriment to Mr Batt.

17 As to whether any interim order would be irreversible, the applicant submitted that there would be nothing to prevent the respondent from recommencing the disciplinary proceedings once the outcomes of the current RSPCA and Department of Local Government investigations are known or alternatively, any charges arising are dealt with. Furthermore, the applicant submitted that the application for interim orders was lodged promptly and the grant of such orders is consistent with the objects of the Act.

18 Furthermore, the applicant submitted that whilst Mr Batt may have remedies under the PSM Act and the Act arising from the outcome of any disciplinary proceedings, in the interim, he would still suffer a detriment unless and until those proceedings led to a successful outcome for him.

19 On behalf of the respondent it was submitted that the appropriate test to apply is that determined by Kenner C in *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Department of Health* (2010) WAIRC 00348 applying the principles discussed in *ALHMWU v National Foods Pty Ltd* (2004) 84 WAIG 3395 and *Browne v President, State School Teachers' Union of Western Australia (Inc)* (1985) 69 WAIG 1390.

20 In this case the respondent submitted that there is not a substantial matter to be tried. It contended that it has an obligation under the PSM Act to investigate suspected breaches of discipline. In this case, there are no parallel criminal proceedings on foot as Mr Batt has not been charged with any criminal offences. The respondent contended that there are differences between the nature of any criminal charges that may be brought under the AW Act and the alleged suspected breach of discipline committed by Mr Batt in this case.

21 The respondent referred to *Civil Service Association of Western Australia Incorporated v The Commissioner of Police, Western Australian Police* (2007) 87 WAIG 822 and *Civil Service Association of Western Australia Incorporated v Director General of Department for Community Development* (2002) 82 WAIG 2845 to the effect that the respondent should be allowed to continue to conduct disciplinary proceedings where allegations constitute an actionable breach of discipline.

22 The respondent also submitted that the applicant has failed to demonstrate that there exists a prima facie case for relief in this matter. It was contended that whilst investigations into Mr Batt's conduct may be ongoing under the AW Act, there has been no indication, at least to date, that it is likely that Mr Batt will be charged with a criminal offence. Accordingly, the respondent submitted that it ought to be able to conduct its disciplinary processes without delay where the prospect of a criminal is not imminent and is unlikely in all of the circumstances.

23 In terms of detriment to the respondent, it is contended that its capacity to properly investigate breaches of discipline under the PSM Act may be compromised if the interim order as sought is granted. In this respect, the respondent referred to its usual practice in any event, that where during the course of a disciplinary investigation criminal proceedings are commenced, the disciplinary process is suspended.

24 Reference is also made by the respondent to Mr Batt's right to remain silent during the disciplinary investigation process by invoking his common law privilege against self incrimination.

25 The respondent submitted that Mr Batt will suffer no irreversible damage if the disciplinary proceedings continue as he has avenues of appeal under the PSM Act and the Act if he feels aggrieved from the outcome of those processes.

26 As to other matters, the respondent does not take issue with the promptness of the applicant's application. Furthermore, given the respondent's obligation to provide education services throughout the State, the requirement to hold a relevant licence under the AW Act and the effect on that licence of the events involving Mr Batt are relevant considerations.

Conclusion

27 For the following reasons, in my opinion, the respondent ought be restrained from continuing the disciplinary investigation under s 81 of the PSM Act into the conduct of Mr Batt on 19 March 2010.

28 In this case Mr Batt is the subject of a disciplinary inquiry the content of which, as set out in the respondent's letter to him of 2 July 2010, raises serious allegations as to his conduct in respect of an animal at the Western Australia College of Agriculture in Narrogin. The particulars in support of the allegation, as set out in pars 1 to 18 of the letter, make it plain that many of the particulars of the allegations relate to the failure by Mr Batt to apply accepted animal husbandry practices and causing unnecessary distress to an animal. Under the terms of Part III of the AW Act, in particular s 19, it is an offence for a person to be cruel to an animal and that offence attracts a maximum penalty of $50,000 and imprisonment for five years. The meaning of 'cruelty to an animal' is not defined but includes, without limiting the ordinary natural meaning of the words, any conduct by a person that 'causes the animal unnecessary harm': s 19(2)(e) AW Act. From the particulars of the alleged breach of discipline set out in the letter of 2 July 2010 from the respondent, there would appear to be considerable overlap between the allegations there set out and what may be regarded as animal cruelty for the purposes of s 19 of the AW Act.

29 The relevant principles applicable to circumstances involving a person who is compelled or is required to give evidence or answer questions which may be self incriminating, in light of possible or pending criminal proceedings, have received judicial attention. *Martins and Ors v Racing Penalties Appeal Tribunal of Western Australia and Another* (unreported) Library No: 970519A a decision of the Full Court of the Supreme Court of Western Australia, involved a return on an order in nisi for a writ of certiorari to quash a decision of the Racing Penalties Appeal Tribunal of Western Australia on the grounds of error of law on the face of the record. An issue arising in the proceedings was the effect of the prospect of criminal proceedings being commenced against the second respondents and the failure of the Tribunal to adjourn proceedings in which he was involved because of those possible criminal proceedings. In considering the relevant principles, Steytler J (Kennedy J agreeing) said at 9 – 10:

> 'In ***Edelsten v Richmond*** (1987) 11 NSWLR 51 Hope JA (with whom Priestley and Clarke JJA were relevantly in agreement), at p58, stressed the principle that the general law protects the right to silence 'most jealously'. It is for that

reason that the privilege against self incrimination 'can only be abrogated by the manifestation of a clear legislative intention' (***Hamilton v Oades*** (1989) 166 CLR 486 at 495, per Mason CJ). In ***Hamilton v Oades*** Deane and Gaudron JJ said, at 502-3:

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

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

In ***Edelsten v Richmond***, *supra*, at 59, Hope JA said:

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

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

The case of ***Edelsten*** involved a refusal by the Medical Tribunal to grant an adjournment of an inquiry into a complaint against a medical practitioner being conducted before it until the termination of current pending criminal proceedings. The court had there to consider the provisions of s32W of the *Medical Practitioners Act 1938*, as follows:

> 'A complaint may be referred to a Committee or the Tribunal, and dealt with by the Committee or Tribunal, even though the registered medical practitioner about whom the complaint is made is the subject of proposed or current criminal or civil proceedings relating to the subject matter of the complaint.'

Hope JA said of this provision, at p60, that:

> 'It is clear that this provision is of central importance in the determination of the present appeal and application. Although many of the earlier decisions, including the decisions of the High Court, are to be distinguished on the ground that Dr Edelsten could not be compelled to give self-incriminating answers, a possible view might have been that the disciplinary proceedings should await the outcome of the criminal proceedings. Although he might decline to answer these questions in the proceedings before the Tribunal, it might well be considered that it would be unjust to put him into the dilemma of not being able to answer the complaint because of the prejudice he might suffer in relation to the criminal proceedings.'

There is a good deal of other authority to similar effect.

In the case of ***Re a Solicitor*** (1938) 55 WN (NSW) 110 Jordan CJ (with whom Stephen and Bavin JJ were in agreement) said, at 110:

> 'The Court has undoubted jurisdiction to deal with a solicitor who has been guilty of misconduct of a kind which unfits him to be a solicitor, notwithstanding that the misconduct is not professional misconduct. Where, however, the misconduct alleged is non-professional and would constitute a criminal offence, then if the misconduct is not admitted, it is generally undesirable that the matter should be dealt with by the Court in its disciplinary jurisdiction until it has been determined whether criminal proceedings are to be instituted and until the result of such proceedings is known. This appears from the anonymous case *In re* ---- 3 Nev. & P (KB) 389, and the case of *Re Hill* LR 3 QB 543, at 545-548.''

30 Importantly for present purposes, in *Martins*, criminal charges had not been laid against the second respondent rather he faced the real prospect of a criminal prosecution.

31 In *Chapman* Pullin JA canvassed the relevant principles and referred in particular to *Hammond*, and *Jo's* case and concluded from those authorities that:

> '29 The onus is on the appellants to show that there is a real risk and not a remote possibility that justice will be interfered with: ***Hammond*** at 196. There is a real risk in this case. For example, if the appellants are obliged to state the source of moneys in the accounts referred to in the charges, then the answers may provide direct evidence of the flow of funds the prosecution will seek to prove in the criminal charges. Answers to questions about whether the appellants own or control the accounts or assets referred to in the charges may provide direct evidence of what the prosecution will seek to prove in the prosecutions. The situation is therefore the same as the situation in ***Hammond***. In my view, the effect of the decision in ***Hammond's*** case and ***Jo's*** case and the cases referred to below is that:
>
> (a) There is a common law privilege against self incrimination.

(b) The common law privilege above may be abrogated by legislation.

(c) Parliament has abrogated the common law privilege against self incrimination in this case by s 61.

(d) The case remains that, unless Parliament has expressly stated that what may otherwise amount to:

(i) a contempt of court; or

(ii) interference with the administration of justice

should not be regarded as such, then any threatened contempt of court or threatened interference may be restrained by either an injunction or a stay. Once criminal charges are pending before a court, that court or a court of appropriate jurisdiction has an

obligation to protect the integrity of the proceedings and to prevent interference with the administration of justice: ***Commissioner of Taxation (Commonwealth) v De Vonk*** (1995) 61 FCR 564, 569 per Foster J; ***Victoria v Australian Building Construction Employees & Builders Labourers Federation*** (1982) 152 CLR 25, 53 - 54.

(e) If a prosecutor seeks to interfere with the right of an accused person charged with criminal offences to exercise his right of silence, by seeking to compel that person, under threat of criminal penalty, to give up his right of silence, then such an attempt will amount to an improper interference with the due administration of justice in the criminal proceedings and will amount to a contempt of court.'

32 Furthermore, Pullin JA considered the extent to which there is a risk that justice will be interfered with and in referring to *Hammond* said at par 33:

'I am not prepared to accept the second submission based on ***Flugge's*** case because it suggests that a mere possibility, even a remote possibility, of a charge is sufficient to justify an injunction or a stay. That is contrary to Gibbs J's statement in ***Hammond's*** case at 196 that:

the plaintiff must establish that there is a real risk, as opposed to a remote possibility, that justice will be interfered with if the commission proceeds in accordance with its present intention. The tendency of the proposed actions to interfere with the course of justice must be a practical reality – a theoretical tendency is not enough.'

33 The Commission has adopted this approach in cases where proceedings have commenced before the Commission with concurrent criminal proceedings pending: *The Civil Service Association of Western Australia Incorporated v Director General, Department of Transport* (2000) 80 WAIG 2855; *Paulownia Sawmilling, Timber Supplies and Manufacturing Pty Ltd v Warren Ian Jones* (2001) 81 WAIG 2715.

34 The authorities referred to by the respondent as to the appropriateness of disciplinary proceedings continuing are in my opinion distinguishable. In *CSA v Director General of Department of Community Development* the employee concerned was charged with an offence under the *Criminal Code* but the matter was not proceeded with by the Director of Public Prosecutions. Subsequently, the employee was the subject of a disciplinary process under the PSM Act. That is, the employee in question in those proceedings was not facing the real prospect of, or actual, criminal proceedings at the time of the institution of the disciplinary action.

35 In *CSA v Commissioner of Police, Western Australian Police* the issue arising was not whether the employee in question may be prejudiced in any disciplinary proceedings by reason of possible or pending criminal proceedings, but rather, whether the allegations forming the basis of the disciplinary action were baseless.

36 As to the concerns expressed by the respondent relating to the possession by it of a licence under the AW Act, whilst that is a relevant consideration for present purposes, the making of an interim order by the Commission would provide the respondent with a sound basis to resist any suggestion by authorities granting such licences, that it has not sought to take appropriate steps in relation to any obligations that it may have under its licence.

37 Most importantly, in this case Mr Batt, is placed in a difficult situation. If he exercises his right to silence on the basis of possible self incrimination there is an appreciable risk that given the lower burden of proof upon the respondent in establishing the suspected breach of discipline, he may suffer penalties under the PSM Act. On the other hand, in seeking to protect his position in the disciplinary proceedings, if Mr Batt does not exercise his right to silence, particularly given the respondent's stated position that material matters raised in disciplinary investigations are passed on to the authorities, then that information may severely prejudice him in any subsequent criminal proceedings.

38 In all of the circumstances, and balancing up the competing contentions, in my view it is appropriate that the respondent be restrained from continuing the disciplinary proceedings against Mr Batt, until such time as it is known whether criminal proceedings are to be commenced against him.

39 This will also prevent the deterioration of industrial relations between the parties, pending any further proceedings before the Arbitrator. Nor will the making of an interim order prejudice the respondent's ability to re-commence the disciplinary proceedings as an appropriate time.

2010 WAIRC 00472

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	TUESDAY, 27 JULY 2010
FILE NO	PSAC 20 OF 2010
CITATION NO.	2010 WAIRC 00472

Result	Interim order issued
Representation	
Applicant	Mr S Farrell
Respondent	Ms M Rinaldi

Order

HAVING HEARD Mr S Farrell on behalf of the applicant and Ms M Rinaldi on behalf of the respondent, the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders:

1. THAT the respondent cease the disciplinary proceedings commenced against the applicant's member Mr Batt pursuant to s 81(1) of the Public Sector Management Act 1994 pending the outcome of investigations conducted by the Royal Society for the Prevention of Cruelty to Animals and the Department of Local Government.
2. THAT the parties have liberty to apply on short notice.

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

2011 WAIRC 00287

DISPUTE RE ALLEGED BREACH OF DISCIPLINE BY UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	FRIDAY, 15 APRIL 2011
FILE NO	PSAC 20 OF 2010
CITATION NO.	2011 WAIRC 00287

Result	Application discontinued
Representation	
Applicant	Mr S Farrell
Respondent	Ms M Rinaldi

Order

HAVING heard Mr S Farrell on behalf of the applicant and Ms M Rinaldi on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Director General, Department of Education and Training	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Harrison C	C 80/2006	3/10/2006 16/11/2006 22/11/2006 1/12/2006 16/01/2007 20/02/2007 1/03/2007 28/05/2009 1/07/2009 14/08/2009	Dispute regarding training for Education Assistants	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Department of Health	Harrison C	C 39/2009	4/12/2009 18/08/2010	Dispute re termination of employment for union member	Referred
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Shire of Exmouth	Harrison C	C 28/2011	N/A	Dispute re possible termination of union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2011 WAIRC 00354

DISPUTE REQUESTING RESPONDENT TO STOP REMOVING MONIES FROM MEMBER'S PAY.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

THE COMMISSIONER OF THE DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

DATE MONDAY, 30 MAY 2011

FILE NO PSAC 33 OF 2010

CITATION NO. 2011 WAIRC 00354

Result Discontinued

Representation

Applicant Ms D Larson

Respondent Ms K Jack

Order

HAVING heard Ms D Larson as agent on behalf of the applicant and Ms K Jack as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2011 WAIRC 00352

DISPUTE RE INVESTIGATION OF AN ALLEGATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	C 2 OF 2011
CITATION NO.	2011 WAIRC 00352

Result	Discontinued by Leave
Representation	
Applicant	Ms D Butler
Respondent	Mr R Farrell

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00345

DISPUTE RE FUNDING RELIEF RE PERFORMANCE MANAGEMENT PROCESSES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 19 MAY 2011
FILE NO.	C 33 OF 2011
CITATION NO.	2011 WAIRC 00345

Result	Recommendation issued

Recommendation

WHEREAS this is an application pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) relating to the withdrawal by the respondent from the parties' agreement reached in 2005 (the 2005 Agreement) in respect of teachers participating in performance management meetings and the related funding arrangements; and

WHEREAS the parties are in dispute as to the meaning and effect of the 2005 Agreement, and the effect of the respondent's withdrawal from the 2005 Agreement; and

WHEREAS the Commission convened conferences on 4 May and 18 May 2011 for the purpose of conciliating between the parties; and

WHEREAS The State School Teachers' Union of WA (Incorporated) (the Union) has sought the assistance of the Commission to provide interim relief.

NOW THEREFORE the Commission hereby:

I. Recommends:

1. THAT the respondent reconsider the withdrawal from the 2005 Agreement for the purpose of enabling discussions between the parties as to:

   (a) the meaning and effect of the 2005 Agreement; and

   (b) what constitutes custom and practice at school level in respect of the application of the 2005 Agreement;

2. THAT the Department issue a direction to schools to the effect that the local practice as it was prior to the respondent's withdrawal from the 2005 Agreement is to continue;

3. THAT the parties enter into discussions as to those issues set out in Recommendation 1(a) and (b) above;

4. THAT the Union withdraw resolution of the Executive number 5 dated 13 and 14 May 2011.

II. Orders that the parties report back to the Commission at a time to be fixed in approximately 14 days from the date of this document.

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

2011 WAIRC 00347

DISPUTE RE CHANGES TO WORKING ROSTERS BY EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY 19 MAY, 2011
FILE NO.	C 34 OF 2011
CITATION NO.	2011 WAIRC 00347

Result	Consent Recommendation issued
Representation	
Applicant	Mr G Ferguson
Respondent	Mr R Farrell

Consent Recommendation

1 WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) on 16 May 2011 and whereby the Australian Rail Tram and Bus Industry Union of Employees, West Australian Branch (the applicant union) sought the Western Australian Industrial Relations Commission's (the Commission) assistance.

2 WHEREAS employee representatives have recently been elected to the Joint Consultative Committee (JCC) established under the *Public Transport Authority (Transperth Train Operations Rail Car Drivers) Enterprise Order 2011* (2011 WAIRC 00218).

3 WHEREAS the parties intend to convene the inaugural meeting of the JCC in the week commencing 30 May 2011 recognising that the JCC will be a collective forum for consultation on collective employment issues.

4 WHEREAS the applicant union and the Public Transport Authority (the employer) have reached an agreement now therefore I make the following recommendation with the consent of the parties:

a. effective communication and consultation can assist to improve the working environment for employees and improve the operational performance within Transperth train operations;

b. a consultation process is aimed at giving affected employees the opportunity to respond to proposals to be implemented, including:

i. the opportunity to present a point of view or state an objection; and

ii. the timely exchange of relevant information (other than confidential information, if that disclosure is contrary to the employer's interests) so that those consulted have an actual and genuine opportunity to influence the outcome.

c. consultation processes will not affect the employer's right to make the final decision in these matters. Decisions will continue to be made by the employer, who is responsible and accountable for the effective and efficient operation of Transperth train operations.

d. while the employer is not obliged to consult the JCC in relation to day-to-day operational decisions, and disputes about such decisions can be raised under cl 48 of the dispute resolution procedure (2011 WAIRC 00218), the employer accepts that where prior consultation is able to be informally undertaken in relation to such decisions, the likelihood of those decisions giving rise to disputes may be reduced;

e. the employer will raise any major workplace changes with the JCC (other than changes to the guide roster, for which a separate consultation process is provided by the Enterprise Order) (2011 WAIRC 00218);

f. employer or employee representatives to the JCC may raise collective issues relating to policies, practices or trends within the workplace for consideration by the JCC in accordance with the operating procedures adopted by the JCC;

g. as part of the consultation process with employee rostering representatives for the compilation of a new guide roster, there will be the opportunity to present points of view or state objections in relation to the workload content of the employees proposed for that new guide roster. The workload content for special event employees will be a specific item on the agenda of the first meeting of the JCC; and

h. a copy of this recommendation once issued will be placed on the noticeboard of depots of Transperth train operations.

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

2011 WAIRC 00395

DISPUTE RE LEAVE ENTITLEMENTS DUE TO UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	THURSDAY, 9 JUNE 2011
FILE NO.	PSACR 1 OF 2011
CITATION NO.	2011 WAIRC 00395

Result Direction issued

Direction

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS the parties have agreed that directions should issue in respect of matters associated with the hearing, and have agreed to the terms of those directions; and

WHEREAS the Public Service Arbitrator (the Arbitrator) is of the opinion that the issuing of the directions agreed by the parties will assist in the conduct of the hearing of the matter;

NOW THEREFORE, the Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT the applicant provide to the Arbitrator and the respondent witness statements for any witnesses it intends on calling by close of business Friday 17 June 2011.
2. THAT the respondent provide to the Arbitrator and the applicant witness statements for any witnesses it intends on calling by close of business Friday 24 June 2011.
3. THAT the witness statements shall constitute all of the evidence in chief of the witnesses except for evidence responding to other evidence not reasonably anticipated.
4. THAT the parties provide to the Arbitrator a statement of agreed facts and agreed book of documents by close of business Friday 1 July 2011.
5. THAT each party provide to the Arbitrator, and the other party, an outline of the submissions that they intend to make and a list of authorities they intend to rely upon by close of business Friday 1 July 2011.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Kingsway Christian Education Association Inc Teachers Enterprise Bargaining Agreement 2010 AG 6/2011	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Kingsway Christian Education Association Inc	(Not applicable)	Commissioner J L Harrison	Agreement registered
BOCS Ticketing and Marketing Services - Department of Culture and the Arts - Agreement 2011 AG 13/2011	30/05/2011	Director General, Department of Culture and the Arts	Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)	Commissioner S M Mayman	Agreement registered
Department of Health Medical Practitioners (WA Country Health Service) AMA Industrial Agreement 2011 PSAAG 6/2011	1/06/2011	The Minister for Health incorporated as the WA Country Health Service, under s 7 of the Hospitals and Health Services Act 1927 (WA).	The Australian Medical Association (Western Australia) Incorporated	Acting Senior Commissioner P E Scott	Agreement registered

NOTICES—Appointments—

2011 WAIRC 00407

APPOINTMENT

PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, A/Senior Commissioner PE Scott to be the Public Service Arbitrator for a further period of two years from the 22nd day of June, 2011.

Dated the 13th day of June, 2011.

CHIEF COMMISSIONER A.R. BEECH

2011 WAIRC 00408

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, Commissioner SJ Kenner to be an additional Public Service Arbitrator for a further period of one year from the 26th day of June, 2011.

Dated the 13th day of June, 2011.

CHIEF COMMISSIONER A.R. BEECH

RECLASSIFICATION APPEALS—

2011 WAIRC 00388

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANN MCKNIGHT BROWN
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 3 JUNE 2011
FILE NO	PSA 71 OF 2007
CITATION NO.	2011 WAIRC 00388
Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 20th day of May 2011 the applicant 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,
Public Service Arbitrator.

[L.S.]

2011 WAIRC 00387

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOANNE EDWARDS
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 3 JUNE 2011
FILE NO	PSA 1 OF 2010
CITATION NO.	2011 WAIRC 00387

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the application was set down for hearing and determination on the 12th day of October 2010; and

WHEREAS the hearing was adjourned and the parties agreed to attempt to resolve this matter by agreement; and

WHEREAS on the 20th day of May 2011 the applicant 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.

2011 WAIRC 00389

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ASTRID ALATHEA HOWELL
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 3 JUNE 2011
FILE NO	PSA 63 OF 2007
CITATION NO.	2011 WAIRC 00389

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 20th day of May 2011 the applicant 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.

NOTICES—Union Matters—

2011 WAIRC 00394

NOTICE

FBM 5 of 2011

NOTICE is given of an application by "The Australian Workers' Union, West Australian Branch, Industrial Union of Workers" and "The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A." for the amalgamation of those organisations to form a new organisation to be known as "The Australian Workers' Union, West Australian Branch, Industrial Union of Workers".

The application is made pursuant to Section 72 of the *Industrial Relations Act 1979*.

The rules of the proposed new organisation relating to the qualification of persons for membership including any rule by which that area of the State within which the organisation operates, or intends to operate is limited, are set out below:

"4 - MEMBERSHIP

The Union shall consist of an unlimited number of workers employed or usually employed in any of the following industries or callings:-

(1) Pastoral, Agricultural, Horticultural, Viticultural, Fruitgrowing, the growing of Flax, Guayule, Tobacco, Sugar, Rice, Cotton, and of Safflower and other oil seeds, Afforestation and Silviculture (including the harvesting and/or processing and/or packing of any products of the aforesaid industries), the production of firewood, dairying and rabbit trapping, the handling and/or storage of grain for milling and/or export, including domestic and other work performed at agricultural research stations and farms and agricultural schools and colleges.

(2) Road making and road maintenance, other than in the building industry, and the construction, maintenance, conduct and operations of railways (but excluding the conduct and operations of railways by the Western Australian Government Railways Commission), bridges, water and sewerage works.

(3) Metalliferous mining and the production of minerals (including the harvesting of salt, dredging and sluicing work), the transport, storage, loading and unloading, other than the loading and unloading of ships South of the 26th parallel of latitude, of minerals, metals and ores, the production and supplying of electric current, mechanical engineering, the smelting, reducing and refining of ores and metals (including the charcoal iron and steel industry) and the supplying of firewood for mines.

(4) Stone quarrying, crushing and screening.

(5) Surveying of land.

(6) Fish trawling, cleaning and canning, net making, and all general labour in connection therewith.

(7) Boring for water.

(8) Destruction of noxious weeds and vegetation, or the treatment of the products thereof and the eradication of pests and vermin.

(9) Manufacturing of cement and cement and fibrolite and fibre (other than glass fibre) cement articles.

(10) Formation and maintenance of golf links, bowling greens, tennis courts, and of all gardens, lawns and greens in connection therewith.

(11) Rubber working, the manufacturing of tyres and tubes, including the tyre retreading industry.

(12) Service Station attendants, other than tradesmen and clerical workers, lubritorium attendants and vehicle service attendants, other than tradesmen, in motor vehicle sales establishments. Workers other than tradesmen and clerical workers in rust prevention, cleaning and paint protection of motor vehicles.

(13) Manufacture of sealing devices for bottles or jars, and the manufacture of badges and emblems (other than those made out of textile materials).

(14) The clearing of land for cultivation, sub-division for settlement and formation of aerodromes and parking areas.

(15) The laying of oil, gas, or steam pipe lines and the installation of electric power lines.

(16) Work at immigration reception centres.

PROVIDED THAT all persons who have been appointed as officers or employees of the Union shall be entitled also to become and remain members of the Union during their continuance in office or employment; PROVIDED further that no person who is or is eligible to be a member of –

Eastern Goldfields Municipal and Road Board Labourers' Union of Workers; Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth;

The Western Australian Government Tramways, Motor Omnibus and River Ferries Employees' Union of Workers, Perth;

The Builders Labourers' Union of Workers of Perth, Western Australia;

Westralian Brickyard, Pottery, Porcelain and Roof Tile Fixers Employees' Union of Workers, Perth;

as constituted on the 19th day of August, 1947; or any other Union registered under the provisions of "Industrial Arbitration Act, 1912-1941" (as reprinted) at the date of registration of this Union shall be eligible for or admitted to Membership of the Union, but as from 7th day of March, 1979, the limitation herein imposed by virtue of the registration of the Sugar Refining Employees' Industrial Union of Workers, Fremantle, W.A., at the date of registration of this union shall no longer apply.

(17) The catching and the treatment of whales and the by-products therefrom, (excepting Masters, Mates and Marine Engineers).

(18) Foremen employed in the sleeper cutting and/or saw milling industry (but excluding foremen not exclusively employed as such, and tradesmen foremen), and further excluding that portion of the State of Western Australia comprised within a radius of fourteen (14) miles of the General Post Office, Perth.

(19) The construction, maintenance and/or demolition of floating docks, graving docks, slipways, bridges, viaducts, causeways, wharves, jetties, breakwaters, moles, retaining walls, and all sheds, and buildings, on or about floating docks, graving docks, slipways, wharves and jetties, and the dredging of harbours, rivers and passages. Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Pattern makers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-iron Smiths, Springmakers, Millwrights, Oxy-acetylene and Electric Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Milling Machinists, Press Tool Makers, Drilling Machinists and the assistants to all the foregoing tradesmen, Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stone Masons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Shipwrights, Masters, Mates, Marine Engineers, Clerks and Watchmen, Electrical Workers (except such as are covered by paragraph "o" hereof). Provided further that no person who is eligible to be a member of the "Coastal and E.G. Government Water, Sewerage and Drainage Employees' Industrial Union of Workers" as constituted on the 4th day of July, 1952, shall be admitted to membership of the Union.

(20) (a) Boring for oil, refining, treating, processing, packing, pumping, and all work whatsoever in or in connection with the boring for oil, refining, treating, processing, packing and pumping of oil, and the manufacture (including the extraction) of the by-products of oil, when such manufacture (including extraction) is incidental to and consequent upon the refining of oil carried on by a company whose principal business is oil refining; Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Springmakers, Millwrights, Oxy-acetylene and Electric Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Tool Makers, Milling Machinists, Bolt and Nut Machinists, Drilling Machinists in the Engineering Industry, and the assistants to all the foregoing tradesmen; Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stone Masons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Masters, Mates, Marine Engineers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "o" hereof), Builders' Labourers employed to assist building tradesmen on the construction of buildings.

(b) Boring for natural gas and the production, distribution, treatment and storage of natural gas, and all work in connection with the boring for natural gas and the production, distribution, treatment and storage of natural gas: Provided that, no person, who immediately prior to the 23rd of March, 1966, was not eligible for membership of the Union and who is or is eligible to be a member of –

The Federated Engine Drivers and Firemen's Union of Workers of Western Australia.

The Collie Federated Engine Drivers and Firemen's Union of Western Australia.

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

Municipal Councils, Road Boards and Local Government Employees' Association of Workers, Western Australia.

Municipal Road Boards, Parks and Race Course Employees' Union of Workers, Perth - Western Australia.

Federated Moulders (Metals) Union of Workers, Perth.

Australasian Society of Engineers' Industrial Union of Workers, Perth, W.A.

Australasian Society of Engineers' Industrial Union of Workers, Fremantle.

The Australasian Society of Engineers, Collie River District, Industrial Union of Workers.

Australasian Society of Engineers' Industrial Union of Workers, Goldfields No. 1 Branch. Australasian Society of Engineers' Industrial Union of Workers, Midland Junction Branch.

The Association of Architects, Engineers, Surveyors, and Draughtsmen of Australia, Union of Workers, Western Australian Division.

The Boilermakers Society of Australia, Union of Workers, Coastal Districts, W.A.

Electrical Trades Union of Workers of Australia (Western Australian Branch), Perth.

Federated Ship Painters and Dockers' Union of Australia (West Australian Branch) Union of Workers.

The Seamen's Union of Western Australia Industrial Union of Workers, Fremantle.

Building Trades Association of Unions of Western Australia (Association of Workers).

The West Australian Gas Works Industrial Union of Workers.

Amalgamated Engineering Union of Workers, Perth Branch.

Amalgamated Engineering Union of Workers, Kalgoorlie Branch.

as constituted on the 23rd of March, 1966, shall be eligible for or admitted to membership of the Union.

(21) Iron and Steel Rolling, and all work in or in connection with iron and steel rolling (including all persons engaged in the following locality: "All that area of land and the waters of Cockburn Sound contained within boundaries starting from the intersection of the South-Eastern side of Rockingham Road (Road No. 695) and the North-Eastern side of Ocean Street and extending West to the low-water mark of the said sound and onwards for a distance of one (1) mile; thence North to a point situated in prolongation Westerly of the Northern side of Russell Road (Road No. 678); thence Easterly along that prolongation to the low-water mark of Cockburn Sound and onwards for a distance of three (3) miles; thence South to a point situate East of the starting point) and thence West to the starting point loading and discharging material or matter of any kind used in or in connection with iron and steel rolling".

PROVIDED THAT workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Springmakers, Millwrights, Oxy-acetylene and Electrical Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Toolmakers, Milling Machinists, Bolt and Nut Machinists, Drilling Machinists, and the assistants to all the foregoing tradesmen: Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stone Masons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "o" hereof), Builders' Labourers employed to assist building tradesmen on construction of buildings.

No Person employed in any of the industries or callings mentioned in paragraphs "p" to "t" hereof (both inclusive) and who by reason of such employment is eligible to be a member of any Union affiliated with the Federated Engine Drivers and Firemen's Association (Western Australian Branch) Association of Workers on the 11th August, 1952, shall be eligible to be a member of this Union.

(22) All work in or in connection with Stevedoring operations in that portion of the State of Western Australia North of the 26th parallel of latitude.

(23) All workers (other than journeymen, apprentices, and workers employed or usually employed in or in connection with the construction, repair, demolition or removal of any building) employed in or in connection with the construction of foundations for machinery or plant.

(24) In or in connection with the extraction from wood of a base for tanning compound. Provided that, no person who is eligible to be a member of any other Union (other than persons eligible for membership in the Wood Extract Industrial Union of Workers, South West Land Division, W.A.) registered under the provisions of the Industrial Arbitration Act, 1912-1952 on the 3rd day of May, 1955, shall be eligible for membership of this Union in the industry referred to in this paragraph.

(25) All workers engaged in or in connection with the Manufacture of articles of asbestos, of articles which are a compound of asbestos and one or more other materials the processing of such articles of asbestos or asbestos compounds into finished products.

(26) The manufacture or preparation of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparation, hot mixed asphalt, cold paved asphalt, and mastic asphalt or similar materials.

(27) The production or manufacture of aluminium for use as a raw material in the manufacture of articles.

Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Boilermakers and Steel Constructional Tradesmen, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Spring Makers, Millwrights, Oxy-acetylene and Electrical Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Tool Makers, Machinists, Bolt and Nut Machinists, Drilling Machinists, Riggers, Laggers, and the assistants to all the foregoing tradesmen: Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stonemasons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "o" hereof), Builders' Labourers employed to assist building tradesmen on construction of buildings.

No Person, who is eligible under subclauses (y) and (z) to be a member of any Union affiliated with the Federated Engine Drivers and Firemen's Association (Western Australian Branch) Association of Workers on the 11th April, 1963, shall be eligible to be a member of this Union.

Notwithstanding anything contained in the foregoing, drivers and/or loaders and/or operators and/or washers of all mechanically propelled or animal-drawn vehicles or implements or machines and their assistants, stablemen and yardmen, employed in or in connection with the cartage, conveyance, movement or transportation of persons, goods, merchandise, wares, implements, machines, vehicles, live-stock, material or matter of any kind shall not be eligible for membership in this Union, except such persons who are employed –

(a) in farming, mining (other than coal mining), or pastoral industries; or

(b) in or in connection with –

(i) agriculture, forestry, land clearing, water conservation or irrigation;

(ii) construction and/or maintenance of railways, roads or bridges; or

(iii) stevedoring operations,

by any Government department or public statutory body established by or under a law of the State to carry out all or any functions of such a department or by any port authority; or

(c) in supplying of firewood for gold mines; or

(d) as fork lift operators in the asbestos cement or fibre (other than glass fibre) cement industry; or

(e) as fork lift operators in the sugar refinery industry.

(28) Piano and/or Piano Player Makers, Repairers and Tuners, Organ Makers and/or Repairers, Makers and/or Repairers of Gramophones, and all other musical instruments of which wood forms a part.

(29) Clock Case Makers and/or Repairers of which wood forms a part, Makers of Sewing Machine Stands of wood, Makers of Wireless Instrument Cases or Cabinets of wood, Billiard Table Makers and Fitters, Wood Mantelpiece Makers, Overmantel Makers, Cabinet Makers, Chair Makers, Couch Makers, Veneer Makers in Furniture Factories, Wood Turners, Wood Carvers, Upholsterers (including Upholsterers of Tubular Steel Furniture), Bedding Makers, Wire Mattress Makers, Picture Frame Makers, Bamboo, Pith, Cane and Wicker Workers, Baby Carriage Makers, French Polishers, Enamellers of Furniture and Spraying Machine Operators engaged in the manufacture and/or repair of furniture and Assemblers of furniture, Estimators of furniture of any description, Carpet and Linoleum Planners and Cutters and Measurers and Carpet Sewers, Soft Furnishing Makers of all descriptions and including without limitation thereof Makers of Curtains, Drapes, Loose Covers, Bedspreads and Jabos, Iron Bedstead Makers, Metal Furniture Makers of all descriptions and Makers of Tubular Steel Furniture (except such persons employed as Chromium and/or Electro Platers and/or Polishers) and Designers of furniture of all descriptions.

(30) All Woodworking Machinists employed in preparing and/or handling material for the above employees including the programming and operating of computerised and numerically controlled machines and persons machining materials that are wood substitutes for the above employees. Provided that such persons are solely or substantially engaged in the manufacture of furniture.

(31) Glass Bevellers, Cutters, Polishers and Silverers, Lead-Light Glaziers and Cutters, Brilliant Cutters, Sandblasters of Glass, Draughtsmen and Painters.

(32) Subject to the provisions of Rule 6(a) hereof, such other persons not being qualified tradesmen or apprentices who are employed or usually employed in the foregoing occupations may be admitted as "Furniture Workers".

(33) In addition to the aforementioned workers, the Union shall also consist of an unlimited number of persons employed, or usually employed, as follows: Coffin Makers, Iron Bedstead Makers employed in Furniture or Bedding factories, Makers of Plastic and/or similar furniture and including without limitation thereof Makers of Fibreglass furniture and Foam Rubber furniture makers and Makers of Tubular Steel Furniture (except such persons employed as Chromium and/or Electro Platers and/or Polishers).

(34) Carpet and Linoleum Planners and all Floor Covering Layers, Outdoor Hands employed in measuring and/or fixing furnishings of any description and including without limitation thereof, the installation of blinds, awnings, curtains and drapes and the tracks to which the aforementioned are to be attached and shall include canvas blind cutting and/or making and/or fixing and Venetian Blind Makers and/or Fixers, Wire Blind Makers and/or Fixers, Packers of Furniture, Pictures, Carpets, Drapings, Plate and Sheet Glass in warehouses, shops, factories or stores.

(35) Timber Stackers, Yardmen and Labourers employed in furniture factories, Cementers of Leadlights, Rag Pickers and Fumigators for furniture and upholstery.

(36) Males or Females wheresoever employed in the manufacture of upholstery, carpets, drapings, furnishings of all descriptions, pianos, mattresses, venetian blinds, wire blinds, mantelpieces, billiard tables, overmantels, bedding, picture frames, bamboo, cane, pith and wicker work, and upholstery machinists, upholstery cutters and semi-skilled operatives of all descriptions involved in the manufacture of upholstery and including the making of cushions, together with such other persons, whether employees engaged in the industry or not, who have been appointed officers of the Union.

(37) The Union shall consist of workers employed or usually employed in the sawmilling, sleeper cutting and wood chipping industry as hereinafter defined throughout the South West Land Division of the State of Western Australia excluding the locality comprised within a radius of forty-five (45) kilometres from the G.P.O. Perth, together with the persons who from time to time are elected General Secretary and/or Organiser and/or Industrial Officer of the Union. Notwithstanding the foregoing persons engaged in felling or cutting of timber in plantations at Gnangara, Mundaring, Yanchep and Pinjar shall be eligible for membership of the Union provided that such persons are at the time of this application not eligible to be members of any other Union registered in the State of Western Australia.

(38) For the purpose of this Rule, the sawmilling, sleeper cutting and wood chipping industries shall include felling, hewing, splitting or otherwise dealing with timber in the bush, transporting such timber to a mill or railway, constructing and maintaining roads or railway lines used in connection with timber or wood chipping mills, sawing, machining, chipping, milling or dealing with timber in any other way in a sawmill or woodchipping mill and despatching the timber or timber product to a railway or seaport; and shall include:

(a) The work of and incidental to the preserving, stacking, seasoning and treatment treating of timber, whether within or without the curtilage of sawmill premises.

(b) The work of peeling logs for plywood and all other work incidental to the manufacture of plywood and particle boards.

(c) The work of and incidental to timber yards of retail merchants at which the business of saw milling is not carried out.

(39) (a) Except as hereinbefore provided, no person shall be admitted to membership who is or is eligible to be a member of any other Union registered on 31st August, 1975.

A person shall not be a member of the Union (except in the capacity of an honorary member or a member who or whose personal representative is entitled to some financial benefit or financial assistance under the rules of the Union while not being a worker) who is not an employee within the meaning of the Industrial Relations Act, 1979.

A person shall not be a member of the Union who is not a worker within the meaning of the Industrial Arbitration Act, 1912-66 and any subsequent amendment thereof except in the capacity of an honorary member or a member who or whose personal representative is entitled to some financial benefit or financial assistance under the rules of the Union."

The matter has been listed before the Full Bench at 10:30 am on Wednesday, 10 August 2011 in Court 3 (Floor 18). A copy of the rules of the proposed new organisation may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation registered under the *Industrial Relations Act 1979,* or any person who objects to the registration of the organisation and who satisfies the Full Bench that he/she has sufficient interest in the matter, may appear and be heard in objection to the application.

Notice of the objection (Form 13) should be filed in accordance with the *Industrial Relations Commission Regulations 2005.*

S. HUTCHINSON

DEPUTY REGISTRAR 7 June 2011

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2011 WAIRC 00377

REFERRAL OF DISPUTE RE VARIATION TO CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADTRANS (WA) PTY LTD
	APPLICANT
	-v-
	TOLL TRANSPORT PTY LTD T/AS TOLL AUTOLOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	RFT 35 OF 2010
CITATION NO.	2011 WAIRC 00377

Result	Discontinued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Ms N Tatasciore

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Ms N Tatasciore on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2011 WAIRC 00376

REFERRAL OF DISPUTE RE PAYMENT OF AN INVOICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	OJ WESTON PTY LTD
	APPLICANT
	-v-
	TOLL TRANSPORT PTY LTD T/AS TOLL AUTOLOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	RFT 34 OF 2010
CITATION NO.	2011 WAIRC 00376

Result	Discontinued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Ms N Tatasciore

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Ms N Tatasciore on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2011 WAIRC 00059

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-
	D.V. KING & G.E. MCLEOD TRADING AS AUSTRALIND TILT TRAYS - AUSTRALIND TOWING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 27 JANUARY 2011
FILE NO/S	RFT 22 OF 2010
CITATION NO.	2011 WAIRC 00059

Result	Discontinued by leave
Representation	
Applicant	Ms M Papa
Respondent	Mr D King

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the 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 by leave.

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

2011 WAIRC 00411

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

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-
	KEYFAST BULK HAULAGE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 13 JUNE 2011
FILE NO/S	RFT 25 OF 2010
CITATION NO.	2011 WAIRC 00411

Result	Application discontinued by leave
Representation	
Applicant	Mr A Dzieciol
Respondent	Mr C Boys

Order

WHEREAS the applicant sought and was grated leave by discontinue the application, the 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 by leave.

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

2011 WAIRC 00409

REFERRAL OF DISPUTE RE PAYMENT OF CLAIM

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-
	TOLL AUTOLOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 13 JUNE 2011
FILE NO/S	RFT 24 OF 2009
CITATION NO.	2011 WAIRC 00409

Result	Application discontinued by leave
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr N Griffiths

Order

WHEREAS the applicant sought and was grated leave by discontinue the application, the 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 by leave.

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

2011 WAIRC 00410

REFFERAL OF DISPUTE RE ENTITLEMENTS 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-
	TOLL EXPRESS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 13 JUNE 2011
FILE NO/S	RFT 25 OF 2009
CITATION NO.	2011 WAIRC 00410

Result	Application discontinued by leave
Representation	
Applicant	Mr A Dzieciol
Respondent	Mr N Griffiths

Order

WHEREAS the applicant sought and was grated leave by discontinue the application, the 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 by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2011 WAIRC 00375

REFERRAL OF DISPUTE RE VARIATION TO CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TURTON NOMINEES PTY LTD
	APPLICANT
	-v-
	TOLL TRANSPORT PTY LTD T/AS TOLL AUTOLOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 MAY 2011
FILE NO/S	RFT 33 OF 2010
CITATION NO.	2011 WAIRC 00375

Result	Discontinued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Ms N Tatasciore

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Ms N Tatasciore on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2011 WAIRC 00412

REFERRAL OF DISPUTE RE CONDITIONS OF CONTRACT

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-
	TRANSPORT FLEET SERVICES (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 13 JUNE 2011
FILE NO/S	RFT 29 OF 2010
CITATION NO.	2011 WAIRC 00412

Result	Application discontinued by leave
Representation	
Applicant	Mr A Dzieciol
Respondent	No appearance

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the 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.) S J KENNER,
[L.S.] Commissioner.

Notices—Award/Agreement matters

2011 WAIRC 00418

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. PSAAG 7 of 2011

APPLICATION FOR A NEW AGREEMENT ENTITLED

"PUBLIC SERVICE AND GOVERNMENT OFFICERS GENERAL AGREEMENT 2011"

NOTICE is given that an application was made to the Commission, on 10 June 2011, by The Civil Service Association of Western Australia Incorporated and another for the registration of the above named Agreement.

As far as relevant, those parts of the proposed Agreement that relate to area of operation or scope are published hereunder: -

5. – APPLICATION AND PARTIES BOUND

5.1 The parties bound by this General Agreement are listed in Schedule 5.

5.2 (a) Subject to clause 5.2(b), this General Agreement shall apply to:

(i) all public service officers and executive employees, employed under Part 3 or Part 8, Section 100 of the *Public Sector Management Act 1994* or continuing as such by virtue of clause 4(c) of Schedule 5 of that *Act*, and covered by the *Public Service Award 1992*; and

(ii) all government officers, within the meaning of the *Industrial Relations Act 1979*, employed by an employer party listed in Item (3) of Schedule 5 and covered by the *Government Officers Salaries, Allowances and Conditions Award 1989*

who are members of or eligible to be members of the union.

(b) This General Agreement shall not apply to:

(i) a chief executive officer as defined in section 3(1) of the *Public Sector Management Act 1994*;

(ii) those government officers listed in Schedule B of the *Government Officers Salaries, Allowances and Conditions Award 1989*;

(iii) employees whose remuneration payable is determined or recommended pursuant to the *Salaries and Allowances Act 1975*; or

(iii) employees whose remuneration is determined by an Act to be at a fixed rate, or is determined or to be determined by the Governor pursuant to the provisions of any Act.

A copy of the proposed Agreement may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd.) J. SPURLING,
Registrar.

14 June 2011

2011 WAIRC 00421

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 15 of 2011

APPLICATION FOR A NEW AGREEMENT ENTITLED

"ROCKY BAY INC. INDUSTRIAL AGREEMENT 2011-2014"

NOTICE is given that an application was made to the Commission, on 15 June 2011, by Rocky Bay Incorporated for the registration of the above named Agreement.

As far as relevant, those parts of the proposed Agreement that relate to area of operation or scope are published hereunder: -

3. – PARTIES, AREA AND SCOPE

3.1 The parties to this Agreement are Rocky Bay Inc., the Health Services Union of Western Australia (Union of Workers), the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch and the Australian Nursing Federation, Industrial Union of Workers, Perth.

3.2 This Agreement applies throughout the state of Western Australia and is binding on the parties to this Agreement and all employees who are employed in any of the classifications employed by the employer who are eligible to be members of the above-named unions.

SCHEDULE ONE – WAGES

1. Disability Support Employees, including Monitoring and Support Employees at Employment Services
2. Allied Health Professionals including Therapists
   Registered Nurses
3. Administration & HR
   Marketing
   Fundraising
   Technical Officers
   Therapy/Programme Assistants
   Job Development Consultants
   Drivers & Maintenance staff
   Kitchen & Gardening staff
   Program Team Leaders & Coordinators
   Assistant Managers

A copy of the proposed Agreement may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd) J. SPURLING,
Registrar.

15 June 2011