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GENERAL ORDERS—

2012 WAIRC 00346

2012 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00346
CORAM	**:**	CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S J KENNER COMMISSIONER J L HARRISON COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 29 MAY 2012, WEDNESDAY, 30 MAY 2012, WEDNESDAY, 6 JUNE 2012
DELIVERED	**:**	MONDAY, 11 JUNE 2012
FILE NO.	**:**	APPL 2 OF 2012
	:	ON THE COMMISSION'S OWN MOTION

CatchWords	**:**	State Wage order - Commission's own motion - Minimum wage for employees under Minimum Conditions of Employment Act 1993 - Award rates of wage - Award minimum wage -State wage principles
Legislation	**:**	Industrial Relations Act 1979 s 26, s 50A, Minimum Conditions of Employment Act 1993 s 12, Fair Work Act 2009 (Cth) s 284
Result	**:**	2012 State Wage Order issued

Representation:

Ms S Haynes and with her, Ms M Bolitho on behalf of the Hon. Minister for Commerce

Mr J Ridley and with him, Ms R Catalano on behalf of the Chamber of Commerce and Industry of WA (Inc.)

Ms K Davis and with her, Dr T Dymond on behalf of UnionsWA

Reasons for Decision

1 This is the unanimous decision of the Commission in Court Session. The Commission is required by s 50A of the *Industrial Relations Act 1979* (the Act) before July in each year to make a General Order (the State Wage order) setting the minimum wage applicable under s 12 of the *Minimum Conditions of Employment Act 1993* to employees who have reached 21 years of age, and to apprentices and trainees. The Commission is also to adjust rates of wages paid under State awards.

2 The Commission placed advertisements in two local newspapers on 18, 21 and 26 April 2012 calling for public submissions. The advertisement was also published on the Commission's website and in the WA Industrial Gazette ((2012) 92 WAIG 450; [2012] WAIRC 00229).

3 The Commission sat on 29 and 30 May and 6 June 2012, and heard oral submissions and evidence from the Hon Minister for Commerce, the Chamber of Commerce and Industry of Western Australia (Inc) (CCIWA) and UnionsWA. Written submissions were received from Australian Hotels Association WA Branch (AHAWA) and the Western Australian Council of Social Services Inc (WACOSS). Copies of all submissions were placed on the Commission's website and the proceedings were webcast.

SUMMARY OF SUBMISSIONS RECEIVED

4 We set out a summary of the submissions we have received. The submissions regarding the matters we are obliged to take into consideration are referred to where appropriate later in this decision.

The Hon Minister for Commerce

5 The Hon Minister seeks to balance the disparate issues relating to the needs of the low paid, and the capacity of employers to absorb pay adjustments, within the parameters of the WA economy. The Hon Minister submits that the State minimum wage determination should aim to maintain the real value of minimum and award wages, and therefore it is appropriate to adjust wages by the estimated actual percentage rate of inflation for the financial year 2011/12 as published in the WA State Budget for 2012/13. This figure will account for the first three quarters of the year as measured by the Australian Bureau of Statistics (ABS) and incorporate an estimate for the fourth quarter. The Hon Minister submits that a percentage adjustment to minimum and award wages to account for inflation is fair and sustainable, and considers the needs of both the low paid and employers. The Hon Minister submits that the Commission should also increase the State minimum wage and award wages for other classifications of employees.

6 The Hon Minister refers to the published estimated actual Consumer Price Index (CPI) for Perth in 2011/12 of 2.5% and submits that the appropriate increase is 2.5% or $15.20 which would adjust the minimum wage to $622.30 per week. Other wages set by the State Wage order should likewise be adjusted by 2.5%. This would reflect inflation in the current financial year, and not any potential or anticipated increases in 2012/13 and beyond arising from the impact of the *Clean Energy Act 2011* (Cth) as such increases are not quantifiable before the fact.

7 The Hon Minister presents information to show that over the previous decade the State minimum wage has increased by 6.4% above the CPI. Therefore there has been a gradual real increase over time affording the low paid a relative improvement in their wages compared to cost of living increases. Wages growth across industries tends to fluctuate each year and there does not appear to be a direct correlation between the State Wage order and the wages growth in each industry. The Hon Minister acknowledges the submissions regarding rises in costs which may not be reflected in the headline CPI rate and submits that such costs increases impact on both employees and employers. A wage adjustment in line with overall inflation remains the most reliable means of balancing the needs of the low paid against the capacity of employers to absorb pay adjustments.

8 The Hon Minister presented evidence on the State and national economies from Ms Amy Lomas, the Director of the Forecasting and Quantitative Services Division within the WA Department of Treasury. We express our thanks to the WA Department of Treasury for providing the Commission each year with this information, and to Ms Lomas for her presentation to us.

Chamber of Commerce and Industry of Western Australia (Inc)

9 CCIWA contends that there should be a moderate increase of $11.00 per week to the minimum wage. CCIWA states that the objective is to reflect the role of the minimum wage as being a safety net for the low paid and CCIWA believes the best way to protect recipients of the minimum wage is to ensure their jobs are retained, that there is no reduction in their hours and that overall job growth is promoted. There is still a continuing recovery from the most significant economic downturn since the 1930's, exacerbated by a more pronounced two (multi) speed, or patchwork, economy. Whilst headline figures show the WA economy remains strong, a number of sectors are finding conditions have not fully recovered from the Global Financial Crisis (GFC). CCIWA broadly supports the AHAWA submission, recognising that the hospitality industry has experienced difficult conditions over recent periods with a reduction in operating hours and a severely reduced income for many small businesses in the industry.

10 CCIWA notes that service industries, including retail, hospitality and restaurants have a comparatively higher level of direct employment on minimum wages (without over-award or agreement-based pay) than all-industries averages and other industries with a higher incidence of agreement making, such as manufacturing, construction mining, communications and transport. Accordingly the impact of wage increases in minimum wage reviews is disproportionately experienced in these industries.

11 A minimum wage increase beyond what CCIWA considers to be "moderate" is likely to result in job losses and otherwise disadvantage businesses recovering from the GFC. The approach advocated by CCIWA continues to be one of prudence and caution. Retaining and creating jobs must be of paramount concern.

12 CCIWA maintains that the concept of an income safety net requires the Commission to consider a combination of both minimum wages and the tax/transfer system. Meeting the needs of low paid workers is not consistent with an elevated increase to the minimum wage that sacrifices jobs and/or results in "underemployment". CCIWA refers to Commonwealth Budget initiatives contending that these monetary amounts need to be taken into consideration when determining the quantum of the minimum wage.

13 CCIWA states that an increase of $42.50 per week as sought by UnionsWA is a significant increase in wage rates and is untenable. Many businesses are struggling and employers often have their homes mortgaged to fund their unincorporated business. WA already has the highest minimum wage in Australia, being $17.80 higher than the current national minimum wage. CCIWA also contends that there is no justification for a further widening of the gap between WA and the six other State/Territory minimum wages and the national minimum wage.

14 CCIWA points to the change to the coverage of private sector awards since 2006 when Commonwealth legislation removed trading and financial corporations to the national system. CCIWA asserts that businesses remaining in the State system are very different from medium to large businesses which are trading corporations. Many State private sector awards do not reflect those businesses remaining in the State jurisdiction. The vast majority of State awards are now very old, reflecting very different economic times, industries and occupations and are unlikely to be relevant or operationally practical today. Most of these awards have changed little since they were made and although there is a capacity for awards to be amended, very few have been the subject of applications to amend, in particular applications to amend for the minimum rates adjustment. CCIWA reiterates its submission that the considerations set out in s 50A(3)(a) of the Act can apply only to employers and employees remaining in the State jurisdiction.

15 CCIWA states that applying percentage increases to the minimum wage does not restore work value parity to any award wage scale. Rather, the appropriate way to ensure that award wage classifications and wages reflect work value is to ensure that the award is minimum-rates adjusted where there has been significant net addition to work requirements. In the absence of award modernisation, applying a percentage increase will further distort work value relativities in award classifications and wages, and significantly increase award wages, disproportionately favouring those on higher award wages.

16 CCIWA contends that the WACOSS submission should be afforded less weight as it assumes incorrectly that the Commission has the power or role to redistribute wealth more broadly from one group of workers to another. References to data relating to households also needs to be viewed with caution; prima facie such information is about households, not about low paid workers. "Low income households" is not the same as "low paid employees".

17 CCIWA included a number of attachments to its submission. We are grateful for the assistance they provide to us in our consideration of the many issues involved in this review.

UnionsWA

18 UnionsWA presented evidence from Professor Alison Preston, the Director of the Curtin Graduate School of Business, Professor of Economics and Co-Director of the Women in Social and Economic Research Unit at Curtin University. Professor Preston's evidence is that the WA economy is growing strongly, above trend, and it is predicted to grow above trend for the next few years. Gross State Product (GSP) is projected to grow around 6% this year which is a significant increase on the 2010/11 outcome. In the year to December 2011, WA was growing at a rate of 11.1%. Professor Preston's evidence is that WA "is absolutely in boom conditions": Western Australia is a strong economy, it is profitable and it is growing.

19 Her evidence is that Gross Final Demand in WA is very much made up of the strong growth in business expenditure; this expenditure has been committed and will be flowing through the WA economy for another few years. The strongest growing sectors over the last two years having been mining, followed by health care and rental; also retail trade has been a very strong sector with strong growth in WA.

20 Evidence presented by Professor Preston shows that since the end of 2004, male rates of pay in WA on average have increased significantly. For a significant number of years, women in WA have been paid less than their counterparts nationally. The rate of increase of the minimum wage has been a lot slower, significantly below the rate of increase in average weekly ordinary time earnings (AWOTE) for adults in WA. There has been a decline in the value of the minimum wage relative to average wages.

21 Professor Preston stated that individuals judge the fairness of their wage by reference to the wage rates around them. In 2005, the WA minimum wage/Average Weekly Earnings (AWE) relativity was 47.6%; today the same relativity is 40.1%. The relativity has been steadily declining partly because AWE have been on the increase but also because minimum wage adjustments have been at a slower rate over the latter part of this decade. A person on the WA minimum wage earns 36.5% of the AWE of a male in WA. Therefore, as wages are rising generally, it is important to consider what should happen with the State minimum wage. The gender pay gap is around 17.8% nationally but 27.3% in WA. Gender pay gaps are significant because they affect women's economic and financial status, not only in the current term but over the long term and into retirement as well.

22 We express our thanks to Professor Preston for her evidence.

23 In its submissions, UnionsWA seeks a wage increase of 7%, which would increase the minimum wage by $42.50 per week. It states that while WA has arguably the strongest economy of all States, it is also the most unequal State in the Commonwealth in terms of income distribution between individuals, between households and between genders. It is UnionsWA's contention that WA's minimum wage should reflect WA's stronger economic performance. The WA minimum wage should also play its part in redressing the growing inequalities in WA society and that whilst a minimum wage increase is not the only response to these growing inequalities, other responses will not be adequate without a sufficient minimum wage increase.

24 UnionsWA contends that components of CPI inflation should be disaggregated for low paid workers, for whom some costs have more impact than others. UnionsWA agrees with WACOSS that the Commission should have regard to the composition of low income earners' budgets when judging the adequacy of any proposed minimum wage increase with respect to the cost of living. WA's performance stands out when compared with other States' and Territories' State Final Demand.

25 UnionsWA refers to the most recent ABS data on retail trade which shows that in March 2012 WA's retail turnover rose by 1.2% seasonally adjusted and that since March 2011 WA's retail turnover has had the largest increase of all States and Territories, rising by 10.7%. It submits that WA is clearly ahead of the other States and Territories in trend growth for full time, adult ordinary time earnings. However WA is by no means leading the pack when it comes to the cost of labour per employee; ABS data on labour costs shows that WA comes fourth out of the eight States and Territories in terms of earnings per employee and total labour costs.

26 There are serious concerns about how many Western Australians are actually sharing in the benefits of that strong performance. For example, pockets of high unemployment - particularly high youth unemployment - continue to exist in WA. The need for social inclusion and workforce participation reinforce the need for a State minimum wage that goes beyond

simply matching the all groups CPI, otherwise, the need for strong earnings growth to support the growth of local economies and businesses will be ignored.

27 UnionsWA submits that wage levels are a crucial determinant of participation rates, and refers to the Australian Council of Trade Unions (ACTU) submission to Fair Work Australia (FWA) Annual Wage Review 2011-12, quoting from an article Jefferson, T and Preston, A Australia's Other Two Speed Economy: Gender, Employment and Earnings in the Slow Lane *Australian Bulletin of Labour*, Vol. 36, No. 3, 2010, pp. 333-4. The ACTU submission argues that if minimum wages do not increase in real terms, then the incentive to seek employment will be reduced.

28 The 7% increase sought by UnionsWA is to address the growing divergence in WA between the State minimum wage and AWE. UnionsWA submits that the proportion of WA's AWOTE taken by the State minimum wage has deteriorated from a high point of 51.3% in 2002 to its current 41.2%. The proportion of the WA minimum wage to AWOTE has deteriorated by 10.1 points while the proportion of the national minimum wage to the national AWOTE has deteriorated by 6.2 points.

29 The WA minimum wage increased by 9.1% between 2000 and 2011 whereas AWOTE has increased by 39% over the same period. UnionsWA submits that a substantial increase to the State minimum wage above the all groups CPI figure is needed to begin addressing this growing disparity between WA minimum wage employees and other WA employees.

30 UnionsWA submits that the commonly agreed single statistic that summarises the distribution of income across the population is the Gini Coefficient which is used by the ABS in its household income and income distribution survey to indicate the degree of inequality between households across Australia. The survey shows that a WA household with income in the top 10% now earns 4.8 times as much as a household in the bottom 10%. By contrast, Australia-wide the bottom 10% of households had their income grow by 3.6%, while in WA those households went backwards by 0.9%.

31 Given that WA has the strongest State economy in the country, and the gender pay gap in WA is getting worse as the economy improves, WA's gender pay gap will continue to be at an unacceptably higher level, although a 7% increase in the State minimum wage is one of the ways which may ensure the impact of the growing gender pay gap is limited. UnionsWA contends that the increase in the minimum wage it is asking for is not a disincentive to bargain.

32 UnionsWA urges the Commission to reject downgrading the AWE measure in status and consideration in preference to the Wage Price Index (WPI). Both should be considered together in order to gain a more complete picture of the WA economy. If the WPI is to be the preferred measure of earnings growth then the Commission will be downgrading consideration of the gender pay gap in its deliberations because the WPI does not include information on male and female earnings gaps.

Australian Hotels Association (Western Australia)

33 AHAWA submits that the national minimum wage and the State minimum wage should be the same. Therefore, the State minimum wage should remain the same, or alternatively, transition over the next two years until the national minimum wage catches up. However, if there is to be an increase to the minimum wage, consideration should be given to a $10.00 per week increase. AHAWA notes that approximately 10% of the AHAWA membership are hospitality businesses who are non-constitutional corporations. Hospitality industry employees are more likely to be employed under the award system than in most other industries and any adjustment to the minimum wage significantly affects hospitality businesses more than industries where there is less exposure to the award system.

34 The hospitality industry has experienced difficult conditions over recent periods and many businesses have reduced operating hours, and suffered a decrease in income and a severe shortage of particularly skilled labour. In WA's booming economy, small businesses will continually be exposed to significant increases in operational costs and worsening labour shortages. Regional locations incur increased costs for transportation, fuel, utilities, food and essential services. Regional businesses are generally small and often have few staff, with the responsibility falling on proprietors to work longer hours. The impact of taxation, utility costs, expenses and the Commonwealth Government's proposed Carbon Tax is explored in the AHAWA's submission. It submits that WA businesses have suffered from a fall-off in tourism, particularly in the South West of WA. Hospitality award rates are among the highest available and consequently wage costs are a significant issue for small businesses.

Western Australian Council of Social Services Inc

35 WACOSS's submission calls for an increase to the minimum wage of $42.50 per week consistent with the claim made by UnionsWA. WACOSS submits it is in a unique position to comment on critical social issues that affect members of the WA community and in particular those on low incomes. WACOSS submits that minimum wages are a vital means of protecting low income workers from poverty. Wages earned by full time minimum wage employees should be sufficient to ensure they have the capacity to meet their basic living costs while living with dignity and respect.

36 However, WACOSS is alarmed at the rate at which the gap between the minimum wage and median pay levels in WA is continuing to grow. WACOSS submits that an increase of $42.50 is consistent with maintaining a fair system of wages and conditions in the current WA context. WACOSS also makes the submission, as does UnionsWA, that over the last three years, the WA minimum wage has failed to keep pace with AWOTE, leaving those on the minimum wage falling further and further behind.

37 WACOSS submits data showing indicators of financial stress in low income families in 2009/10 in comparison to other WA households. WACOSS urges the Commission to have regard for the fact that the economy is showing signs of strong expansion, and that minimum wage earners should benefit from this expansion.

38 However not everyone is benefiting from the booming sectors in the economy. Many Western Australians living on low incomes are not benefiting from the boom and continue to be adversely affected in many ways, particularly by cost of living pressures. Although for the average household, the cost of living had generally kept pace with increases in household income, the use of "average" figures can mask the difference in impact on low/middle/high income households.

39 The headline CPI figure does not provide an accurate measure of the true living costs that lower income households actually experience because it is based on an average price increase across a basket of items that an average household might purchase. It does not take into account the spending patterns of households on lower incomes who spend significantly more of their incomes on essential items such as food, utilities, health and public transport, all of which have risen by substantial amounts. WACOSS pointed in particular to the cost of utilities, the cost of housing, the cost of home ownership including the rental market and the cost of food. WACOSS contends that the cost of living pressures on a low income earner relying on the minimum wage are significant and justify the $42.50 increase in the minimum wage being sought.

40 WACOSS refers to the significant number of low income employees in the community services sector and that it is likely a significant number of these fall within the State industrial relations system. The Commission's decision in this matter will have a tangible impact on the living standards of employees in this sector. For various reasons, the sector is disproportionately reliant on award wages and conditions, and the Commission therefore has a direct role in influencing wages for employees in the sector. There is a relative inability of the sector's employees and employers to engage in bargaining. WACOSS refers in particular also to the Regional Price Index because of the additional cost of living burden faced by low income households in regional WA.

41 WACOSS submits that WA has the largest gender pay gap of any State in Australia, a gap much larger than the national average. To reduce the gender pay gap it is vital that minimum wages keep pace with community standards as women are over-represented in low paid jobs and continue to bear an unequal responsibility for unpaid caring roles. WACOSS submits that s 50A(3)(a)(vii) of the Act, which refers to the need to "provide equal remuneration for men and women for work of equal or comparable value" provides the Commission with a mandate to consider this. WACOSS submits that youth wages are inherently discriminatory and submits that the Commission should also provide for those on youth wages, apprentices and trainees the full $42.50 increase rather than only a proportion of any increase to the minimum wage.

42 Whilst WACOSS refers to some Commonwealth Government Budget announcements, it submits that changes to the tax transfer system, whilst providing incentive for labour force participation, should not be used to argue down fair minimum wage levels. Increases in minimum wages are an effective way to improve incentives for jobless people. While the current unemployment figures are encouraging, they mask the ranks of underemployed men and women who are still feeling the impacts of changes to their employment status during the economic downturn. Consequences of underemployment are very real and underemployed individuals often tend to lack bargaining power in the workplace, which reinforces the significance of an increase in the minimum wage.

CONSIDERATION

Legislative Requirements and Application

43 The Act in s 50A(3) obliges the Commission in making a State Wage order to take into consideration:

(a) the need to —

(i) ensure that Western Australians have a system of fair wages and conditions of employment;

(ii) meet the needs of the low paid;

(iii) provide fair wage standards in the context of living standards generally prevailing in the community;

(iv) contribute to improved living standards for employees;

(v) protect employees who may be unable to reach an industrial agreement;

(vi) encourage ongoing skills development; and

(vii) provide equal remuneration for men and women for work of equal or comparable value;

(b) the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity in Western Australia;

(c) to the extent that it is relevant, the state of the national economy;

(d) to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration;

(e) for the purposes of subsection (1)(b) and (c), the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment;

(f) relevant decisions of other industrial courts and tribunals; and

(g) any other matters the Commission considers relevant.

44 The operation of the *Fair Work Act 2009* (Cth) (the FW Act) means that the order which will issue from this decision will affect only businesses in the private sector, and local governments in WA, which are not trading or financial corporations. It will also apply to a significant proportion of State government employment, however, in practical terms, we suspect that most areas of State government employment, and many areas within local government, are unlikely to have employees who will be directly affected by an increase to the minimum wage.

45 Therefore, as a matter of jurisdiction:

- The WA minimum wage will have application to employers and employees in the approximately 20% of businesses in the private sector in WA which are sole traders, partnerships, some trusts and incorporated businesses which are not trading or financial corporations. (Attachment B to the Hon Minister's submission estimate approximately 23.8% by reference to the statistics available regarding type of legal organisation.

CCIWA disputes this figure, submitting that it is in the range of 11% to 16%. It is not necessary in these proceedings to finally decide the issue.)

- Correspondingly as a matter of jurisdiction, the minimum wage determined under the FW Act in the Annual Wage Review will have application to employers and employees in the approximately 80% of businesses in the private sector in WA which are trading or financial corporations.

46 An increase in the respective minimum wages will directly affect those employees who are paid the minimum wage, and indirectly affect those paid in the vicinity of it such that their wage would be increased by an increase to the minimum wage. CCIWA submits that we should read down the considerations in s 50A(3) of the Act because of the operation of the FW Act, however, we are not persuaded that submission is correct. We are obliged by the legislation to consider the evidence concerning WA as a whole. Sections 26(1)(a) and (c) will ensure that the outcome of that consideration is tempered with the knowledge that the minimum wage which we set can apply only to the "small minority" of the workforce in WA (See the 2010 State Wage order Decision (2010) 90 WAIG 568; [2010] WAIRC 00337 at 37). As we observed in paragraph 29 of that decision, we pay particular attention to the information before us regarding those industry sectors which are likely to employ minimum-wage dependent employees.

Consideration of the Statutory Criteria

Section 50A(3)(a)(i) and (iii) - The need to ensure that Western Australians have a system of fair wages and conditions of employment; provide fair wage standards in the context of living standards generally prevailing in the community

47 It is convenient to commence our consideration with s 50A(3)(a)(i) and (iii), which speak of the concept of fairness inherent in the need to ensure that Western Australians have a system of fair wages and conditions of employment, and provide fair wage standards in the context of living standards generally prevailing in the community, because it is the context of "fairness" that UnionsWA mounts its significant submission regarding the gender pay gap in WA.

48 The Hon Minister too submits information showing that more than 30% of women in the WA workforce are employed in four industries which all report an AWOTE below the State average: healthcare and social assistance; retail trade; education and training; and accommodation and food services. With the exception of education and training, employees in these female-dominated industries are likely to be paid according to award rates within the State industrial relations jurisdiction. All industries in WA have gender pay gaps of more than 10% and four industries have gaps of more than 30%. The overall WA gender pay gap of 27.2% is the largest of any State and is well above the average of 17.6%. The Hon Minister concludes that it is likely that increases in the minimum wage help to prevent further divergence between men and women's pay by maintaining the income levels of the lowest paid, amongst whom women are over-represented.

49 CCIWA submits that the disproportion between male and female wage rates largely reflects several characteristics of the female workforce in WA being employed on a part time basis. In general, female employees tend to be employed in more services-orientated industries which, in many cases, have lower rates of pay than many other industries, particularly the higher paying resources, manufacturing and construction industries. CCIWA contends that minimum wage increases have a minimal impact on any gender pay gap.

50 We continue to have reservations regarding linking the setting of the minimum wage to Average Weekly Ordinary Time Earnings. We agree, with respect, with the comment of Professor Preston that an employee's judgment of whether their wage is fair or not is by reference to what is being received by others. However, in the 2011 State Wage order decision ((2011) 91 WAIG 1008; [2011] WAIRC 00399 at 33) we observed that AWE will necessarily measure earnings across the State, including of employees in relatively high-wage sectors such as mining which are not likely to be representative of wages and living standards generally prevailing in the community.

51 CCIWA submits that the differential between the minimum wage and WA's AWOTE can be explained by an increase in positions in the mining, oil and gas related industries. There is a strong correlation between the rise of the mining sector's share of WA's total factor income and the growth in the differential between AWOTE and the State minimum wage. We consider the evidence supports this submission. The data in AWOTE represent gross earnings and provide an average of earnings in WA. However, an average of earnings is not the same thing as the earnings of an average person. There is evidence before us which suggests that since 2005, mining wages have increased by 50 per cent and the average of earnings will undoubtedly be affected by that. The average of earnings is affected by compositional shifts which can result in fluctuations in earnings growth even though rates of pay have not changed.

52 Consequently we have not been persuaded by UnionsWA's submission that the setting of the WA minimum wage should be significantly influenced by its past or present relativity to AWOTE.

53 UnionsWA acknowledges that at least the WPI should also be considered in order to give a more complete picture. UnionsWA observes that while nationally the minimum wage has risen over the past decade at about the same rate as the WPI, this cannot be said of the WA minimum wage and WPI in WA. However, s 50A(3) of the Act requires us to consider a number of matters in reaching our decision. Whilst the concept of "fairness" must be a consideration by us when considering the system of wages and conditions of employment in WA and wage standards in the context of living standards generally prevailing in the community, it is not given greater weight in the legislation than the other matters which we are obliged to consider.

54 The evidence shows the gender pay gap in WA is greater than the gender pay gap nationally. An issue arises whether the restricted coverage of the order to issue from these proceedings can be effective to address the issue. The gender pay gap is calculated by reference to all industries in WA, however we do not set a minimum wage which applies across all industries in WA. The State Wage order can apply only to the small minority of the private sector workforce in WA. The lack of any measurable reduction in the gender pay gap in WA following the $29.00 per week increase to the minimum wage we ordered in 2008 leads inevitably to the conclusion that the gender pay gap in WA is unlikely to be reduced by any order which can issue from these proceedings: the overriding effect of the FW Act makes it likely that the coverage of the State Wage order is insignificant for this purpose. There is nothing to suggest that the gender pay gap for the small minority of employees in WA

who are covered by the State industrial relations system is significantly different from the gender pay gap for the majority of employees in WA who are covered by the national industrial relations system.

55 Further, a significant increase to the WA minimum wage will correspondingly significantly increase the price of labour for WA businesses in the State jurisdiction when, in the absence of a corresponding increase to the national minimum wage, there will be no significant cost increase of the price of labour for WA businesses in the national jurisdiction. Given that the jurisdiction is determined by reference only to whether or not the business is undertaken by a trading or financial corporation, this is not a result which sits comfortably with the requirement on the Commission in ss 26(1)(a) and (c) of the Act to decide matters according to equity, good conscience and substantial merit, having regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole.

56 Moreover, the evidence before us also establishes that gender pay ratios differ significantly by industry or industry sector. In particular, in a low pay sector where there is not a lot of difference in the earnings between male and female employees such as accommodation, cafes and restaurants, there is a consequent reduction in the gender pay gap. In that context, significantly increasing the WA minimum wage with the object of reducing the gender pay gap in WA necessarily will mean that that significant increase will apply to an industry or sector of the State where it is not necessary because the gender pay gap is significantly less than elsewhere.

57 We stated in the 2011 State Wage order decision (*op cit*) at 39 and 40 that the reasons for the gender pay gap in WA are complex and that the scope in State Wage order proceedings for us to address those reasons is limited. We repeat that conclusion here.

58 We accept the evidence that a significant proportion of minimum wage employees is female and correspondingly increases to the minimum wage will be of benefit to female employees. We recognise that increases to the minimum wage assist in reducing the gender pay gap for those female employees within the State jurisdiction. Given that the WA minimum wage is higher than the national minimum wage it will, for that reason, be of greater benefit to female employees than will be the national minimum wage. However s 50A(3)(a) as a whole means that these issues also need to be balanced against competing considerations.

Section 50A(3)(a)(ii) and (iv) – The need to meet the needs of the low paid; contribute to improved living standards for employees

59 In relation to the concept of improving living standards in s 50A(3)(a)(iv) of the Act, CCIWA submits that there is no presumption that changes in living standards as reflected by the CPI or other measures require a significant increase to minimum wages to keep up with, or indeed outpace, inflation. CCIWA states that increases in the minimum wage influence the viability of businesses employing at minimum wage levels, therefore increases in the minimum wage must not reduce jobs, or have the potential to promote job loss, or inhibit job creation. The extent of reliance on increases to the State minimum wage to assist low income workers must depend and inter relate with tax transfers, income supplementation and other measures provided by Commonwealth and State governments. Increases in the minimum wage must not discourage productivity improvement or act as a substitute for productivity bargaining.

60 This submission from CCIWA effectively repeats its submission in 2011 and we retain confidence in our decision on that occasion (*op cit* at 35) when we said that it is difficult to take into consideration the need to meet the needs of the low paid (s 50A(3)(a)(ii)) and the need to contribute to improved living standards for employees (s 50A(3)(a)(iv)) without giving some weight to measures which are available to assess the relative value of the minimum wage over time. We observe that the Commission has been responsive in the past to the State's economic performance and to movements in the cost of living and wage rates generally in WA in the context of the considerations in s 50A(3)(a) of the Act.

Section 50A(3)(v) – The need to protect employees who may be unable to reach an industrial agreement

61 We are not aware of any evidence which would lead to the conclusion that the increases to the WA minimum wage since s 50A commenced in 2006 have discouraged bargaining in the workplace. We consider that the adjustment arising from this decision will protect employees who may be unable to reach an industrial agreement. The Hon Minister acknowledges that lower paid workers are generally less likely to engage in workplace bargaining which means they have a greater reliance on adjustments to minimum and award wages. This corresponds to the WACOSS submission that there is an inability to bargain in the community services sector. Further, many small business employers are less likely to engage in wage bargaining than better resourced businesses and as such, small business employers apply minimum or award wage determinations. We respectfully agree with those conclusions.

Section 50A(3)(vii) – The need to provide equal remuneration for men and women for work of equal or comparable value

62 The Hon Minister submits that women are more likely than men to work in award-reliant industries and occupations, and are therefore more likely to have their pay determined by award or minimum wages. Minimum wage decisions are one of a range of factors which influence overall patterns of female labour market participation.

63 CCIWA submits that pay equity principles are supported by CCIWA and employers generally. Whilst reiterating its support for pay equity principles, CCIWA points out that the equal remuneration criterion should not be given disproportional weight - it is only one factor to be taken into consideration. Award classifications and wages that do not reflect contemporary workplace circumstances or work value, however, present major and confronting difficulties, none of which can be rectified through increases to the State minimum wage. There are more appropriate and targeted measures to address substantiated paid differentials or inequities including that award classifications and wages are appropriately benchmarked and reflect work value.

64 There is some overlap between this consideration and the issue of pay equity which we have considered earlier in this decision. We consider that an increase to the minimum wage has the potential to assist in providing equal remuneration for men and women for work of equal or comparable value.

Section 50A(3)(b) – The state of the economy of Western Australia

65 In relation to the State's economic performance for the financial year 2011/12 and for 2012/13, Ms Lomas referred to three measures of aggregate economic activity: State Final Demand, Gross State Product, and Gross State Income. Ms Lomas's evidence was that considering these measures of economic activity, and a number of other indicators, and notwithstanding the risks to any forecast, the expectations for the State economy for the remainder of this year and for next year are very positive.

66 The major economic forecasts for WA are set out in the following table as shown in table 2 of the Minister's submission in reply:

Table Two: Economic Forecasts

Major Economic Aggregates, Annual growth (%)

Western Australia

Indicator	2010-11 Actual	2011-12 Estimated Actual	2012-13 Budget Estimate	2013-14 Forward Estimate	2014-15 Forward Estimate
Gross State Product (GSP)	3.5	6.0	4.75	4.75	4.25
Gross State Income (GSI)	20.0	6.25	2.5	3.5	1.5
Employment	3.2	2.5	2.75	2.5	2.25
Unemployment Rate	4.4	4.25	4.25	4.25	4.0
Wage Price Index	3.9	4.25	4.5	4.5	4.5
Consumer Price Index[(a)]	2.8	2.5	3.5	3.25	3.25

(a) Includes 0.7 percentage points In 2012-13 and 0.2 percentage points In 2015-16, to reflect the price level effects of the Commonwealth Government's Carbon Tax.

67 We note particularly that Gross State Product is forecast to grow by 4.75% in 2012/13, following an increase of 6% in 2011/12. Demand for labour is expected to remain strong, with the State's economy effectively at full employment. Inflation is expected to be its lowest in 2011/12 and then peak next year with the introduction of the Carbon Tax, after which it will average around 3.25%. Wages growth is expected to be quite strong, exceeding 4% across the years. Population growth will peak this year at 2.5% and is expected to remain above the long run average. There has been stronger than expected growth in agricultural exports and household consumption over the past year as households display considerably less conservative spending behaviour.

68 Ms Lomas gave evidence regarding the national economy. She also gave evidence regarding the outlook for the global economy and identified the risks to the Department of Treasury forecasts which could potentially lead to changes. These are principally the sovereign debt concerns in the Eurozone, a slowing of economic growth in China and the dependence of the global economy on oil prices with instability in the Middle East.

69 CCIWA also provides economic information regarding the performance of the WA and national economies. CCIWA points out notwithstanding the current economic growth forecasts, there remain significant challenges for business including:

- Low productivity growth, the need to foster entrepreneurial innovation and creativity;
- Implications of the ageing population and skills shortages;
- Labour force inflexibilities;
- Constraints imposed by inadequate infrastructure; and
- Regulatory burdens.

70 CCIWA also submits that difficulties in forecasting the effects of the minimum wage decision are ever present and are exacerbated by the expectation that global economic growth would weaken, with growth in China easing and Europe expecting to enter a shallow recession in the first half of the year. Further, uncertainty remains about the actual effects of the Commonwealth Carbon Tax commencing on 1 July 2012.

71 Overall, the evidence before us, particularly from the Department of Treasury, is that according to current economic indicators the WA economy is robust and projections are for continued growth even though the recovery from the GFC has been uneven and some sectors such as housing continue to face suppressed conditions.

72 We conclude that the strength of the WA economy will support an increase to the WA minimum wage. The evidence before us permits the conclusion that increases to the WA minimum wage from our annual decisions since s 50A was introduced into the Act in 2006 have had little, if any, effect on the level of employment, inflation and productivity in WA. We conclude that the increase to the minimum wage which arises from this decision will have little effect on the level of employment, inflation and productivity in WA. There is no evidence that past increases to the WA minimum wage had adversely affected profitability or had an impact on business failures.

Section 50A(3)(c) - The state of the national economy

73 The WA economy can be contrasted with the rest of the country, particularly in the categories of unemployment and average earnings which are strongly influenced by the resource sector. The CPI for Perth to the March quarter 2012 increased by 1.9% compared to 1.6% nationally. The LPI for the same period showed an annual change for WA of 4.5% compared to the national annual change of 3.5%.

74 WA has significantly higher AWE than the rest of Australia due in large part to the higher earnings in the resource sector. Treasury forecasts that the overall demand for labour is likely to grow in the next year. There is evidence that nationally,

labour productivity fell 0.3% over the course of 2010/11, meanwhile WA's labour productivity climbed by 1.5% in 2010/11 following a 6.4% surge in the previous year.

75 In general terms, the stronger performance of the WA economy compared to the national economy leads to the conclusion that a minimum wage in WA which is higher that the national minimum wage is supportable. This general conclusion is tempered by the conclusion we have stated above, that is, the minimum wage we set in this State Wage order is not a minimum wage for the whole of WA but only for a small minority of WA employers and employees. The extent to which those employers are able to sustain a minimum wage which is higher than the national minimum wage is a separate consideration.

Section 50A(3)(d) – The capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration

76 The Hon Minister submits that the overall healthy economic picture supports the view that the WA labour market has the capacity to maintain real wages. The only data available to measure profitability for businesses in WA is the Gross Operating Surplus (GOS) plus Gross Mixed Income (GMI) measure recorded by the ABS. It should be used with caution but, as a whole, WA businesses in the year to June 2011 increased overall profitability by 23.9%.

77 Only the rental, hiring and real estate services sector recorded a reduction in profitability. Overall the industries with more than 50% of employees within the State industrial relations jurisdiction, and which also rely heavily on awards for wage setting, recorded overall profitability. It is nevertheless imperative, in the Hon Minister's submission, not to arrest positive trends with wage increases that employers, particularly small businesses, cannot afford.

78 CCIWA refers to the Hon Minister's reference to the GOS and GMI measure. CCIWA suggests that such data tells us very little about capacity to pay of the majority of industries affected by State wage increases. The data is viewed as potentially deceptive given the patchwork nature of the economy. CCIWA views this profitability measure with considerable caution especially in relation to the capacity to pay micro businesses.

79 UnionsWA submits that the number of businesses operating in each of the industries most likely to be impacted by a State minimum wage increase has grown by 3.8% between the financial year 2007/08 and the financial year 2010/11 and the indications are that having a high State minimum wage in WA has not hurt the growth of these business numbers.

80 UnionsWA acknowledges the difficulties faced by small businesses in the hospitality industry, particularly in the area of attracting and retaining quality staff to provide competitive service. UnionsWA submits that the "compensation of employees" share of total factor income in WA's accommodation and food services industry in WA was lower than the equivalent nationally in June 2011.

81 We conclude that the strength of the WA economy supports the conclusion that employers as a whole have the capacity to bear the cost of the minimum wage arising from our decision. We consider it is important to state that the size of any increase to the WA minimum wage which would follow from this conclusion will take into account the evidence and submissions about those industry sectors identified by CCIWA and AHAWA which are not experiencing strong conditions and which are likely to have employers and employees in the WA industrial relations jurisdiction.

Section 50A(3)(e) – The need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment

82 We have consistently applied the increase to the WA minimum wage to wage rates in awards. Indeed, there has not been an occasion when we have been asked not to do so. We consider that to do so maintains the currency of award wages and assists in ensuring that the WA award framework represents a system of fair wages. We do not overlook the submission from CCIWA that many of the awards may not reflect the coverage resulting from the operation of Commonwealth legislation, and that they are not modern awards, however they are issues separate from these proceedings under s 50A of the Act and are not a reason why the wage rates in awards should not be increased in these proceedings.

Section 50A(3)(f) – Relevant decisions of other industrial courts and tribunals

83 We noted in the 2011 State Wage order decision (*op cit* at 46) that the minimum wages of other States are now not applicable to private sector employment in those States. We note for the record that the WA minimum wage which, since 2006, has been higher that the corresponding national minimum wage, is not the highest minimum wage in Australia, with the Queensland minimum wage of $610.20 (2011 QIRComm 147, 31 August 2011) being higher than the WA minimum wage.

84 However, more significantly, since the referral to the Commonwealth of the other States' remaining private sector industrial relations coverage, the minimum wage that is applicable to employers and employees in the unincorporated private sector in those States, and which we do consider to be more relevant to these proceedings, is the minimum wage applicable to employers and their employees in WA who are covered by the national system.

85 It is more relevant because the WA minimum wage will apply to the same types of private sector businesses in WA, and in the same industry sectors with the same gender pay gap or the same relative position regarding average earnings, as are subject to the national minimum wage. As we have observed, the point of difference between those businesses in the national system and those in the WA system is not a difference in productivity or profitability, but only a difference in the employer's business structure. Until the Commonwealth Government's use of the corporations power in 2006 to legislate employment conditions for employees of constitutional corporations, the business structure of an employer was largely an irrelevant consideration in the setting of employment conditions. Other than for the question of jurisdiction in WA, it remains largely an irrelevant consideration for our purposes.

86 Fairness, in the context of setting the WA minimum wage, necessarily includes a comparison with the national minimum wage which is applicable to comparable employees elsewhere in the State. The observation that an employee's judgment of whether or not their wage is fair by reference to what is being received by others, applies equally to the minimum wage received by the others who are the significant majority of low paid employees in WA, and in each other State.

87 Although s 284(1) of the FW Act does not require consideration of the state of the WA economy and the WA award framework which we are obliged by s 50A(3)(b) and (e) of the Act to take into consideration, we consider it significant that there is a considerable overlap between the considerations of the FWA Minimum Wage Panel and the considerations we are obliged by s 50A(3) to take into account. We refer to s 284(1) of the FW Act which obliges FWA:

- To establish and maintain a safety net of fair minimum wages. This broadly corresponds to the obligation on this Commission under ss 50A(3)(a)(i) and (iii) of the Act.
- In the context of the performance and competitiveness of the national economy, to take into account productivity, inflation and employment growth. This broadly corresponds to the obligation on this Commission in s 50A(3)(b) to take into account productivity, inflation and employment growth with respect to the WA economy, and in s 50A(3)(c) consideration of the state of the national economy.
- To take into account relative living standards and the needs of the low paid. This broadly corresponds to the obligation on this Commission in s 50A(3)(a)(ii).
- To take into account the principle of equal remuneration for work of equal or comparable value. This corresponds to the obligation on this Commission in s 50A(3)(a)(vii).

88 Further, the timing of the FWA Annual Wage Review and the date of operation of the minimum wage to be set by FWA is contemporaneous with the obligations on this Commission under s 50A of the Act.

89 On this occasion, the Annual Wage Review 2011-12 has considered submissions and issues which have also been raised in these proceedings, namely:

- That average earnings have risen faster than individual rates;
- The relative position of the minimum wage and average earnings;
- Financial stress and the role of the tax/transfer system;
- Specific characteristics of award-reliant industries;
- Conditions in retail and tourism sectors;
- Pay equity.

90 For all of these reasons, we consider the Annual Wage Review 2011-12, which increased the national minimum wage by 2.9% from $589.30 to $606.40 per week, an increase of $17.10 per week, to be a relevant and significant consideration.

91 Although the Annual Wage Review 2011-12 is relevant and significant, the Act does not provide simply for it to be adopted by us in the absence of good reason not to do so. We are obliged by s 50A(3) of the Act to set a minimum wage for WA by having regard primarily to the conditions of the WA economy and labour market. This is in contrast to the national considerations which the FWA Minimum Wage Panel is obliged to take into account. For that reason, and also that since 2006 –

- S 50A(3) of the Act and the corresponding national legislative provisions have not been the same; and
- there have been differences in the timing of both national and WA minimum wage decisions,

the WA minimum wage has been higher than the national minimum wage. On this occasion, as was the case in the 2011 State Wage order case, the AHAWA's primary submission that there should be no increase to the WA minimum wage in order to allow the WA minimum wage to align with the national minimum wage was not supported by any other person. We consider that s 50A(3) of the Act would not permit the Commission to "freeze" the WA minimum wage merely to achieve such an alignment.

92 Rather, we have an obligation to ensure "that Western Australians have a system of fair wages and conditions of employment" and to "provide fair wage standards in the context of living standards generally prevailing in the community". This suggests that it would not be fair to those low paid employees in the WA industrial relations system, even though they are a small minority, who are dependent on the minimum wage, not to receive an increase when one is otherwise appropriate. For as long as s 50A(3) retains its present wording, the WA minimum wage will require to be set by an exercise of independent judgment according to equity, good conscience and the substantial merits of the case having regard to the s 50A(3) considerations.

93 In the context of s 50A(3), we consider the approach of the FWA Minimum Wage Panel to its setting of the national minimum wage to be of assistance. The resulting 2.9% increase to the national minimum wage followed FWA's consideration of some of the issues raised in these proceedings. This includes the issue of the role of the tax transfer system and the introduction of the Carbon Tax. It also includes the issue raised by UnionsWA in relation to the gender pay gap and the reliance of women on the minimum wage, where FWA's conclusion at [231] was that given women are disproportionately represented amongst the low paid, an increase in minimum wages is likely to promote pay equity, although moderate changes in award rates of pay would be expected to have only a small effect on the overall differences in earnings between males and females. This accords with our own conclusion.

94 The evidence of Professor Preston, and the submissions of UnionsWA however shows that although the national minimum wage has risen over the past decade at about the same rate as the WPI, that cannot be said of the WA minimum wage. We have earlier not accepted UnionsWA's reliance on AWOTE as an appropriate measure for this purpose. However, we do consider that it is appropriate to refer to the WPI movement in WA, taking into account that WPI also includes some measure of mining and resource wages which are not representative of wages generally. We note also the WACOSS material regarding financial stress in low income families being experienced in WA.

95 We also note the extent to which the FWA Minimum Wage Panel has considered specific award-reliant industries, retail: accommodation and food. FWA specifically addressed retail, manufacturing and tourism which are expected to be adversely

affected by the ongoing global uncertainty, high Australian dollar, consumer caution and changes in expenditure patterns. At [98], FWA stated:

> In assessing the available economic information, we have looked at developments in the economy as a whole and paid particular attention to developments in the award-reliant industries. It is in these industries where the minimum wage has greatest application and where the greatest practical impact of minimum wage increases might be felt. In specifically addressing information concerning the award-reliant industries, we remain aware of the fact that changes in award rates of pay continue to have a substantial influence beyond those industries.

96 In our case too we look at the WA economy as a whole and pay particular attention to the information before us regarding those industry sectors which are likely to employ minimum wage dependent employees.

CONCLUSION

97 Our past decisions setting the WA minimum wage have paid particular regard to the State of the WA economy. We are obliged to do so by s 50A(3)(b) of the Act, however we point out that we have been responsive in the past to the State's economic performance and to movements in the cost of living and wage rates generally. Where we have been able to do so, we have given a real increase to the minimum wage, considering that to do so gives effect to the obligation to meet the needs of the low paid and contribute to improved living standards for employees.

98 Where the state of the WA economy has been such that we have not been able to do so, we have at least been able to maintain its real value relative to CPI in WA, even though that measure is criticised by UnionsWA and WACOSS.

99 There is no evidence that these decisions have been inappropriate to the circumstances.

100 In 2011, our considerations under s 50A(3) of the Act resulted in an increase which was much the same as the increase awarded in the FWA Annual Wage Review 2010-11. On that occasion, the relative positions of the WA economy and of the national economy were similar. That is not the case on this occasion. As the evidence from the WA Department of Treasury shows, conditions in WA are stronger than they are nationally, WA's annual CPI is greater than the national, its unemployment rate is lower, male and female participation rates are higher, its youth unemployment rate is lower, and its WPI and AWE are higher, than nationally.

101 Additionally, over the last decade the WA minimum wage has not kept pace with the WPI, in contrast to the national minimum wage which has risen over the last decade at about the same rate as the WPI.

102 In the context of the current strength of the WA economy, and taking into consideration the need -

- "to meet the needs of the low paid";
- "to contribute to improved living standards for employees";
- "to protect employees who may be unable to reach an industrial agreement"; and
- "to provide equal remuneration for men and women for work of equal or comparable value",

we consider an increase to the WA minimum wage greater than awarded nationally is warranted.

103 As to the size of the increase, we are obliged to balance many competing and almost irreconcilable issues. We conclude, as the Annual Wage Review 2011-12 has concluded for the national minimum wage, that we too should give a real increase to the WA minimum wage. For that reason, we consider the increase suggested by CCIWA, and in turn, the increase submitted by the Hon Minister to maintain the real value of the WA minimum wage, on this occasion do not satisfy the considerations in s 50A(3) of the Act.

104 Correspondingly, we consider UnionsWA's submission that the setting of the WA minimum wage should be significantly influenced by its past or present relativity to AWOTE not to be appropriate.

105 The lower rate of increase in the WA minimum wage relative to the WPI is explainable by reference to the higher wages in the mining and resource sectors in WA. In both sets of data, there is an influence of high wages in the mining and resource sectors which we do not see as representative of earnings growth generally.

106 Further, the patchy growth in some award-reliant sectors of the WA economy and difficulties being experienced in some sectors, including hospitality and tourism, shows a limited capacity to afford to pay an increase which significantly seeks to address the lower level of the minimum wage in WA relative to wage rates in WA. And of course, any increase to the WA minimum wage widens the gap between it and the national minimum wage.

107 Although we consider an increase to the WA minimum wage greater than awarded nationally is warranted, we are acutely conscious that we must balance considerations of the capacity of employers to pay with the need for the WA minimum wage to meet the needs of the low paid, provide fair wage standards and indeed to contribute to improved living standards for employees. We have decided to increase the WA minimum wage by 3.4%, representing an increase of $20.60 per week to the WA minimum wage. This is 0.5%, or $3.50 more than that awarded in the Annual Wage Review 2011-12.

108 This is an increase less than the increase in wage rates generally in WA, and we think it will not affect the WA economy or have a measurable effect on the level of employment, inflation and productivity in WA. Although s 50A(3)(a)(i) and (iii) in particular suggest that it might be desirable to further remedy the decline of the relative position of the WA minimum wage to wages generally in the community, any greater increase we might have awarded has been conditioned by the evidence of some award-reliant industry sectors in WA which are not performing as well as some other sectors.

109 The adjustment will increase the gap between the WA and national minimum wages which has existed since the 2011 State Wage order, although only marginally.

Date of Operation

110 The presumption in s 50A(5) of the Act is that the State Wage order takes effect on 1 July in the year it is made and the minimum wage to be set also takes effect from that date. The new minimum wage will take effect from the commencement of the first pay period on or after 1 July 2012.

Consequent Variations to Awards

111 We are obliged by s 50A(4) to ensure, to the extent possible, that there is consistency and equity in relation to the variation of awards. No person appearing submitted that we should not correspondingly adjust rates of wages paid under awards.

112 On this occasion, we consider award rates of wages should be varied by 3.4% because we appreciate that our past flat-dollar increases inevitably will have had the effect of compressing relativities between wage rates in awards. We also appreciate, as submitted by CCIWA, that many awards do require the attention of the parties to those awards if they are to be modernised, however, in the meantime, employers and employees in award-reliant industries in WA are still bound by them. We have taken into account that the application of the percentage increase to awards gives a greater increase to those on higher award rates than those on the minimum wage, and that the corresponding cost to employers. The increase is able to be absorbed into any overaward payment such that it will apply only to employees who are paid the award wage; any wage paid over the award wage is able to be used to offset the increase.

The Minimum Weekly Rate of Pay Applicable to Apprentices and Trainees

113 Section 50A(3)(a)(vi) requires the Commission to take into consideration the need to encourage ongoing skills development. The Hon Minister submits that in the past seven years, the overall number of apprenticeships commenced has risen and the percentage of people over the age of 21 commencing apprenticeships has increased significantly, and that previous State minimum wage increases for apprentices and trainees have not had a significant impact on the number of apprenticeships and traineeships being undertaken in WA.

114 We note the submissions of UnionsWA and WACOSS that on this occasion we should award the full increase to apprentices and trainees. However in the absence of evidence from which we could reach a conclusion regarding the effect of doing so on the need to encourage ongoing skills development, we are not persuaded to do so. The Hon Minister refers to the FWA review of modern awards which will include apprentice, trainee and junior rates; the outcome of the review as it relates to apprentice and trainee wages and conditions may be a matter which can be taken into account in our consideration of s 50A(3)(a)(vi) in the next State Wage order case.

Industry/Skill Levels

115 As in previous years, the Minister has provided an updated industry/skill level classifications table based on advice from the Department of Education and Training. This updated table will be included in Attachment A to the 2012 State Wage order to issue.

THE STATE WAGE PRINCIPLES

116 No person suggested that any change is required to be made to the State Wage Principles. Section 50A(1)(d) of the Act obliges the Commission to set out a statement of principles to be applied and followed in relation to the exercise of jurisdiction to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment. The Statement of Principles July 2012 to issue remains unchanged from the Statement of Principles July 2011 apart from the necessary and consequential amendments to Principle 9.

MINUTE OF PROPOSED GENERAL ORDER

117 A minute of proposed General Order now issues. The Commission should be advised by 2.00pm on 13 June 2012 whether or not a speaking to the minutes is requested. If a speaking to the minutes is necessary, it will be dealt with on the papers and written submissions should be received by 10.00am on 14 June 2012.

2012 WAIRC 00359

2012 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 14 JUNE 2012
FILE NO.	APPL 2 OF 2012
CITATION NO.	2012 WAIRC 00359

Result	2012 State Wage order issued
Representation	Ms S Haynes and with her, Ms M Bolitho on behalf of the Hon. Minister for Commerce
	Mr J Ridley and with him, Ms R Catalano on behalf of the Chamber of Commerce and Industry of WA (Inc.)
	Ms K Davis and with her, Dr T Dymond on behalf of UnionsWA

General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2012 State Wage order and thereby orders as follows:

1. THAT the 2012 State Wage order takes effect on 1 July 2012.

2. THAT the General Order which issued in matter No. APPL 2 of 2011 ((2011) 91 WAIG 1015) is rescinded with effect on and from the commencement of the first pay period on or after 1 July 2012.

3. THAT the Minimum Weekly Rate of Pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be $627.70 per week on and from the commencement of the first pay period on or after 1 July 2012.

Apprentices

4. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking an apprenticeship ("apprentice") shall be:

   (a) In relation to that class of apprentice to whom an award or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant award where an employer-employee agreement is in force.

   (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award* which operate on and from the commencement of the first pay period on or after 1 July 2012:

	1 July 2012
Four Year Term	
First year	$304.37
Second year	$398.59
Third year	$543.53
Fourth year	$637.74
Three and a Half Year Term	
First six months	$304.37
Next year	$398.59
Next year	$543.53
Final year	$637.74
Three Year Term	
First year	$398.59
Second year	$543.53
Third year	$637.74

5. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be $543.50 per week on and from the commencement of the first pay period on or after 1 July 2012.

Trainees

6. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking a traineeship ("trainee") shall be:

   (a) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of trainee under the award where an award applies or the relevant award where an employer-employee agreement is in force.

   (b) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay at the relevant Industry/Skill level as determined by reference to Attachment A hereunder, shall be the rate of pay based on the *Metal Trades (General) Award* contained in Table 1 as follows:

Table 1

The following rates of pay apply on and from the commencement of the first pay period on or after 1 July 2012:

Industry/Skill Level A			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	215.00	257.00	317.00
Plus 1 year out of school	257.00	317.00	366.00
Plus 2 years	317.00	366.00	428.00
Plus 3 years	366.00	428.00	490.00
Plus 4 years	428.00	490.00	
Plus 5 years or more	490.00		
Industry/Skill Level B			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	215.00	257.00	308.00
Plus 1 year out of school	257.00	308.00	351.00
Plus 2 years	308.00	351.00	413.00
Plus 3 years	351.00	413.00	472.00
Plus 4 years	413.00	472.00	
Plus 5 years or more	472.00		
Industry/Skill Level C			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	215.00	257.00	302.00
Plus 1 year out of school	257.00	302.00	339.00
Plus 2 years	302.00	339.00	381.00
Plus 3 years	339.00	381.00	427.00
Plus 4 years	381.00	427.00	
Plus 5 years or more	427.00		

(c) For any class of trainees under this subclause undertaking a traineeship that is not provided for in Attachment A, the minimum weekly rate of pay shall be the rate of pay in Industry/Skill Level C.

Australian Qualification Framework (AQF)

(d) For a trainee in this class undertaking an AQF4 traineeship the minimum weekly rate of pay shall be the weekly wage rate for an AQF3 trainee at Industry/Skill Levels A, B or C as applicable with the addition of 3.8% of that wage rate.

Part-time and School-Based Trainees

(e) This provision shall apply to trainees who undertake a traineeship on a part-time basis, or as a school-based trainee, by working less than full-time hours and by undertaking the approved training at the same or lesser training time than a full-time trainee.

(i) School-based trainees will receive the following minimum hourly rates of pay, as for school leavers:

	Current year of schooling	
Wage levels	Year 11	Year 12
A	$6.76	$8.34
B	$6.76	$8.11
C	$6.76	$7.95

(ii) The minimum hourly rate of pay for part-time trainees shall be calculated by taking the full-time rates expressed in Clause 6(b) Table 1 and dividing that rate by 38 in accordance with section 10 of the *Minimum Conditions of Employment Act 1993* (WA).

(iii) As per the requirement under 60E(1)(iv) of the *Vocational Education and Training Act 1996* (WA), any time spent by a trainee in performing his or her obligations under the training contract and in being trained and assessed under the contract, whether at the employer's workplace or not, is to be taken for all purposes (including the payment of remuneration) to be time spent working for the employer.

(f) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force and who has reached 21 years of age, the minimum weekly rate of pay is the rate of pay that applies to that class of trainee determined by reference to the highest

weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant award where an employer-employee agreement is in force.

(g) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is entered into and who has reached 21 years of age, the minimum weekly rate of pay shall be that determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship set out below:

On and from the commencement of the first pay period on or after 1 July 2012:

Industry/Skill Level A	$490.00 per week
Industry/Skill Level B	$472.00 per week
Industry/Skill Level C	$427.00 per week

7. THAT

(a) The rates of pay applicable to trainees under the following awards be adjusted in accordance with the formula outlined in sub-clause (b).

(i) AWU National Training Wage (Agriculture) Award 1994;

(ii) Food Industry (Food Manufacturing or Processing) Award;

(iii) Furniture Trades Industry Award;

(iv) Licensed Establishments (Retail and Wholesale) Award 1979;

(v) Metal Trades (General) Award;

(vi) Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980;

(vii) Printing Award;

(viii) Sheet Metal Workers' Award No. 10 of 1973;

(ix) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977;

(x) Soft Furnishings Award; and

(xi) Vehicle Builders' Award 1971.

(b) Trainee rates be adjusted as follows:

(i) Industry/Skill Level A, B and C top rates are increased by 80% of the arbitrated safety net adjustment. Each result is then rounded to the nearest dollar.

(ii) All other Industry/Skill Level A, B and C rates are increased by a percentage of the unrounded result of the first step. Each result is then rounded to the nearest dollar.

(iii) However, if an existing rate in Industry/Skill Level B or C is the same as an existing rate in Industry/Skill Level A or B, the former is adjusted in line with the latter rate in order to maintain consistency.

Award Rates of Pay

8. THAT rates of pay for adults in each award of the Commission, other than those set out in Schedule 1, be increased by 3.4% on and from the commencement of the first pay period on or after 1 July 2012 and that this increase shall be subject to absorption in the same terms as previous State Wage decisions.

9. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula, those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of 3.4% to the adult award wage on and from the commencement of the first pay period on or after 1 July 2012.

10. THAT increases under previous State Wage Case decisions prior to 1 July 2012, except those resulting from enterprise agreements, are not to be used to offset this State Wage order increase of 3.4%.

11. THAT on and from 1 July 2012 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by:

(a) Deleting the words "$607.10 per week payable on and from the first pay period on or after 1 July 2011" and inserting in lieu the words "$627.70 per week payable on and from the commencement of the first pay period on or after 1 July 2012".

(b) Deleting the words "$525.70 per week on and from the commencement of the first pay period on or after 1 July 2011" in the Adult Apprentices section and inserting in lieu the words "$543.50 per week on and from the commencement of the first pay period on or after 1 July 2012".

(c) Deleting the date "1 July 2011" wherever it appears and inserting in lieu the date "1 July 2012".

(d) Deleting the words "2011 State Wage order decision" wherever they appear and inserting in lieu the words "2012 State Wage order decision".

Statement of Principles

12. THAT the Statement of Principles – July 2011 under the General Order in matter No. Appl 2 of 2011 be replaced by the Statement of Principles – July 2012 in Schedule 2.

Publication

13. THAT the Registrar publish in the Western Australian Industrial Gazette and on the Commission's website the clauses of the awards varied by Clauses 8 and 9 of this State Wage order incorporating the amendments made.

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

ATTACHMENT A

INDUSTRY / SKILL LEVEL A (as at May 2012)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Aeroskills Industry (MEA)	
Aeroskills (Aircraft Mechanical)	II
Aeroskills Engineer - Avionics	Diploma
Aeroskills Engineer – Mechanical	Diploma
Aviation (AVI)	
Aviation Flight Operations	II & III
Aviation Ground Operations & Service	II & III
Beauty (WRB)	
Beauty Services	III
Beauty Therapy	IV
Business Services (BSB)	
Business Administration	III & IV
Business	II & III & IV
Customer Contact	III & IV
Frontline Management	IV
Legal Administration	III & IV
Legal Assistant	IV
Recordkeeping	III & IV
Marketing	IV
Manager	Diploma
Human Resources	IV
Medical Administration	III
Union Recruitment and Organising	IV
Civil Construction (RII)	
Bituminous Surfacing	II & III
Civil and Structural Engineering Draftsperson	Diploma
Civil Construction	II & III
Civil Construction Manager	Diploma
Civil Construction Senior Designer	Advanced Diploma
Civil Construction Senior Manager	Advanced Diploma
Civil Construction Supervisor	IV
Civil Construction Designer	IV & Diploma
Civil Foundations	III
Plant Operations	III
Pipelaying	III
Public Works Engineering Technical Officer	Diploma
Road Marking	III
Road Construction and Maintenance	III
Bridge Construction & Maintenance	III
Trenchless Technology	III
Tunnel Construction	III
Community Services (CHC)	
Career Development Officer	III & IV
Community Care Work(er)	III & IV
Community Services (Aged Care Work)	III & IV
Community Services (Children's Services)	III
Community Services (Youth Work)	III
Community Services Contact Work	II
Community Services Support Work	II
Community Services Work	II & III & IV
Disability Work	III & IV

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Community Services (CHC)—*continued*	
Aboriginal & Islander Education Worker	III & IV
Aboriginal Child Care Work	III
Child Care Worker	Diploma
Before & After School Care Supervisor	Diploma
Bi-Lingual/Bi-Cultural Community Services Work	II & III
Christian Ministry Work	III & IV & Diploma
Out of School Hours Care Work	IV
Social Housing Work	III & IV
Protective Care Work(er)	IV & Diploma
Mental Health Work	IV
Youth Work	IV
Construction Plumbing and Services (CPC)	
Assistant Building Surveyor ** some employers are choosing to title this role as a cadetship for status purposes. This title is not recognised in the industrial instruments and payment is determined according to the relevant award rates.*	Diploma
Building Maintenance	II
Dogging	III
Drainage	II
General Construction	II
General Construction (Demolition)	III
Estimating (Housing)	IV
Marble and Granite Edge Mason	II
Site Management	IV
Scaffolding	III
Rigging	III
Steel fixing	III
Residential Drafting	IV
Correctional Services (CSC)	
Correctional Practice (Custodial)	III & IV
Correctional Practice	III & IV
Financial Services (FNS)	
Finance and Mortgage Broking	IV
Financial Services	II, III & IV
Financial Services (Accounts Clerical)	III
Financial Services (Financial Practice Support)	IV
Financial Services (Accounting)	IV
Financial Services (Superannuation)	IV
Financial Services Bookkeeping	IV
Insurance Services	III & IV
Drilling(RII)	
Drilling Operations	II & IV
Driller	III
Drilling (Mineral Exploration)	II, III & IV
Electricity Supply – Generation (UEP)	
ESI Generation (Electrical/Electronic)	IV
ESI Generation (Mechanical)	IV
ESI – Generation Operations Manager	Diploma
Electrical/Electronic Service Technician	Diploma
ESI Generation (Operations)	III & IV
ESI Generation (Systems Operations)	IV
Electricity Supply – Transmission, Distribution, Rail (UET)	
ESI - Power Systems Manager	Diploma & Adv Diploma
Electrotechnology (UEE)	
Antennae Equipment	II
Appliance Servicing - Refrigerants	II
Business Equipment Servicing	II
Fire Alarms Servicing	II
Hazardous Areas	IV
Refrigeration and Air Conditioning Systems	IV
Remote Area Essential Service	II

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Electrotechnology (UEE)—*continued*	
Electrotechnology Systems Electrician	IV
Computer Assembly & Repair	II
Computer Systems	IV
Computer Systems Engineer	Diploma & Adv Diploma
Data and Voice Communications	
Electrical/Electronic Service Technician	Diploma
Electrical Engineer	Diploma & Adv Diploma
Electronic Assembly	II
Electronics	II
Electronics and Communications	IV
Electronics & Communications Engineering	Diploma & Adv Diploma
Industrial Electronics and Control	IV
Renewable Energy	II
Security Assembly and Setup	II
Video and Audio Systems	IV
Winding and Assembly	II
Floristry (WRF)	
Floristry	III & IV
Food Processing (FDF)	
Food Processing	III
Food Processing (Wine)	III
Food Processing (Sales)	III
Pharmaceutical Manufacturing	III
Production Line Supervisor	IV
Furnishing (LMF)	
-	
Gas Industry (UEG)	
Gas Operations	III & IV
Gas Industry Advanced Technician	Advanced Diploma
Gas Industry Operations	II, & IV
Gas Industry Technician	Diploma
Gas Operations	III & IV
Information and Communication Technology (ICA)	
Information Technology	II & III
Information Technology (Networking)	IV
Information Technology (Websites)	IV
Information Technology (Multimedia)	IV
Information Technology (Support)	IV
Information Technology (Systems Analysis & Design)	IV
Laboratory Operations(MSL)	
Sampling and Measurement	II
Laboratory Skills	III
Laboratory Techniques	IV
Laboratory Technology	Diploma
Senior Laboratory Technician	Advanced Diploma
Local Government (other than operational works) (LGA)	
Local Government	II & III
Local Government Administration	IV
Local Government Planning	IV
Ranger	IV
Trainee Community Ranger	III
Manufacturing (MSA)	
Aluminium Window and Frames	II
Aluminium Windows and Frames Manufacturing	II
Glass Processor	II
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Manufacturing Technician - Metallurgy	Diploma
Manufacturing Technologist - Metallurgy	Adv Diploma
Surface Preparation and Coatings Application	III

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Metal and Engineering (MEM)	
Engineering Assistant	Advanced Diploma
Engineering Production	II
Engineering Technician	III
Draftsperson	Diploma
Production Systems (Surface Finishing)	III
Engineering (Advanced Trade)	Diploma
Engineering – Higher Engineering Trade	IV
Metallurgical Technician	Diploma & Adv Diploma
Production Systems (Foundry)	III
Production Systems (General Engineering)	III
Production Systems (Surface Finishing)	III
Metalliferous Mining (RII)	
Underground Metalliferous Mining	II & III & IV
Underground Metalliferous Mining Manager	Diploma
Museum and Library/Information Services (CUL)	
Library and Information Services	II & III & IV
Museum Practice	II & III
Plastics, Rubber and Cablemaking (PMB)	
Plastics	III
Process Manufacturing	III
Polymer Technology	IV
Plastics – Film	III
Plastics – Blow Moulding	III
Plastics – Extrusion	III
Plastics – Fabrication	III
Plastics – Injection Moulding	III
Plastics – Thermoforming	III
Plastics – Rotational Moulding	III
Plastics – Polystyrene	III
Rubber	III
Process Manufacturing (Rubber - Injection Moulding)	III
Rubber - Belt Splicing	III
Rubber – Rubber Lining	III
Process Manufactured Mineral Products	III & IV
Process Plant Operations	III
Process Plant Technology	IV
Process Support	III
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Process Plant Advanced Technician	Diploma
Public Safety (PUA)	
Firefighting Operations	III
Policing	Diploma
Public Sector (PSP)	
Government	II & III & IV
Government – Fraud Controller	IV
Government – Investigator	IV
Property Services (CPP)	
Property Management	IV
Spatial Services Technician	Diploma
Surveyor	Diploma
Retail (including Wholesale and Community Pharmacy) (SIR)	
Retail	III
Retail Management	IV
Community Pharmacy	III & IV
Wholesale	III
Telecommunications (ICT)	
Telecommunications	II & III
Telecommunications Cabling	II
Telecommunications (Access Network)	II
Telecommunications (Cabling & Customer Premises Equipment)	III
Telecommunications Engineering	IV

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Telecommunications (ICT)*—continued*	
Customer Contact	III & IV
Data and Voice Communications	II & III
Telecommunications Engineering	IV
Textile Clothing and Footwear (LMT)	
Textile Fabrication	III
Textile Production	III
Laundry Operations	III
Clothing Production	III & IV
Dry Cleaning Operations	III
Early Stage Wool Processing	III
Leather Production	III
Footwear Repair	III
Tourism, Hospitality and Events (THC: SIT: CUE)	
Events Technical	III
Hospitality (Accommodation Services)	III
Hospitality (Food and Beverage)	III
Hospitality – (Asian Cookery)	II
Hospitality – (Catering Operations)	II
Hospitality – (Commercial Cookery)	II
Hospitality – (Patisserie)	II
Hospitality – (Operations)	II & III
Hospitality Gaming	III
Hospitality - Supervision	IV
International Retail Travel Sales	III
Tourism (Attractions and Theme Parks)	II
Tourism (Guiding)	II & III & IV
Tourism (Sales/Office Operations)	II
Tourism (Visitor Information Services)	III
Venues & Events (Customer Service)	III
Costume for Performance	IV
Live Production Theatre & Events	II
Entertainment (Front of House)	II
Live Production Theatre & Events (Technical Operations) Lighting	III & IV
Live Production Theatre & Events (Technical Operations) Vision Systems	III & IV
Live Production Theatre & Events (Technical Operations) Audio	III & IV
Transport and Distribution (TLI)	
Integrated Rating	III
Logistics Operations	III
Cash in Transit	III
Transport and Distribution (Marine Engine Driving)	III
Transport and Distribution (Maritime Operations)	III
Mobile Cranes	III
Rail Infrastructure	III
Rail Operations	III & IV
Road Transport	III & IV
Stevedoring	III
Warehousing & Storage	III & IV
Water Industry(NWP)	
Water Operations	III & IV

INDUSTRY / SKILL LEVEL B (as at May 2012)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Animal Care & Management (ACM)	
Veterinary Nursing	IV
Animal Control and Regulation	IV
Animal Studies	II
Animal Technology	III
Captive Animals	III
Companion Animal Services	III & IV

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Asset Maintenance (PRM)	
Asset Maintenance (Cleaning Operations)	II & III
Asset Maintenance (Waste Management)	II & III
Asset Maintenance (Fire Protection Equipment)	II & III
Pest Management Technician	III
Australian Meat Industry (MTM)	
Meat Processing (Abattoirs)	II
Meat Processing (Boning)	III
Meat Processing (Food Services)	II & III
Meat Processing (General)	III
Meat Processing (Rendering)	III
Meat Processing (Smallgoods) Manufacture	III
Meat Processing (Smallgoods) General	II & III
Meat Processing (Slaughtering)	III
Meat Processing (Leadership)	IV
Meat Processing (Quality Assurance)	IV
Meat Inspector	III
Meat Inspector / Quality Assurance Officer	IV
Production Manager (Meat Processing)	Diploma
Automotive Industry Manufacturing (THC)	
Recreational Vehicle Production Assistant	II
Recreational Vehicle Production Team Leader	III
Automotive Industry/Retail Service and Repair (AUR)	
Automotive (Administration)	II & III
Automotive Administration (Rental Vehicles)	III
Automotive Electrical Technology	II
Automotive Management	IV & V
Automotive (Mechanical)	II
Automotive (Sales)	II & III
Automotive (Vehicle Body)	II
Automotive Aftermarket Warehousing Distribution Operations	II & III
Bicycles	II
Marine	II
Outdoor Power Equipment	II
Vehicle Servicing	II
Automotive Retail Service and Repair (Tyre Fitting)	III
Mechanical Driveline	II
Mechanical Engine Overhaul	II
Mechanical Hydraulics	II
Mechanical Machine Assembly	II
Mechanical Transmissions	II
Beauty (WRB)	
Make-Up Services	II
Nail Technology	II
Retail Cosmetic Services	II
Caravan Industry (THC)	
Caravan Park Operations	II & III
Civil Construction (RII)	
Civil Construction for entry level Indigenous Workers	I
Community Recreation Industry (SRC)	
Community Recreation	II & III
Extractive Industries(RII)	
Extractive Industries Senior Manager	Advanced Diploma
Field/Exploration Operations	II
Minerals Processing	Diploma
Resource Processing	II & III & IV
Surface Extraction Operations	II & III & IV
Surface Operations Manager	Diploma
Fitness Industry (SRF)	
Fitness	III & IV
Floristry (WRF)	
Floristry	II

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Food Processing Industry (FDF)	
Food Processing	II
Food Processing (Sales)	II
Food Processing (Wine)	II
Forest and Forest Products Industry (FPI)	
Forest Growing and Management	II & III
Harvesting & Haulage	II & III
Sawmilling and Processing	II & III
Timber Manufactured Products	II & III
Timber Merchandising	II & III
TIMBER FABRICATION DETAILER	IV
TIMBER FABRICATION PRODUCTION MANAGER	Diploma
TIMBER FABRICATION DETAILING MANAGER	Diploma
Timber Fabrication Estimator or Jig Setter	III
Timber Fabrication Production Hand	II
Timber Fabrication Production Specialist Or Leading Hand	IV
Wood Panel Products	II & III
Production Technician (Timber)	IV
Forester (Operations)	IV
Furnishing (LMF)	
Furnishing (Flooring)	II
Furnishing (Polishing)	II
Furnishing (Upholstery)	II
Furniture Making	II
Glass and Glazing	II
Interior Design – Retail Services	III
Picture Framing	III
Soft Furnishing	II & III
Designer (Kitchens, Bathrooms and Interior Spaces) * some employers are choosing to title this role as a cadetship for status purposes. This title is not recognised in the industrial instruments and payment is determined according to the relevant award rates.	IV
Gas Industry (UEG)	
Gas Industry Advanced Technician	Adv Diploma
Gas Industry Technician	Diploma
Gas Industry Operations	II & III & IV
Health (HLT)	
Aboriginal Environmental Health	II & III
Assistant Aboriginal and/or Torres Strait Islander Health Care Worker	II
Aboriginal and/or Torres Strait Islander Health Care Worker	III
Senior Aboriginal and/or Torres Strait Islander Health Care Worker	IV
Allied Health Assistance	III & IV
Client/Patient Support Services	III
Dental Assisting	III & IV
Health Service Assistant	III
Health Support Services	II & III
Optical Dispensing	IV
Sterilization Services	III
Pathology Collection	III
Local Government (Operational Works) (LGA)	
Local Government (Operational Works)	Diploma
Metal and Engineering (MEM)	
Engineering – Production	II
Aluminium Windows and Frames Manufacturing	II
Winding & Assembly	II
Outdoor Recreation (SRO)	
Outdoor Recreation	III & IV
Community Recreation	II & III
Sport and Recreation	II & III & IV

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Plastics, Rubber and Cablemaking (PMB: PMC)	
Process Manufacturing	II
Process Manufacturing (Cablemaking)	II
Plastics	II
Plastics – Film	II
Plastics – Blow Moulding	II
Plastics – Composites	II
Plastics – Extrusion	II
Plastics – Fabrication	II
Plastics – Injection Moulding	II
Plastics – Thermoforming	II
Plastics – Rotational Moulding	II
Plastics – Polystyrene	II
Rubber	II
Rubber – Rubber Lining	II
Process Manufacturing (Rubber – Injection Moulding)	II
Rubber - Belt Splicing	II
Process Manufactured Mineral Products	II
Process Plant Operations	II
Process Support	II
Printing and Graphic Arts (ICP)	
Desktop Publishing	II
Graphic Arts Services	II
Print Production Support	II
Printing and Graphic Arts (Instant Print)	II
Printing and Graphic Arts (Multimedia)	III
Screen Printing	II
Property Services (CPP)	
Property Management	IV
Property Services (operations)	III
Technical Security	II & III
Security Operations	III
Hazardous Areas	IV
Spatial Services Technician	V
Surveying	IV & V
Retail (SIR) (including wholesale and Community Pharmacy)	
Retail	II
Community Pharmacy	II
Salon Assistant	II
Warehouse	II
Screen and Media (CUF)	
Broadcasting (Radio)	II & III & IV
Broadcasting (Remote Area Operations)	III
Broadcasting (Television)	III & IV
Screen	II & III & IV
Multimedia	II & III & IV
Sport Industry (SRS, SIS)	
Fitness	IV
Sport (Career Orientated Participation)	II &III
Textile, Clothing and Footwear (LMT)	
Dry Cleaning Operations	II
Footwear Repair	II
Laundry Operations	II
Textile Production (Complex or Multiple Processes)	II
Laundry Operations	II
Transport and Logistics (TLI)	
Furniture Removalist	II
Transport and Distribution (Aviation Flight Operations)	II
Aviation Ground Operations and Service	II
Transport and Distribution (Marine Engine Driving	II
Transport and Distribution (Maritime Operations)	II
Transport & Distribution (Maritime Operations – Coxswain)	II

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Transport and Logistics (TLI)—*continued*	
Rail Infrastructure	II
Rail Operations	II
Road Transport	II
Stevedoring	II
Logistics Operations	II
Warehousing & Storage	II
Water Industry(NWP)	
Water Operations	II

INDUSTRY / SKILL LEVEL C (as at May 2012)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Amenity Horticulture (RTF)	
Horticulture	II & III & IV
Horticulture (Arboriculture)	II & III & IV
Horticulture (Floriculture)	II & III & IV
Horticulture (Landscape)	II & IV
Horticulture (Retail Nursery)	II & IV
Horticulture (Wholesale Nursery)	II & IV
Horticulture (Parks and Gardens)	II & IV
Horticulture (Turf)	II & IV
Conservation and Land Management (RTD)	
Conservation and Land Management	II & III & IV
Funeral Services (SIF)	
Funeral Services (Embalmer)	IV
Funeral Services	IV
Gravedigging, Grounds and Maintenance	III
Cemetery and Crematorium Operations	III
Music (CUS)	
Music	III & IV
Music Industry (Foundation)	II
Music Industry (Technical Production)	III & IV
Music Industry (Business)	III
Racing Industry (RGR)	
Racing - Stablehand	II
Racing - Advanced Stablehand	III
Racing - Trackrider	III
Racing - Jockey	IV
Racing (Harness Driver)	III
Rural Production (RTE)	
Agriculture	II & III & IV
Agriculture (Beef Cattle Production)	III & IV
Agriculture (Dairy)	III
Agriculture (Goat Production)	III
Agriculture (Grain Production)	III
Agriculture (Horse Breeding)	III
Horticulture (Production)	II & III & IV
Agriculture (Pig Production)	III
Agriculture (Sheep and Wool)	III
Agriculture (Rural Merchandising)	III
Advanced Wool Handler	III
Irrigation	II & III & IV
Rural Operations	II & III
Shearing	II & III & IV
Wool Handling	II
Wool Clip Preparation	III
Wool Classing	IV
Seafood Industry (SIF)	
Seafood Processing	II & III
Seafood Sales and Distribution	II & III

Schedule 1

LIST OF AWARDS NOT SUBJECT TO THIS GENERAL ORDER

Awards that do not contain wages and are therefore excluded:

Alcoa Long Service Leave Conditions Award, 1980

Catering Employees' (North West Shelf Project) Long Service Leave Conditions Award 1991

Catering Workers' (North Rankin A) Long Service Leave Conditions Award No. A 40 of 1987

The Contract Cleaning (F.M.W.U.) Superannuation Award 1988

Health Care Industry (Private) Superannuation Award 1987

Iron and Steel Industry Workers' (Australian Iron and Steel Pty. Ltd.) Production Bonus Scheme Award

Miscellaneous Government Conditions and Allowances Award No A 4 of 1992

Miscellaneous Workers' (Security Industry) Superannuation Award, 1987

Ngala Superannuation Award, 1989

Printing Industry Superannuation Award 1991

Public Service Allowances (Fisheries and Wildlife Officers) Award 1990

Supported Employees Industry Award

The Swan Brewery Company Limited (Superannuation) Award 1987

West Australian Petroleum Pty Ltd Long Service Leave conditions Award 1991

Woodside Offshore Petroleum Pty. Ltd. Long Service Leave Conditions Award, 1984

Worsley Alumina Pty. Ltd. Long Service Leave Conditions Award, 1984

Awards that have certain parts quarantined:

Clerks (Racing Industry - Betting) Award 1978 **– Schedule C**

The Iron Ore Production & Processing (Locomotive Drivers) Award 2006 – **Clause 2.1**

Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 **– Clause 6**

Shearing Contractors' Award of Western Australia 2003 **– Clause 4.3**

Awards containing transitional provisions to which the General Order does not apply:

Clothing Trades Award 1973 **– Clause 18**

Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 **– Schedule F**

Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983 **– Schedule I**

Egg Processing Award 1978 **– Appendix 4**

Electorate Officers Award 1986 **– Schedule G**

Family Day Care Co-Ordinators' and Assistants' Award, 1985 **- Schedule C**

Government Officers (Social Trainers) Award 1988 **– Schedule K**

Government Officers (State Government Insurance Commission) Award, 1987 **– Schedule D**

Government Officers Salaries, Allowances and Conditions Award 1989 **- Schedule P**

Juvenile Custodial Officers' Award **– Schedule G**

Public Service Award 1992 **– Schedule M**

Schedule 2

STATEMENT OF PRINCIPLES – July 2012

1. Application of the Statement of Principles

1.1 This Statement of Principles is to be applied and followed when the Commission is making or varying an award or making an order in relation to the exercise of the jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.

1.2 In these Principles, wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of employment will be referred to as "wages".

1.3 In making a decision in respect of any application brought under these Principles the primary consideration in all cases will be the merits of the application in accordance with equity, good conscience and the substantial merits of the case pursuant to section 26(1)(a) of the Act.

1.4 These Principles do not have application to Enterprise Orders made under section 42I of the Act or to applications made under section 40A of the Act to incorporate industrial agreement provisions into an award by consent.

2. (deleted)

3. When an Award may be varied or another Award made without the claim being regarded as above or below Minimum Award Conditions

3.1 In the following circumstances wages in an award, may on application, be varied or another award made without the application being regarded as a claim for wages above or below the minimum award conditions:

3.1.1 To include previous State Wage Case increases in accordance with Principle 4.

3.1.2 To incorporate test case standards in accordance with Principle 5.

3.1.3 To adjust allowances and service increments in accordance with Principle 6.

3.1.4 To adjust wages pursuant to work value changes in accordance with Principle 7.

3.1.5 To adjust wages for total minimum adjustments in accordance with Principle 8.

3.1.6 To vary an award to include the minimum wage in accordance with Principle 9.

4. Previous State Wage Case Increases

4.1 Wage increases available under previous State Wage Case Decisions such as structural efficiency adjustments, and previous arbitrated safety net adjustments will, on application, still be accessible.

4.2 Minimum rates adjustments may also be progressed under this Principle.

5. Test Case Standards

5.1 Test Case Standards in respect of wages established and/or revised by the Commission may be incorporated in an award. Where disagreement exists as to whether a claim involves a test case standard, those asserting that it does, must make an application and justify its referral. The Chief Commissioner will decide whether the claim should be dealt with by a Commission in Court Session.

6. Adjustment of Allowances and Service Increments

6.1 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.

6.2 Adjustment of existing allowances which relate to work or conditions which have not changed and of service increments will be determined in each case in accordance with State Wage Case Decisions.

6.3 Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the State Wage order in Principle 8.

6.4 In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed and service increments for a monetary safety net increase, the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100.

6.5 Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7.

6.6 New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.

6.7 Where changes in the work have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant Principles of this Statement of Principles. The relevant Principles in this context may be Principle 7 and Principle 11.

6.8 New service increments may only be awarded to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant parts of Principle 7 of this Statement of Principles.

7. Work Value Changes

7.1 Applications may be made for a wage increase under this Principle based on changes in work value.

7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage “leapfrogging” arising out of changes in relative position.

7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.

7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.

7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.

7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.

7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.

7.10 The expression "the conditions under which the work is performed" relates to the environment in which the work is done.

7.11 The Commission should guard against contrived classifications and over-classification of jobs.

7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

8. Total Minimum Rate Adjustments

8.1 Where the minimum rates adjustment process in an award has been completed, the Commission may consider an application for the base rate, supplementary payment and State Wage order adjustments to be combined so that the award specifies only the total minimum rate for each classification.

8.2 By consent of all parties to an award, where the minimum rates adjustment has been completed, award rates may be expressed as hourly rates or weekly rates. In the absence of consent, a claim that award rates be so expressed may be determined by arbitration.

8.3 The State Wage order arising from this decision is a 3.4% increase.

9. Minimum Adult Award Wage

9.1 A minimum adult award wage clause will be required to be inserted in all new awards.

9.2 The minimum adult wage clause will be as follows –

MINIMUM ADULT AWARD WAGE

No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

The minimum adult award wage for full-time employees aged 21 or more is $627.70 per week payable on and from the commencement of the first pay period on or after 1 July 2012.

The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

Unless otherwise provided in this clause adults employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2012 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.

Adult Apprentices

Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $543.50 per week on and from the commencement of the first pay period on or after 1 July 2012.

The rate paid in the paragraph above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.

Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003.

10. Making or Varying an Award or issuing an Order which has the effect of varying wages or conditions above or below the award minimum conditions

10.1 An application or reference for a variation in wages which is not made by an applicant under any other Principle and which is a matter or concerns a matter to vary wages above or below the award minimum conditions may be made under this Principle. This may include but is not limited to matters such as equal remuneration for men and women for work of equal or comparable value.

10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.

10.3 All claims made under this Principle will be referred to the Chief Commissioner for him to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner.

11. New Awards (including interim Awards) and Extensions to an Existing Award

11.1 The following shall apply to the making of wages in a new award (including an interim award) and an extension to an existing award:

11.1.1 In the making of wages in an interim award the Commission shall apply the matters set out in section 36A of the Act.

11.1.2 A new award (including an interim award) shall have a clause providing for the minimum award wage [see Principle 9] included in its terms.

11.1.3 In the extension of wages in an existing award to new work or to award-free work the wages applicable to such work shall ensure that any award or order made:

(1) meets the need to facilitate the efficient organisation and performance of work according to the needs of an industry and or enterprises within it, balanced with fairness to the employees in the industry or enterprises; and

(2) sets fair wages.

12. Economic Incapacity

12.1 Any respondent or group of respondents to an award may apply to reduce and/or postpone the variation which results in an increase in labour costs under this Statement of Principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested. The impact on employment at the enterprise level of the increase in labour costs is a significant factor to be taken into account in assessing the merit of an application. It will then be a matter for the Chief Commissioner to decide whether it should be dealt with by a Commission in Court Session.

13. Duration

13.1 This Statement of Principles will operate until reviewed under s 50A(1)(d) of the Act.

FULL BENCH—Appeals against decision of Commission—

2012 WAIRC 00319

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATES COURT GIVEN ON 23 NOVEMBER 2011 IN CLAIM NOS. M 33, M 34 AND M 35 OF 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2012 WAIRC 00319
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER S J KENNER COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 17 APRIL 2012
DELIVERED	**:**	THURSDAY, 24 MAY 2012
FILE NO.	**:**	FBA 8 OF 2011
BETWEEN	**:**	UNITED VOICE WA Appellant AND THE MINISTER FOR HEALTH Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Magistrates Court**
Coram	**:**	**Industrial Magistrate G Cicchini**
Citation	**:**	**[2011] WAIRC 01065; (2011) 91 WAIG 2337**
File No	**:**	**M 33 of 2011, M 34 of 2011 and M 35 of 2011**

CatchWords	**:**	Industrial Law (WA) - claims dismissed on grounds that they did not disclose a reasonable cause of action - interpretation of industrial agreement - cl 11.13 of the WA Health - LHMU - Support Workers Industrial Agreement 2007 prohibits contracting out and privatisation - no arguable case before the Industrial Magistrate on which a finding could be made that the functions and duties performed at hospitals covered by the agreement had been, or are intended to be contracted out, or privatised, within the meaning of the provisions of the industrial agreement - principles to be applied when determining a summary dismissal application considered.
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7, s 41, s 41(4), s 41(6), s 41(7), s 44, s 44(6a), s 82, s 83, s 83(4), s 83(5), s 83(7), s 84(2) *Hospitals and Health Services Act 1927* (WA) s 7, s 7(1), s 7(2), s 15, s 15(3), s 18, s 18(1)(a)(i), s 19, Part IIIA *Workplace Relations Act 1996* (Cth)
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	Mr T J Hammond
Respondent	**:**	Mr G T W Tannin SC and Mr R Bathurst
Solicitors:		
Respondent	**:**	State Solicitor for Western Australia

Case(s) referred to in reasons:

Actew Corporation Ltd v Pangallo [2002] FCAFC 325; (2002) 127 FCR 1

AK v Western Australia (2008) 232 CLR 438

Amcor Ltd v Construction, Forestry, Mining and Energy Union [2005] HCA 10; (2005) 222 CLR 241

Beaudesert Shire Council v Smith (1966) 120 CLR 145; [1966] ALR 1175

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission [2001] HCA 16; (2001) 203 CLR 645

Fancourt v Mercantile Credits Ltd [1983] HCA 25; (1983) 154 CLR 87

General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 124

George A Bond & Co Ltd (in liquidation) v McKenzie [1929] AR (NSW) 498

Hospitals Contribution Fund of Australia v Hunt (1983) 44 ALR 365

Kucks v CSR Ltd (1996) 66 IR 182

Liquor Hospitality and Miscellaneous Union, Western Australian Branch v The Minister for Health [2010] WAIRC 01210; (2010) 90 WAIG 1868

Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health [2011] WAIRC 00192; (2011) 91 WAIG 291

Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union (1987) 67 WAIG 1097

Talbot & Oliver (a firm) v Witcombe [2006] WASCA 87; (2006) 32 WAR 179

United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board [2003] FCA 480; (2003) 198 ALR 466

Case(s) also cited:

Bride v Peat Marwick Mitchell [1989] WAR 383

Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Education [2010] WAIRC 00305; (2010) 90 WAIG 1542

Metwally v University of Wollongong (1985) 60 ALR 68

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

Quinlivan v Austal Ships Pty Ltd (2003) 83 WAIG 3684

United Voice WA v Minister for Health [2011] WAIRC 01065; (2011) 91 WAIG 2337

Reasons for Decision

SMITH AP:

1 This is an appeal instituted under s 84(2) of the *Industrial Relations Act 1979* (WA) (the Act). The appeal is against orders of the Industrial Magistrates Court made on 23 November 2011 dismissing claims M 33 of 2011, M 34 of 2011 and M 35 of 2011.

The applications before the Industrial Magistrates Court

2 Each of the claims are brought under s 83 of the Act. In each application, the appellant alleges that the respondent breached cl 11.13 of the *WA Health – LHMU – Support Workers Industrial Agreement 2007* (2007 industrial agreement) and seeks that the respondent pay a penalty to the appellant pursuant to s 83(4) of the Act. The appellant also seeks an order pursuant to s 83(5) of the Act, that the respondent be prevented from any further contravention or failure to comply with cl 11.13 of the 2007 industrial agreement.

3 Clause 11.13 of the 2007 industrial agreement provides:

> 11.13 Contracting Out and Privatisation
>
> (a) The parties recognise the importance of promoting long term job security and career development for employees subject to this Agreement.
>
> (b) With the exception of those contracts for services currently in existence, there will be no contracting out or privatisation of functions or duties performed by directly employed workers during the life of this Agreement.
>
> (c) Subject to successfully negotiating an efficiency and quality agreement between the parties to this Agreement, the Employer will not re-tender contracts for service currently in place which can be carried out by directly employed workers.
>
> (d) Negotiations to successfully return in house those functions or duties currently out-sourced will include the following factors;
>
> (i) Whether the product delivered under the contract for services meets the expected outcomes in terms of efficiency, quality and safety;
>
> (ii) Public interest considerations such as quality of services and the safety of patients;
>
> (iii) Cost, in particular the wages differential (if any) between the rates of pay for employees current contracts and directly employed employees; and
>
> (iv) The impact the contract has on the job security and career development for employees subject to this agreement.

(e) Any agreement reached between the parties as a result of this process will be written up into a document and signed by both parties. The parties agree to be bound by the agreement as recorded in this document. The document will then be binding and enforceable between the parities [sic].

Background

4 By force of various statutory instruments made under the provisions of the *Hospitals and Health Services Act 1927* (WA) the respondent to this appeal is deemed to be the board of the Peel Health Services Board, the Metropolitan Health Service Board and the WA Country Health Service. As the board of these health services the respondent is responsible for the management and control of various public hospitals, including Royal Perth Hospital, Fremantle Hospital, Kaleeya Hospital and Swan District Hospital; and in this capacity is a party to the 2007 industrial agreement. In essence, the claims before the Industrial Magistrate allege the respondent breached cl 11.13(b) of the 2007 industrial agreement by contracting out or privatising services at those hospitals, by transferring services from Royal Perth Hospital and Fremantle Hospital and Health Service to Fiona Stanley Hospital and from Swan District Hospital to the Midland Health Campus.

5 The 2007 industrial agreement was entered into by the appellant when it was then known as the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch. Pursuant to cl 4.1(a)(ii) of the 2007 industrial agreement, one of its aims is to 'enable the parties to develop and implement strategies which enhance job satisfaction, security and remuneration'.

6 On 31 July 2010, the term of the 2007 industrial agreement expired. However, pursuant to s 41(6) of the Act, the 2007 industrial agreement continues in force until a new agreement or award is made in substitution for the industrial agreement, or a party retires upon giving 30 days' notice under s 41(7) of the Act.

7 In 2010, the parties entered into negotiations with a view to entering into an industrial agreement to replace the 2007 industrial agreement. Whilst the parties could not agree on the terms of a replacement industrial agreement, following a series of compulsory conferences convened by the Commission, the parties agreed to an order being made under s 44 of the Act. Under s 44(6a)(b) of the Act the Commission is empowered to make an interim order to vary the terms of an award or industrial agreement.

8 The agreement to consent to an order was reduced to writing in a document. The document was executed by the appellant and the respondent's representative on 24 October 2010 and titled 'Heads of Agreement'. The clauses of the Heads of Agreement relevant to this appeal are as follows:

1. WA Health - LHMU - Support Workers Industrial Agreement 2007 continues in its current form (an expired industrial agreement which continues to apply unless cancelled or replaced). The Director General of Health has advised the LHMU in writing that the Department of Health has no plans to withdraw from the 2007 Industrial Agreement while the order cited at paragraph 2 is in force.

2. The parties will consent to an Order being made under Section 44 which is limited to setting out alternative wage rates, for prescribed classifications, to be paid to employees of 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, the Peel Health Services Board and the WA Country Health Service and of the Western Australian Drug and Alcohol Authority and whose contracts of employment are regulated by the Hospital Workers (Government) Award No. 21 of 1966.

…

4. The parties agree that the percentage wage increases will likewise apply to wage rate related allowances. Non-wage related allowances whether in the Award or in the Agreement will be increased in accordance with established custom and practice.

5. The parties will consent to amendment of the Hospital Workers (Government) Award No. 21 of 1966 to add classifications currently only prescribed in the expired industrial agreement.

6. The parties agree to make no further claims until after 31 July 2012.

7. The parties agreed to commence negotiations for an Industrial Agreement by no later than 1 February 2012.

9 On the same day the Heads of Agreement was executed, an order was made by the Commission in C 41 of 2010 ([2010] WAIRC 01064). The order varied the rates of pay in the *Hospital Workers (Government) Award No 21 of 1966* to provide for increments payable on or between 24 October 2010 to 31 July 2011 and from 1 August 2011 to 31 July 2012 and thereafter. Relevantly, the terms of the order did not vary the provisions of the 2007 industrial agreement.

10 When Fiona Stanley Hospital is completed in 2014 it will be operated by a new hospital board to be established under s 15(3) of the *Hospitals and Health Services Act*. It will be independent of other existing hospital boards, in particular the Metropolitan Health Service Board. The board of Fiona Stanley Hospital will be responsible for employing employees to perform various functions not already contracted out. The State has announced that some services which are currently performed at Royal Perth Hospital, Fremantle Hospital and Kaleeya Hospital will be transferred to Fiona Stanley Hospital. This will result in job losses at Royal Perth Hospital and at Fremantle Hospital and Health Service. After the Heads of Agreement was signed by the parties and the order in C 41 of 2010 was made, in 2011 the State entered into a contract with Serco Australia Pty Ltd (Serco) for the provision of facilities management services at Fiona Stanley Hospital. It is anticipated that a substantial number of the functions and duties of persons who will be engaged by Serco will be undertaken by persons who are eligible to be members of the appellant.

11 In 2011, the State also announced the closure of Swan District Hospital and the opening of a new hospital to be known as the Midland Health Campus. The Midland Health Campus is scheduled to open in 2015. It will be considerably larger than Swan District Hospital and will provide additional services to those currently available at Swan District Hospital. At the time the application to dismiss was heard by the Industrial Magistrate the State had not made a decision as to whether the Midland Health Campus will be a public hospital or a private hospital that accepts public patients operated by a private corporation

under Part IIIA – Private hospitals of the *Hospitals and Health Services Act*. If the Midland Health Campus is opened as a public hospital it will be operated by a new board. That board will be a separate legal entity to the existing board of the Metropolitan Health Service Board which operates Swan District Hospital. If the Midland Health Campus is opened as a private hospital which accepts public patients, then the corporation conducting it will be a separate organisation.

The originating claims

12 To properly consider merits of the appellant's grounds of appeal, it is necessary to review the basis of the appellant's case as set out in its pleadings.

(a) M 33 of 2011

13 In this claim an allegation is made that the transfer of services from Fremantle Hospital and Kaleeya Hospital, which form Fremantle Hospital and Health Service, to Fiona Stanley Hospital, constitutes a breach of cl 11.13 of the 2007 industrial agreement. In the statement of claim, the appellant states in paragraph 7 that the Heads of Agreement extended the lifetime of the 2007 industrial agreement for a further three years on 24 October 2010. It is then pleaded in paragraph 8 that, as pleaded in paragraph 7, pursuant to the Act and cl 6 of the 2007 industrial agreement, the 2007 industrial agreement continues in force beyond 2013, unless cancelled or replaced. The appellant also pleads in paragraph 12:

> The Respondent is transferring and relocating to FSH some public hospital and health services currently provided at FHHS.
>
> PARTICULARS
>
> (a) FHHS will be reduced from its current allocation of 552 to 339 beds.
>
> (b) FH will no longer operate as a tertiary facility.
>
> (c) FH will no longer provide emergency services.
>
> (d) The diving and hyperbaric medicine until [sic] will be transferred to FSH.

14 In paragraph 13 it is stated by virtue of the matters pleaded in paragraph 12, the functions and duties currently being performed by directly employed workers at Fremantle Hospital and Health Service will be contracted out and/or privatised.

15 Paragraph 14 states that as a result of the facts pleaded at paragraph 13, the functions or duties associated with the matters pleaded at paragraph 12 and currently performed by direct employees at Fremantle Hospital and Health Service will be transferred to a private contractor.

16 Paragraph 15 pleads as a consequence of the matters pleaded, the respondent is in breach of cl 11.13 of the 2007 industrial agreement.

17 In paragraph 16 the appellant pleads in the alternative, the respondent is in breach of the following implied terms of the 2007 industrial agreement:

> (a) It was an implied term of the Agreement that even if the functions and duties of directly employed workers were transferred to another location, clause 11.13 of the Agreement would continue to bind the parties.
>
> (b) It was an implied term of the Agreement that where existing positions of directly employed workers are made redundant, but the functions and duties are preserved, that clause 11.13 of the Agreement would continue to bind the parties.
>
> (c) By virtue of the conduct of the Respondent as pleaded at paragraph 13 of the Statement of Claim, the Respondent has demonstrated a failure to comply with the meaning and intent of the clause, which precludes the Respondent from contracting or privatising the functions or duties currently performed by directly employed workers.

18 During the course of proceedings before the Industrial Magistrate the implied terms pleaded in paragraph (16)(b) and (16)(c) of the statement of claim were abandoned and the following alleged implied terms were raised in their place:

> (b) Bargaining would be undertaken in good faith in accordance with the employer's duties at common law and/or pursuant to section 42B of the Act;
>
> (c) Where a transfer of functions and duties was to occur to another (work) site, directly employed workers would continue to be covered by the Agreement, as they would continue to be directly employed by the Minister, given the prohibition of contracting out functions and duties in cl 11.13 of the 2007 Agreement.

(b) M 34 of 2011

19 Like M 33 of 2011, the appellant pleads in M 34 of 2011 the facts and issues which it seeks to raise in respect of the transfer of services from Royal Perth Hospital to Fiona Stanley Hospital. The issues which are pleaded in respect of the transfer of services between these two hospitals are substantially the same as the issues raised in relation to Fremantle Hospital and Health Service. The particulars of the services which are to be transferred from Royal Perth Hospital to Fiona Stanley Hospital are set out in paragraph 12 of the statement of claim as follows:

> The Respondent is transferring and relocating to FSH some public hospital and health services currently provided at RPH.
>
> PARTICULARS
>
> (a) The RPH - Wellington Street Campus will be reduced from its current allocation of 662 beds to a 410 bed tertiary hospital.
>
> (b) The RPH - Shenton Park Campus, which currently has 208 beds allocated to it, will be closed.
>
> (c) The State Rehabilitation Unit at the Shenton Park Campus will be transferred to FSH.

(d) Further particulars will be provided following discovery and/or the provision of interrogatories by the Respondent.

(c) M 35 of 2011

20 This originating claim in M 35 of 2011 also sets out the appellant's allegations of what it says is a breach of the 2007 industrial agreement in respect of the transfer of services from Swan District Hospital to the Midland Health Campus. Whilst the issues raised are substantially the same, the particulars of the services are different to M 33 of 2011 and M 34 of 2011 in that Swan District Hospital is to be closed in its entirety and all of the services which are currently being provided by that hospital will be transferred to the Midland Health Campus. In addition, it is not known whether the hospital will be established as a public hospital or a private hospital. However, it is pleaded in paragraph 13 of the statement of claim, that on 27 January 2011 the respondent announced that Ramsay Health Care Ltd and St John of God Health Care Inc were shortlisted as preferred providers of services for the Midland Health Campus.

History of litigation

21 This is the second appeal which comes before the Full Bench which concerns the transfer of services from the Metropolitan Health Service Board to Fiona Stanley Hospital.

22 On 19 October 2010, the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch filed claim M 117 of 2010 in the Industrial Magistrates Court seeking interim and substantive relief. The interim relief sought was an order pursuant to s 83(5) and s 83(7) of the Act for orders restraining the Minister for Health from entering into a contract with Serco in relation to Fiona Stanley Hospital. The application was dismissed by the Industrial Magistrate: ***Liquor Hospitality and Miscellaneous Union, Western Australian Branch v The Minister for Health*** [2010] WAIRC 01210; (2010) 90 WAIG 1868. The order dismissing the claim was appealed to the Full Bench and subsequently dismissed on 11 March 2011: ***Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health*** [2011] WAIRC 00192; (2011) 91 WAIG 291 (***Fiona Stanley Hospital [No 1]***).

The orders the subject of this appeal

23 On 15 September 2011, the respondent filed applications in the Industrial Magistrates Court seeking orders that each claim be summarily dismissed because, in each instance, the claims did not disclose a reasonable cause of action. The appellant opposed the applications.

24 After hearing the parties, the Industrial Magistrate found that the claims put forward by the appellant were not tenable.

25 For the purposes of the applications to summarily dismiss the claims, the respondent put forward a submission to the Industrial Magistrate that the following facts must be assumed:

(a) The respondent (that is, the Minister for Health in his incorporated capacity under s 7 of the *Hospitals and Health Services Act*) is constructing Fiona Stanley Hospital (which is denied);

(b) The respondent is transferring the medical services in question from Royal Perth Hospital, Fremantle Hospital and Kaleeya Hospital to Fiona Stanley Hospital (which is denied);

(c) The functions or duties performed by employees covered by the 2007 industrial agreement at Royal Perth Hospital, Fremantle Hospital and Kaleeya Hospital (for example, cleaning and gardening) will be performed by employees of Serco Australia Pty Ltd at Fiona Stanley Hospital when it opens in 2014 (which is admitted);

(d) The respondent is constructing the Midland Health Campus (which is denied);

(e) The Midland Health Campus will be operated by a private corporation who will employ all the staff at the hospital (a matter which has not yet been decided); and

(f) All medical services provided at Swan District Hospital will in the future be provided at the Midland Health Campus (which is admitted).

The Industrial Magistrate's reasons for decision

26 After setting out the submissions made on behalf of the parties, the Industrial Magistrate made the following findings:

(a) The issue to be determined with respect to each of the applications is whether the respondent has succeeded in establishing that there is no basis for the legal conclusion contended by the appellant and that in each instance the claim is completely untenable.

(b) The power to order summary judgment must be exercised with due care and should never be exercised unless it is clear that there is no real issue of fact or law to be tried.

(c) There is no dispute as to the facts and the facts are assumed on the basis most favourable to the appellant.

(d) The proper interpretation of cl 11.13(b) of the 2007 industrial agreement is that it prevents the contracting out or privatisation, at existing hospitals, of functions or duties performed by employees of the respondent in his incorporated capacity at those hospitals.

(e) The transfer of medical services from Royal Perth Hospital and Fremantle Hospital to a separate legal entity, that is the future board of Fiona Stanley Hospital, is not and cannot be, a contracting out or privatisation prohibited by cl 11.13 of the 2007 industrial agreement: ***Fiona Stanley Hospital [No 1]*** (Smith AP, with whom Scott ASC agreed) [85].

(f) The same reasoning applies with respect to the transfer of services from Swan District Hospital to the Midland Health Campus. Irrespective of whether the services are to be transferred to a future board of the Midland Health Campus or a private corporation, the transfer will be to another separate legal entity.

(g) Clause 11.13(b) of the 2007 industrial agreement does not apply to the transfer of services to a separate legal entity. It only prevents the contracting out, or privatisation at existing hospitals, of functions or duties performed by employees at those hospitals.

(h) Implied terms cannot be implied into industrial agreements on the basis of fact or law. Industrial agreements exist independently of contract and operate with statutory force: ***Amcor Ltd v Construction, Forestry, Mining and Energy Union*** [2005] HCA 10; (2005) 222 CLR 241. Private law contractual principles do not apply to them: ***Actew Corporation Ltd v Pangallo*** [2002] FCAFC 325; (2002) 127 FCR 1.

(i) Even if terms can be implied into an industrial agreement, based either in fact or law, when regard is had to all five of the conditions set out in ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1977) 180 CLR 266 (283), the terms sought to be applied by United Voice WA do not satisfy these conditions.

(i) The first alleged implied term is not so obvious that it goes without saying. It cannot be said that the Minister would have consented to such a term that would remove from the State and the Minister the option of having some or all of the services transferred to new hospitals whether it be public or private. The Minister's involvement in the creation of new hospitals and the transfer of services contra-indicates that. Nor is the alleged implied term necessary to give business efficacy to the 2007 industrial agreement. It is a comprehensive agreement effective without the alleged first implied term. The Full Bench in ***Fiona Stanley Hospital [No 1]*** clearly found that the express terms of the 2007 industrial agreement do not apply to a transfer of services to separate legal entities. Consequently, the alleged implied first term would be in conflict with the express terms of the 2007 industrial agreement. It is impermissible to imply a term which is in conflict with the express terms of an agreement.

(ii) Like the first alleged implied term, the third alleged implied term appears to attempt to contradict the legal position that a transfer of services to a new separate legal entity is not covered by the 2007 industrial agreement. It cannot be said that the implied term goes without saying. Given the current situation with respect to the creation of new hospitals it could not possibly be reasonably argued that the Minister has consented to the term. In any event, the 2007 industrial agreement is effective without it.

(iii) The second alleged implied term is difficult to understand. If it relates to the conduct of the Minister with respect to the 2010 interim arrangement it cannot be seen how it had any bearing on the 2007 industrial agreement. However, what the alleged bargaining relates to is not discernible. In any event, there is a statutory scheme for good faith in bargaining. There is no need for the alleged implied term in these circumstances. The term is not so obvious that it goes without saying. In addition, insofar as its implication is based in law, its necessity has not been demonstrated.

27 When the application to dismiss the claims was heard by the Industrial Magistrate the appellant put forward an unpleaded proposition that the 2007 industrial agreement placed an obligation on the Minister to take all reasonable steps to prevent the contracting out of functions and duties covered by cl 11.13(b). This argument was also rejected by the Industrial Magistrate. He found that whatever the knowledge of the Minister in his incorporated capacity under s 7 of the *Hospitals and Health Services Act* was in 2009, that knowledge did not prevent the transfer of medical services from an existing hospital to a new hospital. In particular, the Industrial Magistrate found:

(a) A hospital board has no duty to override a decision of the State or the Minister for Health as to how hospitals will be organised: s 18 of the *Hospitals and Health Services Act*; and

(b) Even if it could be said that the Minister owed a fiduciary duty to employees it could not alter the meaning of cl 11.13(b) of the 2007 industrial agreement, nor the statutory provisions of the *Hospitals and Health Services Act*.

28 In conclusion, the Industrial Magistrate found the difficulties with the appellant's claims were insurmountable and there was no basis for the legal conclusions being contended, and in each instance, no reasonable cause of action.

The evidence

29 The evidence before the Industrial Magistrate was in affidavit form. When the application for summary dismissal was heard, neither party sought to cross-examine the deponents of the affidavits. The affidavits were made by:

(a) Carolyn Smith, the Assistant Secretary of the appellant;

(b) Elyane Palmer, Team Lead – Industrial for the appellant;

(c) Robert Bathurst, a solicitor employed in the Office of the State Solicitor for Western Australia who was assisting in the conduct of the claim on behalf of the respondent; and

(d) Marshall Kingsley Warner, the Director, Health Industrial Relations Service in the Western Australian Department of Health.

(a) Ms Smith's affidavit evidence

30 In Ms Smith's affidavit made on 26 October 2011 she sets out the history of the making of a number of industrial instruments from 2002 until 2007 which were made between the parties to this appeal. These industrial instruments contained anti-privatisation and contracting out provisions. The first of these industrial instruments was negotiated and certified pursuant to the provisions of the *Workplace Relations Act 1996* (Cth) and the later instruments were registered under the provisions of the Act. Prior to the first agreement being made in 2002, privatisation and outsourcing of hospital services had occurred in public hospitals. A change in government at the State level in 2001 enabled the appellant to address this issue. From 2001 to 2010 all services that had been privatised or outsourced in public hospitals were brought back in-house, except for the contracts which had been entered into at the Joondalup and Peel Health Campuses where whole hospitals had been privatised on 20-year

contracts. These included cleaning and catering at Royal Perth Hospital (two separate contracts), non-ward cleaning at Fremantle Hospital, support services (including cleaning, catering, orderly services and sterilisation services) at Swan District Hospital and Bentley Hospital.

31 Between 27 May 2010 and 9 September 2010, when the parties began negotiating for a replacement industrial agreement to the 2007 industrial agreement, the issue of privatisation and contracting out of functions and duties was discussed at some length. During those meetings Mr Warner told Ms Smith on a number of occasions that the respondent was seeking to expand its ability under cl 11.2 of the 2007 industrial agreement, to use fixed-term contracts in place of permanent employment contracts at Royal Perth Hospital and Swan District Hospital, as there was an intent to privatise services. Mr Warner indicated to Ms Smith that it did not make sense to offer permanent employment where jobs were going to be lost. During these meetings Mr Warner was asked to identify which services were to be privatised. In response, Mr Warner said that the Shenton Park Campus of Royal Perth Hospital would be closed and that a number of positions available at the Wellington Street Campus would be reduced because those functions and duties were being transferred to Fiona Stanley Hospital. He also said that Swan District Hospital would be closed and its services (and accordingly the functions and duties of the appellant's members employed there) would be transferred to the Midland Health Campus.

32 During the negotiations for a replacement agreement in 2010, the parties discussed proposals put forward on behalf of the respondent for a replacement industrial agreement to:

(a) delete cl 11.13; or

(b) retain cl 11.13, with the scope of the clause restricted to exclude the operation of the clause in connection with the construction and/or operations of all or part of the Midland Health Campus (replacing Swan District Hospital), the State Rehabilitation Centre (replacing Royal Perth Hospital – Shenton Park Campus), a new children's hospital (replacing Princess Margaret Hospital) and Fiona Stanley Hospital.

However, negotiations for a replacement agreement failed and on 24 October 2010 the parties signed the Heads of Agreement which led to the consent order being made by the Commission in C 41 of 2010.

(b) Ms Palmer's affidavit evidence

33 Ms Palmer made two affidavits on 30 October 2011.

34 In Ms Palmer's first affidavit, she sets out in substantial detail the services and functions that are to be transferred from Royal Perth Hospital and Fremantle Hospital and Health Service to Fiona Stanley Hospital. Her evidence is drawn from a number of documents that emanated from representatives of the State that contain information that the soft facilities management services to be transferred include patient catering services, linen, cleaning, internal and external transport services, sterilisation services and ground maintenance. These duties and functions are currently performed at Royal Perth Hospital and Fremantle Hospital and Health Service by directly employed workers employed pursuant to the 2007 industrial agreement.

35 In July 2011, the Department of Health, South Metropolitan Area Health Service issued a document entitled 'Fiona Stanley Hospital Facilities Management Services – Contract Announcement, July 2011' which identified that Serco would be responsible for the provision of these services at Fiona Stanley Hospital.

36 Ms Palmer's first affidavit also sets out a number of facts which the appellant says provides evidence of the impact of the transfer of services from Royal Perth Hospital to Fiona Stanley Hospital. These are as follows:

(a) The State Rehabilitation Unit is a unit of Royal Perth Hospital that is currently located at the Shenton Park Campus. The Shenton Park Campus primarily provides rehabilitation services. It also provides satellite dialysis, orthopaedic, urology and plastic surgery services. The State Rehabilitation Unit will be closed and replaced with a new State Rehabilitation Centre to be located at Fiona Stanley Hospital. According to a briefing note dated 5 November 2009 from the Executive Director, Fiona Stanley Hospital, the impact will be that approximately 90 full-time equivalent positions (FTE) that are involved in facilities management and support service functions at the Shenton Park Campus will not have an opportunity to transfer to Fiona Stanley Hospital as government employees, if a private contractor is appointed to manage these services at Fiona Stanley Hospital.

(b) As a result of the transfer of services from Royal Perth Hospital to Fiona Stanley Hospital, the Wellington Street Campus of Royal Perth Hospital will be reduced in size as bed numbers will be reduced from 662 to 410 beds by 2014. Certain services will cease to be provided at the Wellington Street Campus and the complexity level of a number of current services will be downgraded upon the opening of Fiona Stanley Hospital in 2014. When Fiona Stanley Hospital opens it will have a total of 783 beds.

(c) According to a document provided to the appellant by the State Solicitor's Office, as at July 2011 there were 647.51 FTE (headcount 816) support worker positions at Royal Perth Hospital. It is unknown how many of these positions are at either, or both, the Wellington Street Campus and/or the Shenton Park Campus and what proportion of these positions will be affected by the transfer of services to Fiona Stanley Hospital.

37 Ms Palmer's first affidavit also sets out what the appellant says is the impact on the transfer of services from Fremantle Hospital and Health Service to Fiona Stanley Hospital. She says these are as follows:

(a) Fremantle Hospital is a tertiary facility providing general and specialist services including 24-hour emergency, medical, surgical and ambulatory care. It is the State referral centre for diving and hyperbaric medicine. Kaleeya Hospital provides obstetrics and gynaecological services, rehabilitation, endoscopy and elective surgery.

(b) By 2014, Fremantle Hospital and Health Service will no longer be a tertiary facility. It will reduce in size from 552 to 359 beds. It will no longer provide emergency services. The diving and hyperbaric medicine unit will move to Fiona Stanley Hospital.

(c) A number of hospital and health services currently provided by Fremantle Hospital and Health Service will be provided at Fiona Stanley Hospital. The provision of these services at Fiona Stanley Hospital will result in a downsizing, if not a complete replacement, of the services currently provided by Fremantle Hospital and Health Service. The service complexity level of all of the services that will remain to be provided at Fremantle Hospital and Health Service will be downgraded upon the opening of Fiona Stanley Hospital in 2014.

(d) According to a document provided to the appellant by the State Solicitor's Office, as at July 2011 there were 306.27 FTE (headcount 405) support worker positions at Fremantle Hospital and Health Service. It is unknown what proportion of these positions will be affected by the transfer of services to Fiona Stanley Hospital.

38 In the second affidavit made by Ms Palmer, she sets out the factual circumstances the appellant relies upon in respect of the transfer of services from Swan District Hospital to the Midland Health Campus. These are as follows:

(a) The respondent is planning to build a new hospital, the Midland Health Campus. Construction is due to start in 2012 and open in 2015. It is planned that the Midland Health Campus will replace Swan District Hospital and all hospital and health services currently provided at that hospital will be transferred to the Midland Health Campus. Swan District Hospital will close.

(b) The strategy to build a new hospital began in at least March 2010 by the Department of Health. On 9 June 2010, Dr Peter Owen, the Executive Director, Swan Kalamunda Health Service and NMAHS Contract Management Unit, prepared a briefing note for information for the Minister for Health. The briefing note stated that the government will engage the private sector in the design, construction and operation of the new Midland Health Campus and discussed the industrial relations position and potential issues regarding the delivery of the Midland Health Campus as a public-private partnership. The briefing note also identified that as a consequence of private sector delivery, permanent staff at Swan District Hospital will have the option to resign or be redeployed within WA Health; while fixed-term and contract staff will have the option to seek employment with WA Health or the private operator.

(c) In other documents which have been made available as FAQ sheets and media responses, current employees of Swan District Hospital have been informed that current permanent employees of the respondent will have the option of seeking employment with the private provider or, if they wish to remain employed by the respondent, being redeployed elsewhere within the public hospital system.

(d) By May 2011, the government had shortlisted two proponents to design, build and operate the new Midland Health Campus. These companies are Ramsay Health Care Ltd and St John of God Health Care Inc.

(e) Swan District Hospital employs approximately 121 support service employees (81.2 FTE).

(c) Mr Bathurst's affidavit evidence

39 Mr Bathurst in his affidavit made on 15 September 2011 sets out and annexes a number of documents. These include copies of the claim in M 117 of 2010 which was dismissed by the Industrial Magistrate on 7 December 2010, together with the notice of appeal in that matter and reasons for decision given by the Full Bench of the Commission, dismissing the appeal on 11 March 2011. Mr Bathurst's affidavit also annexes copies of documents that passed between the parties and the appellant's barrister which deal with the particularisation of the alleged implied terms in these claims and a copy of the respondent's outline of submissions in support of its application to dismiss each of the claims in these appeals.

(d) Mr Warner's affidavit evidence

40 In Mr Warner's affidavit made on 15 September 2011 he refers to and annexes a number of notices made under the provisions of the *Hospitals and Health Services Act* which constituted the board of the Metropolitan Health Service Board. This board was in existence until 9 March 2001 when it was abolished. Upon the abolition of the Metropolitan Health Service Board, pursuant to s 7 of the *Hospitals and Health Services Act,* the Minister for Health was deemed to be the board and to be incorporated under the name of the Metropolitan Health Service Board and to have all the duties, powers and functions of the board. Mr Warner also in his affidavit sets out the history of the notices which created the WA Country Health Service. That board too was abolished on 27 July 2006 and the Minister has been deemed to be that board since that date pursuant to s 7 of the *Hospitals and Health Services Act*.

41 Mr Warner was involved in negotiations with the appellant in 2010 which culminated in the making of the settlement set out in the Heads of Agreement made on 24 October 2010.

42 Mr Warner sets out in his affidavit the following circumstances which the respondent says are relevant matters in respect of each of the hospitals dealt with in the claims:

(a) When Fiona Stanley Hospital commences services in 2014, it will be a public hospital. No board has yet been constituted in respect of Fiona Stanley Hospital. The board of Fiona Stanley Hospital will, under s 15(3) of the *Hospitals and Health Services Act,* be a body corporate with a separate legal entity to any other current hospital board.

(b) Kaleeya Hospital, until its purchase by the State in January 2005, was a private hospital. Since that time it became part of Fremantle Hospital and Health Service and is a public hospital.

(c) Swan District Hospital is a public hospital located in Middle Swan, Western Australia. When the Midland Health Campus opens in 2015, Swan District Hospital will be closed. The Midland Health Campus will be considerably larger than Swan District Hospital and will provide additional services to those currently available at Swan District Hospital. No decision has yet been made by the State as to whether the Midland Health Campus will be:

(i) a public hospital; or

(ii) a private hospital, operated by a private corporation, under Part IIIA of the *Hospitals and Health Services Act*, that accepts public patients.

If the Midland Health Campus is opened as a public hospital, the Midland Health Campus will have a new hospital board which will be a separate legal entity to the existing board of the Metropolitan Health Service Board that operates the Swan District Hospital. If, however, the Midland Health Campus is opened as a private hospital that accepts public patients, the corporation conducting the private hospital will be a separate legal entity to the Metropolitan Health Service Board.

Grounds of appeal

43 In ground 1(a) of the grounds of appeal the appellant says that:

(a) The Industrial Magistrate erred in applying previous findings of the Full Bench in ***Fiona Stanley Hospital [No 1]*** to the pleadings and evidence in the claims in these matters; and

(b) In applying those findings, the Industrial Magistrate arrived at the incorrect conclusion as to whether these actions were reasonably arguable.

44 In the particulars to ground 1(a), the appellant puts forward an argument that the Industrial Magistrate:

(a) Erred in applying the findings of the Full Bench in ***Fiona Stanley Hospital [No 1]*** in particular at [85]; and

(b) In concluding that those findings caused the appellant insurmountable difficulty, the Industrial Magistrate either disregarded or failed to recognise:

(i) the different nature of the claims put in these matters as opposed to ***Fiona Stanley Hospital [No 1]***; and

(ii) the additional evidence filed in support of these claims that was not otherwise before the court in ***Fiona Stanley Hospital [No 1]***.

45 In these circumstances, the appellant says that the pleadings and evidence considered in ***Fiona Stanley Hospital [No 1]*** were capable of being distinguished from the claims in these matters.

46 In ground 1(b) the appellant puts an argument in the alternative, that even if the Industrial Magistrate was correct in the manner in which he applied the findings of the Full Bench in ***Fiona Stanley Hospital [No 1]*** to the pleadings and evidence in the claims the subject of this appeal, he erred in the manner in which he applied the findings of the Full Bench. In the particulars the appellant takes issue with the finding made by the Industrial Magistrate applying the reasoning of the Full Bench in ***Fiona Stanley Hospital [No 1]*** with respect to the transfer of services from Swan District Hospital to the Midland Health Campus. In making this finding, the appellant says that the Industrial Magistrate either disregarded, or failed to recognise:

(a) The different nature of the claims put in M 35 of 2011 as opposed to ***Fiona Stanley Hospital [No 1]***; and

(b) The additional evidence filed in this matter that was not otherwise before the court in ***Fiona Stanley Hospital [No 1]***.

47 In ground 2 the appellant argues that the Industrial Magistrate erred in failing to find that it was arguable that the respondent owed obligations or duties to the appellant to prevent functions and duties of directly employed workers covered by the 2007 industrial agreement being contracted to the private sector, and thereby breached the agreement, giving rise to a remedy pursuant to s 83 of the Act. In the particulars to this ground of appeal, the appellant directly attacks the Industrial Magistrate's finding that the submissions in relation to obligations or duties conferred on the parties arising out of the 2007 industrial agreement (and the signing of the Heads of Agreement) were not reasonably arguable. The appellant contends that the Industrial Magistrate erred in arriving at this finding, having regard to:

(a) A generous approach to interpretation of agreements being permissible (especially if the term in question is ambiguous): ***George A Bond & Co Ltd (in liquidation) v McKenzie*** [1929] AR (NSW) 498 and ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union*** (1987) 67 WAIG 1097 at 1098;

(b) The provisions of the agreement, especially cl 4 and cl 11.13(a);

(c) The intention of the parties, both in relation to the signing of the 2007 industrial agreement and the signing of the Heads of Agreement, which served as a formal acknowledgment that all parties were committed to honouring the terms of the agreement; and

(d) The evidence before the Industrial Magistrate.

48 In ground 3 the appellant puts forward an argument the Industrial Magistrate applied the incorrect legal test to the respondent's application to seek summary judgment. In written submissions filed by the appellant on 11 April 2012 the appellant informed the Full Bench that it does not press the third ground of appeal.

The appellant's submissions

49 The appellant in its written submissions points out that there are a number of arguments ventilated before the Industrial Magistrate that are not pressed on appeal. Firstly, the appellant no longer presses the allegation that implied terms can be read into the 2007 industrial agreement which give rise to obligations on behalf of the Minister to act in a certain way. Secondly, the appellant no longer presses the assertion that the 2007 industrial agreement gives rise to a claim in equity that can be pursued in this jurisdiction.

50 In essence the appeal raises two issues. Firstly, the appellant submits that it is incorrect to assert that the reasons for decision in ***Fiona Stanley Hospital [No 1]*** caused the appellant insurmountable difficulties in the claims. This argument relies upon an assessment of the basis on which the claims are pleaded and the evidence before the court in these matters that were not before the court in ***Fiona Stanley Hospital [No 1]***. The second issue the appellant says is raised is that as the pleadings and the evidence in the claims currently stand, there is an arguable case that the respondent is in breach of cl 11.13 of the 2007 industrial agreement.

51 The appellant points out that evidence of the contracting out and/or privatisation of functions and duties otherwise performed by directly employed workers at each of the hospitals is contained within the affidavits of Ms Palmer and is before the court. The appellant also argues that the respondent has previously admitted for the purpose of these applications that current functions and duties of directly employed workers:

(a) who are covered by the 2007 industrial agreement; and

(b) who are currently employed at either Royal Perth Hospital, Fremantle Hospital and Health Service or Swan District Hospital

will be functions and duties otherwise contracted out and/or privatised: AB 88 – 90.

52 The appellant says the significant points of difference between the claims in this matter and the pleadings in ***Fiona Stanley Hospital [No 1]*** include:

(a) The applicant in ***Fiona Stanley Hospital [No 1]*** argued that the 2007 industrial agreement applied to functions and duties performed at Fiona Stanley Hospital: AB 55. Nowhere in the claims, the subject of this appeal, is such a case pleaded.

(b) The applicant in ***Fiona Stanley Hospital [No 1]*** argued that the Minister as employer of directly employed workers pursuant to the 2007 industrial agreement was acting in the same capacity in relation to the tendering of functions and duties to a private company at Fiona Stanley Hospital. This is also not a matter which is pleaded in these claims.

53 In ***Fiona Stanley Hospital [No 1]*** no particulars were provided about any functions or duties being contracted out or privatised. However, in these matters the appellant says there is evidence that demonstrates that the functions and duties performed at Royal Perth Hospital, Fremantle Hospital and Health Service and Swan District Hospital are being contracted out and/or privatised. Of particular importance it says the respondent concedes that the transfer of functions and duties to the private sector has occurred or is about to occur.

54 Having regard to the evidence before this court, when read with the language of the 2007 industrial agreement, the appellant contends that the respondent has an obligation pursuant to the 2007 industrial agreement to prevent the privatisation of functions and duties of directly employed workers. On the basis that such a submission is reasonably arguable, it says the Industrial Magistrate erred in not granting the appellant leave to plead such a cause of action. This is, in essence, the appellant's ground of appeal in ground 2.

(a) Ground 1(a)

55 The appellant argues that in ***Fiona Stanley Hospital [No 1]*** I found that on the basis of a forensic evidentiary issue, there was a paucity of evidence about what was due to occur by way of privatisation of functions and duties of directly employed workers at Royal Perth Hospital and that job losses did not establish privatisation of functions and duties of directly employed workers: [85]. I also found that a breach of cl 11.13 of the 2007 industrial agreement had not occurred because the services will in the future be transferred to a separate legal entity; that is to the future board of Fiona Stanley Hospital (which the appellant refers to as the legal transfer issue).

56 The appellant claims that in these matters neither a finding supportive of the evidence issue, nor the legal transfer issue, was open to the Industrial Magistrate or is open to be made by this Full Bench.

57 In respect of the evidentiary issue the appellant contends that the first affidavit sworn by Ms Palmer clearly identifies those functions and duties that are being transferred offsite from Royal Perth Hospital and/or Fremantle Hospital and Health Service to Fiona Stanley Hospital and that those functions and duties will be performed by employees in the private sector. It also points to the fact that it is now common ground that in July 2011 the Minister for Health signed an agreement confirming that Serco, a private entity, would provide operational services to Fiona Stanley Hospital. Ms Palmer in her second affidavit also clearly identified functions and duties currently being performed by directly employed workers at Swan District Hospital and identifies that all those functions and duties are being transferred from Swan District Hospital to the Midland Health Campus. The appellant says that the Industrial Magistrate erred as he failed to refer to this evidence. Nor did he consider whether anything turned on the fact that the claim in M 35 of 2011, which deals with facts in relation to the Midland Health Campus and Swan District Hospital, are different to the claims in M 33 and M 34 of 2011 which deal with the facts relating to a transfer of services from Royal Perth Hospital and Fremantle Hospital and Health Service to Fiona Stanley Hospital.

58 As to the legal transfer issue, the appellant says that the finding made by me at [85] of ***Fiona Stanley Hospital [No 1]*** is in error. The appellant points out that contracting out of services must, by their very nature, be transferred from the public sector to the private sector. This must involve by necessity the transfer of functions and duties to a separate legal entity and it matters not whether these functions and duties are transferred to an entity within the relevant hospitals, or outside of them. It is not the location of the transfer that is important, rather it is the transfer in itself.

59 The appellant also points out that when functions and duties are contracted out or privatised it will always be the case that such duties will be transferred to a separate legal entity. Finally, it says it follows that if these submissions are accepted, the characterisation of transfer of services to a separate legal entity not being a breach of cl 11.13 of the 2007 industrial agreement, cannot be sustained.

(b) Ground 1(b)

60 The appellant argues there is a key difference in respect of the evidence before the court in M 35 of 2011 which deals with functions and duties of directly employed workers at Swan District Hospital. This is because the respondent has conceded that the Midland Health Campus will be operated by a private corporation and may in fact be constituted as a private hospital under Part IIIA of the *Hospitals and Health Services Act* that accepts public patients: AB 90 and 114. Even if the argument that the transfer of functions and duties in this case does not constitute a contracting out as argued in respect of ground 1(a) in relation to claims M 33 and M 34 of 2011 (which is not conceded), the argument that a transfer from one public hospital board to another is not privatisation cannot be sustained if the transfer is directly to a private entity, as it is in the case of M 35 of 2011.

Consequently, the appellant argues that the findings made by me in ***Fiona Stanley Hospital [No 1]*** at [85] have no application to this claim and was a matter not considered by the Industrial Magistrate. Such an error it says is one which fails to expose the process of reasoning undertaken by the Industrial Magistrate and therefore distracts from the integrity of the decision-making process: ***AK v Western Australia*** (2008) 232 CLR 438 (Heydon J) [89].

(c) Ground 2

61 In this ground, the appellant contends that the pleadings and evidence make it clear that at the very least the appellant has an arguable case that the respondent has breached the terms of the 2007 industrial agreement by failing to comply with his obligations created by the language of the agreement. In support of this submission the appellant relies on its submissions in respect of the privatisation and transfer of functions and duties as set out in Ms Palmer's first and second affidavits and concedes that if this ground is to succeed, ground 1(a) and/or ground 1(b) must first be upheld. The appellant says when one has regard to the orthodox principles of interpretation of industrial agreements there was evidence before the Industrial Magistrate of a clear breach on behalf of the respondent in relation to privatising functions and duties of directly employed workers at Royal Perth Hospital, Fremantle Hospital and Health Service and Swan District Hospital.

62 The appellant argues that the aim of the agreement in cl 4 to enhance job security when read together with cl 11.13(a) of the 2007 industrial agreement, which provides that the parties are to recognise the importance of promoting long term job security for employees, is that these provisions are protected in nature and carry with them an express obligation to protect employees from job insecurity. When regard is had to the purpose, general policy and context of these provisions and not interpreted in a vacuum divorced from industrial realities it is clearly arguable that the Minister is in breach of his obligations under the 2007 industrial agreement. The appellant also argues that such an interpretation applies when one has regard to the conduct of the Minister at the time of negotiating the Heads of Agreement. It says the Minister as the employer of directly employed workers at Royal Perth Hospital and Fremantle Hospital and Health Service knew, or ought to have known, at all times throughout the course of signing the Heads of Agreement, that the Fiona Stanley Hospital negotiations would directly affect directly employed workers performing functions and duties in their capacity as public sector employees. It also makes the same submission in relation to the establishment of the Midland Health Campus.

63 The appellant says on the basis of the affidavits and evidence, it is submitted that the appellant demonstrated:

(a) There was a sound basis for the legal conclusion that the Minister was in breach of cl 11.13(b) of the 2007 industrial agreement thereby triggering the provisions of s 83(5) of the Act.

(b) There remains a real question of fact or law which affects the rights of the parties that is still yet to be tried.

(c) A finding against the respondent at this stage of the proceedings would risk stifling the development of law by summarily disposing of an action in respect of which there is a reasonable possibility it will be found in the development of the law, still embryonic, that a cause of action does lie.

64 The appellant seeks orders to set aside the orders of the Industrial Magistrate dismissing each of the claims. In its place, the appellant seeks an order that the respondent's applications for summary dismissal of the claims be dismissed and the claims be programmed to hearing before the Full Bench pursuant to s 82 of the Act.

Principles to be applied when determining a summary dismissal application

65 Exceptional caution is required by courts and tribunals when exercising the power to summarily dismiss. A claim should not be dismissed other than when it is clear there is no real question of fact or law to be tried: ***General Steel Industries Inc v Commissioner for Railways (NSW)*** [1964] HCA 69; (1964) 112 CLR 125, ***Fancourt v Mercantile Credits Ltd*** [1983] HCA 25; (1983) 154 CLR 87. President Steytler in ***Talbot & Oliver (a firm) v Witcombe*** [2006] WASCA 87 summarised the applicable principles as follows:

> [21] … An action should only be dismissed as frivolous or vexatious if it cannot possibly succeed. Moreover, in deciding whether an action could possibly succeed, a court of first instance should be astute not to risk stifling the development of law by summarily disposing of actions in respect of which there is a reasonable possibility that it will be found in the development of the law, still embryonic, that a cause of action does lie: *Hospitals Contribution Fund of Australia v Hunt* (1983) 44 ALR 365 at 373.
>
> [22] Similar principles apply in the case of an application to strike out a statement of claim as not disclosing a reasonable cause of action: *Kimberley Downs Pty Ltd v State of Western Australia* unreported; SCt of WA; Library No 6414; 25 August 1986 at 6–7. In *Dalgety Australia Ltd v Rubin* unreported; FCt SCt of WA; Library No 5485; 24 August 1984, it was held that it is only in cases in which it can be seen from the outset that, however the facts be found, there is no basis for the legal conclusion contended for by the plaintiff that the pleading should be struck out. It has also been held in this jurisdiction that, in a case in which an application for summary judgment is combined with an application to the Court's inherent jurisdiction and with an application under O 20 r 19(1)(a) to strike out a pleading upon the basis that it discloses no reasonable cause of action, the Court is not confined by the manner in which the plaintiff has formulated his or her case on the pleadings and may consider not only the undisputed facts but also facts which are in dispute: *Bride v Peat Marwick Mitchell* [1989] WAR 383 at 394; and see, generally, Seaman *Civil Procedure Western Australia* (Vol 1) at [16.0.1] and [20.19.6].

Is there a real question of fact or law to be tried

66 The issue to be determined in this appeal is whether the appellant's arguments when analysed contain a real question of law or fact to be tried, or raise the basis of a cause of action that may be developed in the law. For a reasonable possibility that a cause of action may be found in the development of law, the arguments put forward in the matters pleaded must raise an area of the law that is uncertain or has yet to be developed. This is what Master Allen meant in ***Hospitals Contribution Fund of Australia v Hunt*** (1983) 44 ALR 365 (373), when he spoke of allowing for the 'development of the law, still embryonic'. In that matter the plaintiff's claim pleaded a cause of action in tort enunciated by the High Court in ***Beaudesert Shire Council v Smith*** (1966) 120 CLR 145; [1966] ALR 1175. Master Allan in ***Hunt*** found the ambit of the ***Beaudesert*** tort had been left

without substantial exposition and was more a signpost as to where the High Court considered the law might be heading rather than a definitive statement of what the law is (373).

67 In this appeal, the only area of law raised in the Industrial Magistrate's reasons for decision that could be argued to be uncertain is whether terms can be implied into a registered industrial agreement. In the light of the brief observations of the High Court in ***Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission*** [2001] HCA 16; (2001) 203 CLR 645 [34] and the discussion that followed in ***Pangallo*** and ***United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board*** [2003] FCA 480; (2003) 198 ALR 466 whether an industrial agreement made between an employer and a union is enforceable in the law of contract and the consequent issue of whether there is scope for the implication of terms in such an agreement, is an area of the law that could be said to be in an embryonic state. However, the appellant in this appeal does not press its contention that implied terms can be read into the 2007 industrial agreement.

68 Other than the pleadings and argument raised at first instance in respect of the implication of terms, there is no matter pleaded or put in argument that raises an area of the law that can be said to be in an embryonic state or is ripe for development.

69 Turning to the issue whether there is a real question of law or fact to be tried, Mr Hammond on behalf of the appellant conceded that for ground 2 to succeed, ground 1(a) and/or ground 1(b) must also be upheld, as ground 2 principally goes to the issue whether there was factual evidence before the learned Industrial Magistrate that the respondent had breached cl 11.13(b) of the 2007 industrial agreement in 2010 and 2011.

70 In grounds 1(a) and 1(b), the appellant argues that the reasons for decision of the Full Bench in ***Fiona Stanley Hospital [No 1]*** is distinguishable because the evidence and the pleadings in that appeal are different to the matters pleaded and the evidence before the Industrial Magistrate in these matters. Alternatively, the appellant argues that the finding made by me at [85] of my reasons for decision in ***Fiona Stanley Hospital [No 1]*** is wrong and should not be followed.

(a) Was the evidence before the Industrial Magistrate different in these matters

71 Whilst it is the case that the services to be transferred from Royal Perth Hospital, Fremantle Hospital and Health Service and Swan District Hospital are particularised in some detail in the statements of claim and in the affidavits of Ms Palmer, it is not the case that the evidence and particulars demonstrate that the functions and duties of employees currently employed at these hospitals are to be contracted out or privatised. In that respect, in my opinion, there is no material difference between the evidence before the Industrial Magistrate at first instance in ***Fiona Stanley Hospital [No 1]*** and in these claims.

72 The uncontroverted evidence contained in the affidavits of Ms Palmer establishes that particular services will cease or be downgraded at Royal Perth Hospital and Fremantle Hospital and Health Service and all services will cease to be provided at Swan District Hospital. It does not follow that because the services in question will be offered at hospitals that are not, or will not be, hospitals that formerly comprise the Metropolitan Health Service Board, Peel Health Services Board or the WA Country Health Service, the functions and duties of specific employees will be transferred. Firstly, although the services in question are to be provided by employees of the new entities that will operate Fiona Stanley Hospital and the Midland Health Campus, a contract of employment cannot be transferred from one employer to another without consent of the employee: ***Nokes v Doncaster Amalgamated Collieries Ltd*** [1940] AC 1014, 1020, 1026. Secondly, and of greater significance, is that cl 11.13 of the 2007 industrial agreement only prohibits contracting out or privatisation of functions and duties performed by directly employed employees of the hospitals that comprise the Metropolitan Health Service Board, the Peel Health Services Board and the WA Country Health Service at or for those hospitals. The evidentiary material set out in the affidavits of Ms Palmer goes no further than to provide evidence that contracting out and privatisation of particular services is to occur at and for Fiona Stanley Hospital, and for all services at the Midland Health Campus. This was in essence the substance of the evidence considered in ***Fiona Stanley Hospital [No 1]***.

73 In [85] of my reasons for decision in ***Fiona Stanley Hospital [No 1]*** I said that the evidence of Mr Warner was vague and without further information did not disclose privatisation or contracting out of the functions and duties of persons who are covered by the 2007 industrial agreement. This finding must be considered in its context. In [79] of my decision I observed that the pleadings did not specify any particulars which related to an intention to privatise services at Royal Perth Hospital or Swan District Hospital. What I meant to convey in [85] was that there was no evidence or material before the Industrial Magistrate on which a finding could be made that contracting out or privatisation was to occur at those hospitals, in the sense that, the services provided at those hospitals, were to be provided by a third party at those hospitals. In other words, there was no evidence that 'in-house' services would be contracted out or privatised.

(b) Interpretation of the 2007 industrial agreement

74 Turning to the provisions of the 2007 industrial agreement and an assessment of the evidence in light of a proper interpretation of the obligations placed on the respondent in cl 11.13 of the 2007 industrial agreement, it is firstly necessary to consider the modern principles that govern interpretation of industrial instruments and the statutory framework that enables the registration of agreements.

75 It is settled that the terms of an industrial agreement should be interpreted broadly and a too literal adherence to the technical meaning of words should be avoided: ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union*** (1100) (Kennedy J). In ***Amcor*** Kirby and Callinan JJ adopted a broad contextual approach to the construction of an industrial agreement enunciated by Madgwick J in ***Kucks v CSR Ltd*** (1996) 66 IR 182 wherein his Honour observed (184):

> It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in

> the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

76 After quoting this passage, Callinan J in ***Amcor*** said [131]:

> An industrial agreement has a number of purposes, to settle disputes, to anticipate and make provision for the resolution of future disputes, to ensure fair and just treatment of both employer and employees, and generally to promote harmony in the workplace

77 Whilst a broad contextual approach to the interpretation of the 2007 industrial agreement must be applied, the terms of the 2007 industrial agreement must also be interpreted within the statutory framework that provides the capacity for the parties to enter into a binding industrial agreement. This is part of the context and purpose of the contested text of cl 11.13 of the 2007 industrial agreement.

78 Section 41 of the Act authorises, among others, an organisation (of employees) and an employer to enter into an agreement with respect to any industrial matter. What constitutes an 'industrial matter' is broadly defined in s 7 of the Act.

79 Industrial agreements may apply to a single enterprise or more than a single enterprise if it applies to more than one business, project or undertaking or the activities carried on by more than one public authority. Of importance to this matter is s 41(4) which provides:

> (4) An industrial agreement extends to and binds —
>
> (a) all employees who are employed —
>
> (i) in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies; and
>
> (ii) by an employer who is —
>
> (I) a party to the industrial agreement; or
>
> (II) a member of an organisation of employers that is a party to the industrial agreement or that is a member of an association of employers that is a party to the industrial agreement;
>
> and
>
> (b) all employers referred to in paragraph (a)(ii),
>
> and no other employee or employer, and its scope shall be expressly so limited in the industrial agreement.

80 The provisions of the 2007 industrial agreement must be construed in light of the statutory command in s 41(4) of the Act that the scope of the agreement and thus its binding force does not extend beyond the employees mentioned in the callings in the agreement and the employer who is a party to the agreement. The respondent is the employer party to the agreement, but only in his capacity as the corporate deemed boards of management of the hospitals formerly comprised in the Metropolitan Health Service Board, the Peel Health Services Board and the WA Country Health Service: cl 5.2(b) of the 2007 industrial agreement and s 7 of the *Hospitals and Health Services Act*. It is only in that capacity and no other capacity that he is bound by the terms of the 2007 industrial agreement. It follows therefore that any conduct by him or his delegates that will constitute contracting out or privatisation within the meaning of cl 11.13 can only be such action if undertaken in the capacity of those boards of management set out in cl 5.2(b) of the 2007 industrial agreement.

81 The *Hospitals and Health Services Act* provides the Minister for Health with extensive powers to provide for the establishment, maintenance and management of public hospitals and the licensing and regulation of private hospitals. The Minister for Health is also a representative of the Crown. However, he is not bound to observe the provisions of the 2007 industrial agreement in respect of any of his functions other than as a board of management of the hospitals comprised in the boards set out in cl 5.2(b) of the 2007 industrial agreement: (see my observations in ***Fiona Stanley Hospital [No 1]*** [69], [71] – [74]).

82 Section 7 of the *Hospitals and Health Services Act* provides:

> (1) Where in relation to any public hospital the Governor does not appoint any person to constitute a hospital board in accordance with the provisions of section 15, or where a board is abolished in accordance with the provisions of section 8 the management and control of the hospital is vested in the Minister.
>
> (2) Whilst the Minister is so controlling any hospital he shall be deemed to be the board thereof and to be incorporated under the name of such board, and shall have all the duties, powers and functions of a board, and all property which would vest in a board of such hospital shall vest in the Minister.

83 Pursuant to s 7(2) the Minister is incorporated under the names of each board to which s 7(1) applies and is obliged to constitute each board in accordance with s 15 of the *Hospitals and Health Services Act*. As a board the Minister may engage employees or contractors to perform the functions of the board: s 19 of the *Hospitals and Health Services Act.* Under s 18(1)(a)(i) the Minister is responsible for the control, management and maintenance of the public hospitals for which he has been appointed as a board.

84 As I observed in ***Fiona Stanley Hospital [No 1]***, the *Hospitals and Health Services Act* establishes a statutory scheme whereby each board of a public hospital is established as a separate employer: [66].

85 It is plain the words 'contracting out' and 'privatisation' should be construed broadly. In ***Fiona Stanley Hospital [No 1]*** I said [87]:

> The concept of 'contracting out' and 'privatisation' are words of wide import. The words 'contracting out' connote and encompass the entire process of entering into a contract, which would include the contractual processes such as issuing of expressions of interest, the calling of tenders and selecting a preferred tenderer. By including the word 'privatisation' is to extend the meaning of the prohibition to include the process and incidents of privatisation which would also include issuing an expression of interest, selection of a preferred tenderer or other pre-contractual processes. The prohibition in

cl 11.13(b) is not simply on the entering into a contract but is something more than an intention to commence a process of privatisation or contracting out.

86 Although the words 'contracting out' and 'privatisation' must be construed broadly, they must also be construed within the context of the entire agreement. Whilst an interpretation of the 2007 industrial agreement requires an interpretation with the purpose of such an agreement is to use the words of Callinan J in ***Amcor*** 'to ensure fair and just treatment' towards both parties: [131], such an interpretation must be considered in the context of the purpose of cl 11.13 in its entirety together with its statutory context. When regard is had to the context of the prohibition in cl 11.13 it is notable that cl 11.13(c), cl 11.13(d) and cl 11.13(e) specifically deal only with the prohibition of contracting out and privatisation of 'in-house' services that were in place when the parties entered into the 2007 industrial agreement. When regard is had to these provisions and their statutory context it is apparent that the prohibited conduct in cl 11.13(b) is directed to and includes only contracting out and privatisation of services that are in-house services provided to or for the hospitals that comprise the Metropolitan Health Service Board, the Peel Health Services Board and the WA Country Health Service and no other board established under the provisions of the *Hospitals and Health Services Act*.

87 Despite the valiant submissions made by Mr Hammond on behalf of the appellant there is not a shred of evidence or nothing in the pleadings or averred to in argument upon which a proper inference could be drawn that the respondent has, or is intending to, contract out or privatise services, at or for any of the hospitals which form the three boards named in cl 5.2(b) of the 2007 industrial agreement.

88 For these reasons, I am of the opinion an order should be made that the appeal be dismissed as I am not persuaded that the appellant's arguments contain a real question of law or fact to be tried, nor raise any basis of a cause of action that may be developed in the law.

KENNER C:

89 The importance to the appellant Union of protecting job security for its members is readily accepted. This is one of the reasons for the existence of registered organisations under the Act. Indeed, the industrial agreement the subject of the present dispute between the parties to this appeal, the WA Health – LHMU – Support Workers Industrial Agreement 2007, contains, at cls 4 and 11.13(a), an express affirmation of the importance of job security of employees and the role of the Union in this regard.

90 This appeal from a decision of the learned Industrial Magistrate is a further attempt by the Union to assert that the terms of the Agreement in relation to contracting out and privatisation, preclude the Minister for Health from redeploying hospital staff from Royal Perth Hospital and Fremantle Hospital to the new Fiona Stanley Hospital and from the Swan Districts Hospital (to be closed), to a new Midland Health Campus. The decision of the learned Industrial Magistrate arose from three separate claims commenced by the Union, that in each case, the proposed transfer of staff by the Minister constituted a contravention of cl 11.13(b) of the Agreement. The learned Industrial Magistrate upheld an application by the Minister for the court at first instance to summarily dismiss the union's claims, on the basis that none of them disclosed a reasonable cause of action.

91 The background to the dispute is set out in the reasons of the learned Industrial Magistrate at first instance, and also in an earlier decision of the Full Bench dealing with similar issues, which need not be repeated in any detail: (2011) 91 WAIG 2337; (2011) 91 WAIG 291. The first Full Bench decision dismissed an appeal by the Union from a decision of the Industrial Magistrate's Court, which refused the Union interim relief under s 83(7) of the Act. The interim relief sought in those proceedings was to prevent the Minister from entering into any contracts with Serco Australia Pty Ltd, which is the provider of facilities management services at the new Fiona Stanley Hospital, which is due to open in 2014. The provision of facilities management services by Serco will entail the employment by Serco of employees to perform work the same as, or substantially similar to, the work performed by employees at hospitals covered by the Agreement.

92 Insofar as the closure of the Swan Districts Hospital is concerned, the services previously performed will be transferred to a new and expanded hospital, the Midland Health Campus, from 2015. Those services will include work presently performed by staff covered by the Agreement. From the evidence at first instance in these proceedings, no final decision has yet been made by the State Government as to whether the new Midland Health Campus will be a public or private hospital facility. However, for reasons which I will shortly refer to, that distinction is not material to the conclusions I have reached in the disposition of this appeal.

Grounds of appeal

93 Ground one is in two parts, (a) and (b). By the first part in (a), the Union contended that the pleaded cases in the three claims at first instance, and the evidence led in support of them, meant that these claims were materially distinguishable from the first set of proceedings. Thus, the conclusions of the first Full Bench, in particular as expressed in the reasons of Smith AP at par 85 (Scott ASC agreeing), and as adopted by the learned Industrial Magistrate as the basis for upholding the summary dismissal application, did not apply to the circumstances of these claims. As to the second part in (b), even if the learned Industrial Magistrate did not err as alleged in (a), he failed to recognise that the claim in relation to the Midland Health Campus was materially different to the two claims dealing with Royal Perth and Fremantle Hospitals.

94 Without hopefully doing any injustice to the detailed and helpful submissions of the Union, they are summarised as follows. It was contended that the previous case brought before the Industrial Magistrate was significantly different to the present proceedings. In failing to recognise the difference, and considering himself bound by the findings of the first Full Bench decision, the learned Industrial Magistrate was in error. Specifically, in the first proceedings, it was alleged that the Agreement applied to functions and duties to be performed at the new Fiona Stanley Hospital and secondly, as the employer, the Minister was acting in that capacity when engaging in the tender process for functions and duties to be contracted out at the Fiona Stanley Hospital. Neither of these two allegations were made in these proceedings.

95 Furthermore, and significantly in the Union's view, was the fact that in these proceedings, the Union put on detailed evidence through two affidavits of Ms Palmer, an officer of the Union, evidencing the extent to which functions and duties of employees employed at the hospitals covered by the Agreement, were being contracted out to the Fiona Stanley Hospital. The second affidavit of Ms Palmer, specifically identifies that all functions and duties performed by employees at the Swan Districts

Hospital will be transferred to the new Midland Health Campus. It is also said by Ms Palmer that these employees will be employed by a private sector employer. Ms Palmer's evidence also referred to July 2011, when the Minister formally entered into an agreement confirming the provision by Serco of facilities management services at the Fiona Stanley Hospital.

96 The Union submitted that none of this evidence was before the first Full Bench for consideration. It was also contended by the Union, that the evidentiary distinction between the circumstances applying to the transfer from Royal Perth and Fremantle Hospitals to The Fiona Stanley Hospital, and the transfer of services from the Swan Districts Hospital to the Midland Health Campus, was not considered by the learned Industrial Magistrate. All of these matters were broadly described as "evidentiary issues".

97 A further submission was made by the Union that was broadly described as "the legal transfer issue". This turned upon the conclusion said to be arrived at by Smith AP at par 85 of the first Full Bench decision, dealing with the functions and duties of employees of the hospitals under the Agreement being transferred to a separate legal entity, that being the future board of the Fiona Stanley Hospital. The submission was that this conclusion was seemingly based upon the proposition that services being transferred to a separate legal entity cannot be considered as being contracted out or privatised. The proposition put by the Union, allied to this submission, was that it is axiomatic that a contracting out of services will involve a transfer of the provision of those services from the public to the private sectors. Thus a separate legal entity transfer will occur.

98 On the construction of the Agreement advanced by the Union, it matters not in its submission, as to where the location of the transferred services will be. It is said the fact of the transfer is what is significant. On this footing, the submission was that the location of the transfer of services at a particular hospital covered by the Agreement is not decisive. If this be so, then in short the Union contended that the conclusions of Smith AP (with Scott ASC agreeing) at par 85 of the first Full Bench decision were erroneous and should not be followed.

99 As to part (b) of this ground of appeal, the Union submitted that a crucial difference between the evidentiary case concerning the Swan Districts Hospital, and the other claims, was that it was accepted by the Minister that the new Midland Health Campus will be run by a private entity. Thus, it followed, according to the Union, that a contracting out of functions and duties from a public hospital to a private hospital is materially different, which difference was not considered by the learned Industrial Magistrate.

100 As to ground two, it was contended by the Union that the learned Industrial Magistrate, on a proper construction of the terms of the Agreement, failed to find that it was arguable that the Minister owed a general duty to prevent functions and duties of employees covered by the Agreement, from being contracted out to the private sector. In referring to various parts of the Agreement, the Union contended that its terms express a general prohibition on contracting out. Applying the generous approach to the interpretation of industrial instruments, on this basis, the terms of the Agreement constitute a general duty on the Minister to not jeopardise job security of employees covered by the Agreement by contracting out and privatising duties and functions to any extent at all. The Union contended that in permitting the contracting out and privatisation, as is common ground, the Minister is clearly in breach of his obligations under the Agreement in this regard.

101 This very broad approach to the interpretation of the Agreement is, on the Union's case, supported by the negotiation by the parties in 2010, of a "Heads of Agreement', which dealt with various commitments about the future renegotiation of the Agreement, and the making of a consent order by the Commission concerning wage rates. It was said that the Minister at the time this process was occurring, knew or should have known, that the effect of the negotiations with Serco for the provision of facilities management services at the Fiona Stanley Hospital, would affect the job security of employees covered by the Agreement.

102 For the Minister, again in summary, it was submitted as to grounds 1(a) and (b), that there was no error by the learned Industrial Magistrate in dismissing the claims. It was submitted that the interpretation of cl 11.13(b) of the Agreement is confined to contracting out of services only at the hospitals covered by the Agreement. This view of the Agreement is entirely consistent with the decision of the first Full Bench in the context of the facts as found then before it.

103 Insofar as the claims concerning Royal Perth Hospital and Fremantle Hospital are concerned, the Minister assumed factual findings most favourable to the Union. Those being that there will be a transfer of medical services from those two hospitals to the Fiona Stanley Hospital, which will involve the performance of functions or duties of employees covered by the Agreement being undertaken by employees of Serco. On the basis of the first Full Bench decision, it was contended that no breach of the Agreement could arise. This was because, properly understood, the first Full Bench held that the terms of cl 11.13(b) are limited to contracting out or privatisation of functions or duties at hospitals covered by the Agreement.

104 In relation to the closure of the Swan Districts Hospital and the opening of a new Midland Health Campus, the Minister accepted that the new facility will be operated by a private corporation, which will provide the same medical services formerly provided at the Swan Districts Hospital. It was submitted that again, this could not, on the application of the first Full Bench decision, constitute a breach of the Agreement. This is because the first Full Bench held that the transfer of medical services from an existing hospital covered by the Agreement to a new hospital with a private operator does not amount to a breach of cl 11.13(b). On these bases the learned Industrial Magistrate, according to the Minister's submission, was correct in holding that the different characterisation of the claims, and the adducing of further evidence, could not alter the inevitable outcome that the claims had no reasonable prospect of success.

105 As to ground two, the Minister submitted that the Union's contention as to the terms of the Agreement, providing what is in essence a blanket prohibition on preventing the contracting out of functions and duties covered by clause 11.13(b), is unsupported by the terms of the Agreement. It was submitted that the Union has failed to articulate exactly how it is that the specific language of the terms of the Agreement would give rise to such a construction. In relation to the suggestion that the 2010 Heads of Agreement in some way influenced the outcome, the Minister submitted that all this arrangement did was ensure that employees covered by the Agreement received wage rises, following the parties' inability to agree upon a replacement agreement on its expiry.

106 There was no dispute between the parties either at first instance or on the appeal, as to the power of the Industrial Magistrates Court to summarily dispose of a claim on the basis that it discloses no reasonable cause of action, or for other good reason.

The power relied on by the learned Industrial Magistrate was Reg 5 of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005. The test to apply is that an action should only be dismissed if it "cannot possibly succeed", as was said by Steytler P in *Talbot & Olivier (a firm) v Witcombe and another* (2006) 32 WAR 179. Whilst the Union initially complained by appeal ground three that the learned Industrial Magistrate erred by applying the wrong test to the Minister's summary judgment application, this ground was abandoned at the outset of the hearing of the appeal.

Consideration

107 The starting point is cl 11.13 of the Agreement. It is as follows:

"11.13 Contracting Out and Privatisation

(a) The parties recognise the importance of promoting long term job security and career development for employees subject to this Agreement.

(b) With the exception of those contracts for services currently in existence, there will be no contracting out or privatisation of functions or duties performed by directly employed workers during the life of this Agreement.

(c) Subject to successfully negotiating an efficiency and quality agreement between the parties to this Agreement, the Employer will not re-tender contracts for service currently in place which can be carried out by directly employed workers.

(d) Negotiations to successfully return in house those functions or duties currently out-sourced will include the following factors;

(i) Whether the product delivered under the contract for services meets the expected outcomes in terms of efficiency, quality and safety;

(ii) Public interest considerations such as quality of services and the safety of patients;

(iii) Cost, in particular the wages differential (if any) between the rates of pay for employees current contracts and directly employed employees; and

(iv) The impact the contract has on the job security and career development for employees subject to this agreement.

(e) Any agreement reached between the parties as a result of this process will be written up into a document and signed by both parties. The parties agree to be bound by the agreement as recorded in this document. The document will then be binding and enforceable between the parities (sic)."

108 I adopt, without repeating, what I said at pars 101 – 104 of the first Full Bench decision, as to the principles to apply in the interpretation of industrial instruments: (2011) 91 WAIG 291 at 308. The controversial provision is cl 11.13(b) referred to above. The learned Industrial Magistrate concluded, in referring to the reasons of Smith AP at par 85 of the first Full Bench decision (Scott ASC agreeing), that the prohibition on contracting out only extends to work to be performed at the hospitals covered by the Agreement. It does not preclude the Minister from transferring services from a hospital covered by the Agreement, to a separate legal entity, where the work is to be performed at another, in this case, new hospital, not party to the Agreement. That conclusion was with respect, for the following reasons, plainly correct, and in accord with the first Full Bench decision.

109 In my view, the terms of cl 11.13(b) cannot have the effect of prescribing an all-encompassing prohibition on the work of employees covered by the Agreement from ever being performed by an alternative provider anywhere else. The terms of cl 11.13(b) must be construed within the four corners of the Agreement. Whilst the approach to the construction of industrial instruments is to avoid a too literal interpretation of provisions, nonetheless, the task is essentially a text based activity: *Amcor Ltd v Construction, Forestry, Mining, and Energy Union and Ors* (2005) 222 CLR 241 per Kirby J at par 67.

110 The parties to the Agreement are set out in cl 5.2 and it was not suggested that the Agreement extends to persons other than the Union and the Minister in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927. By cl 11.13(a), there is an "aspirational" provision, reflecting the objective of the parties to the Agreement, to promote long term job security and career development. The last part of the sub-clause refers to "for the employees covered by this Agreement". By the combined effect of cl 5 – Area, Incidence and Scope and cl 19 – Rates of Pay of the Agreement, when read with s 41(4) of the Act, that can only mean those employees employed in the classifications specified in the Agreement and employed at the hospitals set out in cl 5.2(b) of the Agreement.

111 By cl 11.13(c), the Agreement refers to an agreed commitment for no "re-tendering" of then on foot contracts for services, for work that can be performed by "directly employed workers". The obligation to not re-tender is on the "Employer", which, by cl 3 – Definitions, is the named employer parties to the Agreement, being the hospitals the Agreement covers and applies to. Clause 11.13(c) is, of itself in my view, a strong textual indicator that the parties, by the language they have used in the Agreement, intended to limit the scope of the contracting out and privatisation term to the existing hospitals covered by the Agreement. Again, for the purposes of this subclause, the "directly employed workers" can only be sensibly read as those then, or in the future, employed by the hospitals as employer parties to and bound by the Agreement.

112 The textual support for this construction to be applied to the clause of the Agreement becomes stronger when one considers the language of subclause (d). This provisions says in the introductory part "Negotiations to successfully return in house those functions or duties currently out-sourced will include the following factors …" Consistent with the evident purpose of cl 11.13 as a whole, the reference to "return in house" can only mean the restoration of the provision of services in a hospital covered by the Agreement by employees of the hospital, as the employer. Again, to be consistent with the first part of subclause (d), the words "currently out-sourced" must mean work done at the hospital by an entity providing services in the form of functions and duties that would otherwise be performed by employees of the hospital, under the Agreement.

113 For the purposes of applying the obligation to negotiate in subclause (d) a range of factors is set out in pars (i) to (iv). In par (iii) there is again reference to the words "directly employed employees", with regard to cost differentials. In par (iv)

reference is made to the impact a contract for services has on job security and career development, no doubt intended to be consistent with the purpose of the clause as expressed in subclause (a). Again, this provision is confined to "employees subject to this Agreement".

114 In light of these parts of the clause, one then returns to subclause (b), the controversial subclause. In my view, when read with the remainder of the clause in the context of the interpretation I have placed on it, the conclusion is inevitable that subclause (b) is limited to a restraint on any further contracting out of functions or duties at the hospitals covered by the Agreement. When regard is had to the specific language used in subclause (b), this meaning becomes evident. The reference to "contracts for services in existence" can only sensibly be read as referring to those "contracts for services currently in place" in subclause (c) and the "functions or duties currently out-sourced" in subclause (d).

115 When read as a whole in this way, the scheme intended by cl 11.13 of the Agreement, is that at hospitals covered by the Agreement, the parties have agreed that there would, for the duration of the Agreement, be no further contracting out. Where services were, at the time the Agreement was made, contracted out at a hospital, it was intended that at the conclusion of those contracts, there would be a negotiation process entered into between the parties to the Agreement, to ascertain whether the services performed at the hospital by a contractor should be returned to be performed by employees of the hospital instead. If those negotiations are successful, then the parties to the Agreement, they being the Union and the Minister in his capacity as the employer hospitals concerned, will, under subclause (e), formally document the arrangement, which arrangement is intended to be binding.

116 The scope and terms of the Agreement constituted a fundamental barrier to the Union succeeding in the first set of proceedings, leading to the first Full Bench decision. Despite the reformulation of the separate claims, and the adducing of further substantial evidence in these proceedings at first instance, that fundamental barrier remains. I am not persuaded that the decision of the learned Industrial Magistrate to exercise the power of summary dismissal of the proceedings before him was in error.

117 In my view, the differently pleaded cases advanced by the Union, and the evidence led by it at first instance, make no difference to the outcome of this case. The affidavit evidence of Ms Palmer in particular, descends to considerable detail as to the nature and scope of the proposed transfer of services from Royal Perth Hospital and Fremantle Hospital to the new Fiona Stanley Hospital. Ms Palmer's evidence also deals with, again in some detail, the proposed closure of the Swan Districts Hospital and the transfer of services to the new Midland Health Campus. However, none of this evidence alters the fact that on its proper construction, the Agreement, in relation to contracting out and privatisation, is limited to those events at the hospitals covered by the Agreement. The Union's evidence does not go to this issue.

118 The learned Industrial Magistrate concluded, at pars 60-65 of his reasons, as follows:

> "60 Having regard to the undisputed facts, are the Claims tenable? The answer to that question is no.
>
> 61 The proper interpretation of clause 11.13(b) of the 2007 Agreement is that it prevents the contracting out or privatisation, at existing hospitals, of functions or duties performed by employees of the Minister in his incorporated capacity at those hospitals.
>
> 62 The transfer of medical services from Royal Perth Hospital and Fremantle Hospital to a separate legal entity that is the future Board of Fiona Stanley Hospital is not and cannot be a contracting out or privatisation prohibited by clause 11.13 of the 2007 Agreement. Her Honour Smith AP (with whom Scott ASC agreed) made that explicitly clear in Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Health (supra).
>
> 63 The same reasoning applies with respect to the transfer of services from Swan Districts Hospital to Midland Health Campus. Irrespective of whether the services are to be transferred to a future board of the Midland Health Campus or a private corporation, the transfer will be to another separate legal entity.
>
> 64 In my view Her Honour Smith AP's comments are unequivocal. They cause insurmountable difficulty for United Voice WA in these Claims.
>
> 65 Clause 11.13(b) of the 2007 Agreement does not apply to the transfer of services to a separate legal entity. It only prevents the contracting out of or privatisation at existing hospitals, of functions or duties performed by employees at those hospitals."

119 Consistent with the authorities, an action should only be summarily dismissed if it is clear that no question of fact or law arises. The power should be exercised with great care. In this case no error has been demonstrated in the conclusions reached by the learned Industrial Magistrate. It was correctly concluded that the pleaded case, and the evidence led in support of it, did not disclose tenable claims, in view of the proper interpretation of cl 11.13 of the Agreement. There was no error expressed by the first Full Bench in its reasons as to the scope of cl 11.13 of the Agreement.

120 Ground 2 must also fail, given the preceding discussion and also the concession by the Union that for this ground to be maintainable, grounds (1a) and (1b) must succeed.

Conclusion

121 Accordingly, I would dismiss the appeal.

HARRISON C:

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

2012 WAIRC 00320

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPELLANT
	-and-
	THE MINISTER FOR HEALTH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 MAY 2012
FILE NO.	FBA 8 OF 2011
CITATION NO.	2012 WAIRC 00320

Result	Appeal dismissed
Appearances	
Appellant	Mr T J Hammond, of counsel
Respondent	Mr G T W Tannin SC and Mr R Bathurst, of counsel

Order

This appeal having come on for hearing before the Full Bench on 17 April 2012, and having heard Mr T J Hammond, of counsel, on behalf of the appellant, and Mr G T W Tannin SC and Mr R Bathurst, of counsel, on behalf of the respondent, and reasons for decision having been delivered on 24 May 2012, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Cancellation of registration—

2012 WAIRC 00219

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	-and-
	THE FEDERATED BRICK, TILE AND POTTERY INDUSTRIAL UNION OF AUSTRALIA (UNION OF WORKERS) WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 12 APRIL 2012
FILE NO/S	FBM 1 OF 2012
CITATION NO.	2012 WAIRC 00219

Result	Order made
Appearances	
Registrar	Ms S Mason

Order

WHEREAS in FBM 14 of 2010 and FBM 2 of 2011 the former secretary of The Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch (FBTPUWA), Mr John Robert Bainbridge, gave evidence that in 2008 the FBTPUWA ceased to operate: [2012] WAIRC 00032; (2012) 92 WAIG 102 [18] – [20];

AND WHEREAS the Full Bench in reasons for decision given on 24 January 2012 in FBM 14 of 2010 and FBM 2 of 2011 found that the FBTPUWA was effectively defunct [193] and that the Commission of its own motion should issue a direction pursuant to s 73 of the Industrial Relations Act 1979 (WA) (the Act) to issue a summons for cancellation of the registration of the FBTPUWA;

AND WHEREAS on 16 February 2012, the President issued a direction to the Registrar pursuant to s 73 of the Act to issue a summons to the FBTPUWA to appear before the Full Bench to show cause why registration should not be cancelled;

AND WHEREAS on 19 March 2012, the Registrar issued and served a summons on the FBTPUWA to show cause why its registration should not be cancelled or suspended pursuant to s 73 of the Act;

AND WHEREAS at the hearing of this matter on 11 April 2012, Ms Mason on behalf of the Registrar tendered documents which evidenced that the:

(a) last financial return of the FBTPUWA was filed on 8 February 1999 for the period ended 30 June 1998;

(b) last return filed indicating the number of union members was on 13 September 2001, which stated the number as of 1 January 2001 was 65;

(c) last election for officers occurred on 18 November 2004 for terms to expire on 25 November 2008;

(d) Registrar received a letter from Mr Bainbridge on 1 November 2009 that stated that the FBTPUWA closed when he retired in November 2008;

AND WHEREAS Mr Bainbridge appeared at the hearing of this matter and informed the Full Bench that the FBTPUWA had ceased to exist when his term of office expired on 25 November 2008;

AND WHEREAS the Full Bench is satisfied the FBTPUWA is defunct and the continuance of the registration is not consistent with or will not serve the objects of the Act;

NOW THEREFORE, pursuant to the powers conferred on the Full Bench under s 73 of the Act, it hereby orders that —

The registration of The Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch be and is hereby cancelled.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2012 WAIRC 00297

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT MCJANNETT
	APPLICANT
	-and-
	CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	WEDNESDAY, 16 MAY 2012
FILE NO/S	PRES 3 OF 2011
CITATION NO.	2012 WAIRC 00297
Result	Order issued

Order

Having heard the applicant and having heard Mr S Millman, of counsel, for the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders, by consent, that —

1. The time for compliance of order 2 of my order dated 4 April 2012 be and is hereby extended to 18 May 2012.

2. The time for compliance of order 3 of my order dated 4 April 2012 be and is hereby extended to 4 June 2012.

(Sgd.) J H SMITH,

[L.S.] Acting President.

2012 WAIRC 00343

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDAN REEVE
	APPLICANT
	-and-
	THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	FRIDAY, 8 JUNE 2012
FILE NO/S	PRES 1 OF 2012
CITATION NO.	2012 WAIRC 00343

Result	Order issued
Appearances	
Applicant	Ms N Ireland
Respondent	Mr L McLaughlan

Order

This matter having come on for hearing before me on 7 June 2012, and having heard Ms N Ireland on behalf of the applicant, and Mr L McLaughlan on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, by consent, hereby orders that —

1. An Interim Committee of Management is established, constituted as follows:

    1. President
    Robert Manhood
    2. Vice-President
    Matthew Coulter
    3. Secretary
    Leslie McLaughlan
    4. Trustees
    Gerry McDonald
    Jamie Hughes-Owen
    5. Committee persons
    James Balfour
    Jay Dellavanzo
    Mark Donaldson
    Mark Henner

2. Rule 23 - Elections to Office shall be waived for a period of 12 months from the date of this order.

3. Whilst paragraph 1 and paragraph 2 of this order remain in force, r 18 and r 19(1) are varied, insofar as the offices of Trustees and Secretary are required to be elected pursuant to r 23.

4. Until further order, the Interim Committee of Management shall have the authority to exercise all of the powers, duties and functions of the Committee of Management and each of the holders of office as set out in paragraph 1 of this order shall have the authority to exercise all of the powers, duties and functions of the office held by each of them.

5. There be liberty to the parties to apply to vary the terms of this order.

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

INDUSTRIAL MAGISTRATE—Claims before—

2012 WAIRC 00314

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2012 WAIRC 00314
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 16 MAY 2012
DELIVERED	**:**	WEDNESDAY, 23 MAY 2012
CLAIM NO.	**:**	M 40 OF 2011
BETWEEN	**:**	JOHANNA LANDSHEER

CLAIMANT

-and-

MORRIS CORPORATION (WA) PTY LTD

RESPONDENT

CatchWords	**:**	Allegation of a contravention of s. 182 of the *Workplace Relations Act 1996* by failing to pay all time worked; Claim for outstanding wages; Whether Industrial Magistrates Court has jurisdiction to hear and determine the claim.
Legislation	**:**	*Workplace Relations Act 1996*, s. 162
		Fair Work Act 2009, s. 12, s. 45
		Industrial Relations Act 1979, s. 81A(1), s. 81A(2), s.82, s. 83A
		Magistrates Court (Civil Proceedings) Act 2004
		Industrial Magistrates Courts (General Jurisdiction) Regulations 2005
Industrial Instruments:		Industrial Catering, Cleaning and Incidental Services (AWU and LHMU) Award 2000
Cases Cited	**:**	Christos Triantopoulos -v- Shell Company of Australia Ltd ([2011] WAIRC 0004)
Result	**:**	Claim struck out for want of jurisdiction
Claimant	**:**	Mr S Banovich of the Australian Workers' Union appeared as agent for the Claimant.
	:	
Respondent	**:**	Mr A Cameron of the Australian Mines and Metals Association appeared for the Respondent

REASONS FOR DECISION

Background

1 On 2 November 2011, the Claimant lodged an Originating Claim alleging that her employer, in breach of the Australian Workplace Agreement (AWA) that governed her employment, underpaid her $39,454.26.

2 Since the claim was lodged the parties have discovered that the Claimant's AWA had never been lodged for approval. The parties now agree that the un-lodged AWA has the status of a common law contract of employment.

3 In the circumstances, I have been asked to determine, by way of preliminary issue, whether this Court has jurisdiction to hear and determine this claim.

Determination

4 An Industrial Magistrates Court has the jurisdiction conferred upon it by s. 81A of the *Industrial Relations Act 1979* (IR Act) which provides:

> **"81A. Jurisdiction under this Act**
>
> An industrial magistrate's court has the jurisdiction conferred on it by sections 77, 80(1) and (2), 83, 83A, 83B, 83D, 83E, 96J, 97V(3), 97VJ(3), 97YC, 97YG, 110, 111 and 112."

5 In the IR Act, sections 77, 80(1) and (2) deal with breaches by officers of organisations. Sections 83 and 83A relate to the enforcement of certain statutory instruments and orders made by the Western Australian Industrial Relations Commission (WAIRC). Section 83B is concerned with the enforcement of unfair dismissal orders. Section 83D deals with offences under the IR Act. Section 83E is concerned with the contravention of civil penalty provisions. Section 96J relates to compliance with freedom of association provisions. Sections 97V(3), 97VJ(3), 97YC and 97YG all deal with statutory *Employer-Employee Agreements*. Section 110 is concerned with disputes between an organisation and its members. Section 111 prohibits the taking of premiums for employment. Section 112 is concerned with the recovery of monies paid under invalid organisational rules.

6 The Claimant submits that the un-lodged AWA constitutes an *Employer-Employee Agreement* for the purposes of s. 83 of the IR Act and that this Court therefore is able to make orders remedying the underpayment in accordance with s. 83A of the IR

Act. With respect, I disagree. An *Employer-Employee Agreement* as defined in s. 7 of the IR Act not only requires the agreement to be in conformity with the requirements of Divisions 2, 3 and 4 of Part VID of the IR Act, but also to have been registered in accordance with Division 5 of Part VID of the IR Act. If the agreement is not registered it ceases to have effect (see section 97UZ of the IR Act). The AWA has not been registered and therefore is not an *Employer-Employee Agreement* for the purposes of s. 83 of the IR Act. The agreement properly characterised is a common law contract of employment.

7 It will be obvious from the review of the aforementioned provisions that there is no jurisdiction conferred on this Court by the IR Act to deal with common law contracts of employment. Indeed that power is specifically conferred on the WAIRC by s. 29(1)(b)(ii) of the IR Act. It provides that an employee may refer to the WAIRC a claim "*that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment*."

8 An employee is, in the alternative, entitled to initiate proceedings in a court of competent jurisdiction to recover entitlements said to be owed under a common law contract of employment. The Claimant contends that the Industrial Magistrates Court at Perth is, by virtue of s. 81CA(2) of the IR Act, such a court.

9 Section 81CA(2) of the IR Act provides:

> "**81CA.Procedure, enforcement etc.**
>
> …
>
> (2) Except as otherwise prescribed by or under this Act or another law –
>
> (a) the powers of an industrial magistrate's court; and
>
> (b) the practice and procedure to be observed by an industrial magistrate's court,
>
> when exercising general jurisdiction are those provided for by the *Magistrates Court (Civil Proceedings) Act 2004* as if the proceedings were a case within the meaning of that Act."

10 The Claimant argues that s. 81CA(2) expands the powers of this Court to the extent that an underpayment arising from a party's failure to comply with the provisions of an instrument can be treated as a claim for an outstanding debt, and dealt with in accordance with s. 6(1)(a)(ii) of the *Magistrates Court (Civil Proceedings) Act 2004*. With respect, I disagree.

11 Section 81CA(2) does not enable this Court to exercise the civil jurisdiction of the Magistrates Court of Western Australia. If the Claimant's contention were to be correct, then it would be possible for this Court to deal with a myriad of non-industrial matters such as contractual claims, claims in tort, residential tenancy claims, dividing fence claims, consumer-trader claims and so on. Industrial Magistrates Courts were created pursuant to s. 81 of the IR Act to specifically deal with industrial matters, whether they be general or criminal in nature. They have a distinct and different jurisdiction to that of the Magistrates Court of Western Australia.

12 Subsection 81CA(2) of the IR Act is concerned with <u>how</u>, in the absence of any prescribed powers, practice and procedures, this Court exercises its general jurisdiction. It is not concerned with <u>what</u> it can do. Such is obvious when subsections 81CA(2)(a) and (b) are read together. The provisions do not expand this Court's jurisdiction.

13 The employer and employee in this matter are in the national system (see sections 13 and 14 of the *Fair Work Act 2009* (FW Act)). Section 26 of the FW Act excludes the application of the IR Act to national system employees and employers. However, s. 26 of the FW Act does not apply to a law of a State or Territory so far as the law deals with rights or remedies incidental to any non-excluded matters (see subsection 27(1)(d)(ii)). Non-excluded matters are listed in s. 27(2). They include claims for enforcement of contracts of employment except so far as the law in question provides for a matter within subsection 26(2)(e). Subsection 26(2)(e) is of no relevance to the matter in issue in this case. It is concerned with varying or setting aside rights and obligations under an employment contract found to be unfair.

14 The FW Act leaves in place the procedure for the enforcement before the WAIRC of common law contracts of employment founded in this state. Such is consistent with the findings of Acting Senior Commissioner P E Scott in *Christos Triantopoulos -v- Shell Company of Australia Ltd* ([2011] WAIRC 0004). It therefore appears that this claim could be tried in the WAIRC.

15 As an alternative, the Claimant alleges that the Respondent is in breach of the Industrial Services (AWU and LHMW) Award 2000 (the Award), by failing to pay the Claimant a basic periodic rate of pay for each of her guaranteed hours between 17 March 2009 and 1 July 2009, thereby exposing it to the imposition of a penalty pursuant to s. 182(1) of the *Workplace Relations Act 1996* (WR Act). The Claimant argues that the alleged WR Act breach is actionable in this Court, an "eligible court" within the meaning of s. 12 of the FW Act, by virtue of the *Fair Work (Transitional and Consequential Amendments) Act 2009*.

16 It suffices to say however, that there is no evidence to suggest that the parties were bound by the Award. Consequently, the foundation for the exercise of jurisdiction by this Court as an "eligible court" does not appear to exist.

17 Further, the Claimant maintains that the alleged underpayment contravenes s. 323(1)(a) of the FW Act. This Court is empowered to deal with such a contravention. In that regard I observe that the alleged contravention of s. 323(1) of the FW Act was not specifically pleaded in the Claimant's outline of claim. The Claimant's own case is that she was paid the agreed annualised salary. On that basis there cannot have been an underpayment or deduction. The real issue to be considered is whether the Claimant should have been paid for additional hours worked. That of course requires a construction of the common law contract, and as such, falls outside of this Court's jurisdiction.

18 It is arguable that the claim of underpayment is intrinsically a claim for failure to pay minimum wages and is enforceable as a safety net contractual entitlement under s. 542(1) of the FW Act. If that is the case the Claimant may apply to the Federal Court or the Federal Magistrates Court to enforce her entitlement. This Court does not have jurisdiction to deal with it.

Conclusion

19 The Industrial Magistrates Court, Perth does not have jurisdiction to hear and determine the Claimant's claim.

Remedy

20 The Claimant suggested that in the event of a finding of lack of jurisdiction the claim should, pursuant to Regulation 34(3) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*, be transferred to the WAIRC.

21 Regulation 34 provides:

> **"34. Court where case is to be tried**
>
> (1) Except as provided in this regulation, a case must be tried at a Court chosen by the clerk when the case is listed for trial under regulation 22.
>
> (2) The clerk must choose a Court by determining in which Court the case can most conveniently and fairly be tried.
>
> (3) A Court may order that the trial of a case be transferred to another Court if -
>
> (a) a party makes an application to transfer the case to the other Court and the Court is satisfied that the case could more conveniently or fairly be tried in the other Court; or
>
> (b) the parties consent to the trial of the case being so transferred by lodging a memorandum of consent to that effect.
>
> (4) If the trial of a case is transferred to another Court the clerk of the Court from which the trial is being transferred must make arrangements for all the original documents relating to the case to be sent to the other Court as soon as practicable after the transfer."

22 It is obvious that Regulation 34 relates to the transfer of a trial with respect to another Industrial Magistrates Court. By proclamation published in the Western Australian Government Gazette on 19 February 1992, separate Industrial Magistrates Courts were established in Bunbury, Geraldton, Kalgoorlie and Perth. Regulation 34 simply facilitates the transfer of trials between those courts.

23 Regulation 34 does not facilitate the transfer of this matter to the WAIRC. Further the WAIRC is not "a court" and is not within the contemplation of Regulation 34.

Result

24 It will be appropriate to strike out the claim for want of jurisdiction.

25 This claim is listed for further hearing at 9.30 am on 30 May 2012, at which time final orders will be made.

G. Cicchini
Industrial Magistrate

2012 WAIRC 00338

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2012 WAIRC 00338
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	THURSDAY, 29 MARCH 2012
DELIVERED	**:**	THURSDAY, 29 MARCH 2012
CLAIM NO.	**:**	M 10 OF 2012
BETWEEN	**:**	GERALD CLAVER STURMAN

CLAIMANT

-v-

DAVID GORHAM

FIRST RESPONDENT

-and-

JAMES PLUMRIDGE

SECOND RESPONDENT

CatchWords	**:**	Claim alleging unspecified breach of the *Industrial Relations Act 1979*; Application to strike out the claim; Abuse of process; Whether the claim is within the Industrial Magistrates Court general jurisdiction; Capacity to bring the claim; Whether the claim was frivolously instituted; Role of court staff in accepting the claim for lodgement; Whether the court should refer the matter to police for investigation.
Legislation	**:**	*Industrial Relations Act 1979, section 81E, 81CA, 77, 80(1), 80(2), 83, 83A, 83E, 96J, 97V(3), 97VJ(3), 97YC, 97YG, 110, 111 and 112* *Justices of the Peace Act 2004* *Industrial Magistrates Courts General Jurisdiction Regulations 2005, regulation 15*
Result	**:**	Claim struck out; Costs awarded to Respondent; Respondents application to refer matter for investigation dismissed
Claimant	**:**	Mr Gerald Claver Sturman appeared in person
First Respondent	**:**	No appearance
Second Respondent		Dr James Plumridge appeared in person

REASONS FOR DECISION

THESE REASONS FOR DECISION ARE TO REPLACE THE PREVIOUS REASONS FOR DECISION, FIRST PUBLISHED (92 WAIG 518)

(These are the reasons for decision which were delivered orally at the conclusion of the hearing and edited from the transcript of proceedings)

The Claim

1 On 6 February this year Gerald Claver Sturman lodged an originating claim within this court's general jurisdiction seeking orders that each named respondent pay a penalty. The named respondents are David Gorham and James Plumridge. In essence Mr Sturman alleges that:

- Dr Plumridge has breached the *Industrial Relations Act of 1979* (the Act) by appearing without authority at the pre-trial conference held by this court in the matter of *Tainsh v Zigzag Ladies and Gents Hair Salon (M112 of 2010)*; and
- Mr Gorham abrogated his obligations pursuant to the *Justices of the Peace Act 2004* by permitting Dr Plumridge to appear at the said pre-trial conference.

2 On 2 March 2012 Mr Gorham lodged his response to Mr Sturman's claim wholly denying it. Dr Plumridge is yet to be served with the claim. However upon becoming aware of it he brought an application dated the 16th of March 2012 seeking the following orders:

1. That Mr Sturman's claim against him be struck out or be otherwise dismissed; and
2. That Mr Sturman pay his costs; and
3. That this court refers to police for investigation Mr Sturman's alleged criminal conduct.

3 On the 26th of March 2012 Mr Sturman lodged a notice of discontinuance with respect to his claim made against Mr Gorham. Pursuant to regulation 15 of the *Industrial Magistrates Courts General Jurisdiction Regulations 2005* (the Regulations) the notice of discontinuance must be served in order to become effective. There is no proof that it has been served on Mr Gorham.

Background

4 By reference to *Tainsh v Zigzag Ladies and Gents Hair Salon* (M112 of 2010) I will revisit the relevant history which gives rise to Mr Sturman's claim.

5 Mr Sturman was, until the 6 June 2011, an Industrial Agent registered by the Western Australian Industrial Relations Commission. In that capacity he represented Ms Tainsh. The respondent was represented by a legal practitioner Ms Bairbre Lewis. I understand that Ms Lewis was at that time engaged by Rural Community Legal Services Incorporated and that she worked for the Wheatbelt Community Legal Centre at Northam. Mr Gorham had an association with those entities.

6 In accordance with the Regulations the Clerk of Court arranged for a pre-trial conference to be held in that matter on the 6th of December 2010. It did not proceed on that day and was adjourned to Monday 31 January 2011. In various documents lodged in this matter it has been suggested that pre-trial conference was originally listed for 9 December 2010 and then adjourned to 21January 2011. The court's file does not reflect that to be the case. In any event when on 31 January 2011 the Clerk of Court resumed the pre-trial conference at Northam, Ms Lewis was not in attendance. Ms Lewis did not attend because of illness. The Clerk of Court had previously rejected her application for a further adjournment of the pre-trial conference. At the resumed pre-trial conference the respondent's principal, Lisa Raven, attended with Dr Plumridge, Ms Lewis' husband. In his affidavit in support of this application Dr Plumridge contends that he attended the pre-trial conference solely as a support person for Ms Raven as had been agreed by the Clerk of Court. Mr Sturman and his client also attended. With the parties unable to reach agreement, the pre-trial conference was concluded and programming orders were made.

7 The matter was ultimately listed for trial. At the trial on 25 May 2011 the parties entered into discussions which led to a settlement and eventually the claim was discontinued on 1 June 2011.

This Application

8 It is against the aforementioned background that I turn to consider the merits of this strike out application. Notwithstanding that the claim has not, thus far, been served upon Dr Plumridge, he is not precluded from bringing this application or being heard with respect of it. His application is properly before the court because he has an interest in the proceedings lodged against him by Mr Sturman.

9 I observe that Mr Sturman has brought the claim in his own right rather than any representative capacity. I note that his ability to act in a representative capacity ceased on 6 June 2011. He alleges a breach of the Act but has failed to specifically identify the provision which is alleged to have been breached. He asserts that because Dr Plumridge represented Ms Raven at the pre-trial conference he has somehow contravened the Act. Leaving aside the issue of whether Dr Plumridge actually represented Ms Raven the only relevant provision of the Act which might have application to his claim is section 81E. It provides:

> "**81E. Representation**
>
> In proceedings before an industrial magistrate's court a party
>
> may —
>
> (a) appear in person;
>
> (b) be represented by an agent; or
>
> (c) be represented by a legal practitioner."

10 Section 81E is an enabling provision. It is not a penal or civil penalty provision. It cannot be the case that Mr Sturman is suggesting a breach of a penal provision given that his claim has been brought within this court's general jurisdiction. To come within this court's general jurisdiction his claim must be made pursuant to one of the provisions set out in section 81CA (1) of the Act. Relevantly it provides:

> "**81CA. Procedure, enforcement etc**.
>
> (1) In this section —
>
> ***general jurisdiction*** means the jurisdiction of an industrial magistrate's court under —
>
> (a) section 77, 80(1) and (2), 83(1) to (7), 83A, 83B(1) to (9), 83E(1) to (8), 96J, 97V(3), 97VJ(3), 97YC, 97YG, 110, 111 or 112; or
>
> (b) Part IV of the *Long Service Leave Act 1958*;

11 It is obvious that none of the provisions within this court's general jurisdiction apply to this claim. Sections 77, 80(1) and 80(2) are concerned with breaches of duties of officers of organisations. Section 83 is concerned with the enforcement of instruments. Section 83A concerns underpayment of employees. Section 83B relates to unfair dismissals. Section 83E is concerned with the contravention of a civil penalty provision of which section 81E is not. Section 96J is concerned with freedom of association. Sections 97V(3), 97VJ(3), 97YC and 97YG all pertain to employer/employee agreements. Section 110 deals with disputes between organisations and its members. Section 111 relates to the taking of premiums for employment, and section 112 is concerned with organisational rules. None of those provisions can base this claim. What is claimed falls outside of those sections and accordingly is not within this court's jurisdiction.

12 Assuming that it could be found that Dr Plumridge represented Ms Raven at the pre-trial conference held on 31 January 2012 (although that is not supported by the court's records) it does not follow that he has breached the Act. Further even it could be said that Dr Plumridge has in some way breached the Act it does not follow that this court has the jurisdiction to deal with such a breach within its general jurisdiction. The fundamental difficulty with this claim is that it is outside of the court's jurisdiction.

13 Another insurmountable difficulty faced by Mr Sturman in this proceeding is that he lacks standing. He does not come within any of the categories of people permitted to bring proceedings in this court as is mentioned in relevant sections including sections 83 E(6) and 102A . He has made this claim in his own right rather than in any representative capacity. Given that he was not directly affected by the alleged breaches he does not have and never has had the legal capacity to bring the claim. During the course of submissions Mr Sturman pointed out that because the word 'may' is used in all the relevant provisions that anyone can bring a claim. He argues that the capacity to make a claim is not limited to those mentioned within the relevant sections. I disagree. If that were so then such provisions would be entirely superfluous and would have no meaning or effect. "May" is used to enable any one of those people referred to in the relevant provisions to bring a claim.

14 In this matter the claimant has proceeded in way which appears to be totally misguided. He cannot succeed. His claim is an abuse of process and ought to be struck out. It is apparent from the materials before me that by making this claim Mr Sturman has caused the respondents much distress, inconvenience and cost.

15 Dr Plumridge seeks his costs of this application and the claim on the basis that the proceedings have been instituted frivolously or vexatiously or both. The claim was made frivolously because it was brought without standing; it lacked merit and had no chance of success. It also sought orders outside of this court's jurisdiction. The making of a claim without any proper legal foundation is not only frivolous, but is also of grave concern and ought to be discouraged. It could be argued in this case that there is also a vexatious component to the claimant's claim, but I need not decide that issue given that I have concluded that the claim has been instituted frivolously.

16 Given that the claim is unmeritorious with no prospects of success in this jurisdiction, the second respondent will be allowed his legal costs and any other reasonable disbursements incurred.

17 In the course of written submissions to this court Dr Plumridge criticised this court's staff for having accepted the claim for lodgement. In that regard I observe that it is not for this court's administrators to assess the merits of any claim. So long as

the claim complies with the rules of court as to form and execution it must be accepted. It would be wrong for the court's administrators to assess the merits of the case. That is not a matter for them. They can only act as a gatekeeper with respect to form and procedure. It would have been quite improper for the administrative staff not to have received the claim in this case. Once lodged the claim is open to attack in the way in which Dr Plumridge has proceeded. That is the proper way to deal with a claim which lacks foundation. A court at its discretion may in those circumstances order costs.

18 Further it is unfair, inappropriate and wrong for Dr Plumridge to have suggested in his written submissions that this court has in some way caused or perpetuated Mr Sturman's acts. This court does not descend into the arena. It merely determines matters which are before it. For that reason I will not refer Mr Sturman's actions to police as is sought by Dr Plumridge. This court has not been called upon to determine whether or not an offence has been committed. It is not for this court to cause an investigation to be held. Again the court does not descend into the arena. It is a matter for the parties to refer the matter to police if they or any one of them is of the belief that an offence has been committed. I accordingly decline to make the order sought in paragraph 3 of the application.

Orders

19 The following orders are made:

1. The claim is struck out for want of jurisdiction.
2. The claimant shall pay Dr James Plumridge's costs fixed at $200 to be paid within 28 days hereof.
3. Dr James Plumridge's application dated 16 March 2012 is otherwise dismissed.

G. Cicchini
Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2012 WAIRC 00298

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STACEY BLACKWOOD
	APPLICANT
	-v-
	BONISSIMO
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 17 MAY 2012
FILE NO/S	U 56 OF 2012
CITATION NO.	2012 WAIRC 00298

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 30 April 2012 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2012 WAIRC 00326

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAHLI ANNE BOND
	APPLICANT
	-v-
	JENNY RYAN (KENNY) - SKIN GYM
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 28 MAY 2012
FILE NO/S	U 3 OF 2012
CITATION NO.	2012 WAIRC 00326

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms J Ryan

Order

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

WHEREAS on 22 February 2012 the Commission convened a conference for the purpose of conciliating between the parties however, agreement was not reached; and

WHEREAS the application was set down for hearing and determination on 23 and 24 April 2012; and

WHEREAS 30 March 2012 the applicant advised the Commission that she wished to withdraw her application; and

WHEREAS on 30 March 2012 the Commission wrote to the applicant about lodging a Notice of Withdrawal or Discontinuance form; and

WHEREAS on 13 April 2012 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 13 April 2012 the hearing was vacated; and

WHEREAS on 17 May 2012 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2012 WAIRC 00361

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COURTENAY BRUDENELL
	APPLICANT
	-v-
	H & A FRIGGER
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 15 JUNE 2012
FILE NO/S	B 105 OF 2012
CITATION NO.	2012 WAIRC 00361

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 14th day of June 2012 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS during that conference the applicant advised that she no longer wished to pursue the application and agreed that an order should issue dismissing 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.

2012 WAIRC 00330

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WENDY SHIRLEY COOK
	APPLICANT
	-v-
	JAMIE CHRISTOPHER BOGIAS T/AS PRICELINE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 30 MAY 2012
FILE NO/S	U 69 OF 2012
CITATION NO.	2012 WAIRC 00330
Result	Application dismissed

Order

WHEREAS this is an application by which the applicant claimed to have been unfairly dismissed by the respondent; and

WHEREAS on the 28th day of May 2012 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.

2012 WAIRC 00302

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JODI DOLAN
	APPLICANT
	-v-
	PROPERTY WEST REAL ESTATE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 21 MAY 2012
FILE NO/S	U 51 OF 2012
CITATION NO.	2012 WAIRC 00302
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 4th day of May 2012 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on the 9th day of May 2012 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 01050

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFF JAMIESON
	APPLICANT
	-v-
	NANNUP TOURIST ASSOCIATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 18 NOVEMBER 2011
FILE NO/S	B 172 OF 2011
CITATION NO.	2011 WAIRC 01050

Result	Extension of time granted
Representation	
Applicant	No appearance
Respondent	Mr S Boak

Order

WHEREAS by notice of application the respondent has sought an extension of time within which to file a notice of answer in the herein application;

AND WHEREAS the Commission has considered the grounds in support of the application and is satisfied that an extension of time should be granted;

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

THAT the time within which a notice of answer is to be filed is extended to 23 November 2011.

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

2012 WAIRC 00050

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFF JAMIESON
	APPLICANT
	-v-
	NANNUP TOURIST ASSOCIATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 6 FEBRUARY 2012
FILE NO/S	B 172 OF 2011
CITATION NO.	2012 WAIRC 00050

Result	Interlocutory application granted
Representation	
Applicant	In person
Respondent	Mr W van der Spuy of counsel

Order

WHEREAS the substantive claim in this matter involves an allegation that the applicant was on termination of his employment denied various contractual entitlements;

AND WHEREAS this claim is denied by the respondent;

AND WHEREAS by notice of application the respondent seeks an order that a witness Ms M Gilmour be permitted to give evidence in the matter listed for hearing on 7 February 2012 by telephone;

AND WHEREAS the Commission having considered the grounds in support of the application and the applicant not opposing the application is prepared to make such an order;

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

THAT the evidence of Ms M Gilmour in the herein proceedings be given by telephone.

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

2012 WAIRC 00196

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00196
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 8 DECEMBER 2011, TUESDAY, 7 FEBRUARY 2012
DELIVERED	**:**	WEDNESDAY, 4 APRIL 2012
FILE NO.	**:**	B 172 OF 2011
BETWEEN	**:**	JEFF JAMIESON
		Applicant
		AND
		NANNUP TOURIST ASSOCIATION
		Respondent

Catchwords	**:**	Industrial Law (WA) - Contractual benefits claim - Formation of contract - Duty to mitigate loss - Principles applied - Application upheld - Nominal compensation ordered.
Result	**:**	Application upheld in part
REPRESENTATION:		
Applicant	**:**	In person
Respondent	**:**	Ms S Maddern of counsel and with her Ms R Dawson of counsel

Case(s) referred to in reasons:

Yousif v Commonwealth Bank of Australia (2010) 193 IR 212;

Masters v Cameron (1954) 91 CLR 353;

Lucke v Cleary and Others (2011) 111 SASR 134;

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

Gunton v Richmond-Upon-Thames London Borough Council [1981] 1 CH 448;

Dellys v Elderslie Finance Corporation Ltd (2002) 132 IR 385;

Tasman Capital Pty Ltd v Sinclair (2008) 75 NSWLR 1;

Brace v Calder [1895] 2 QV 253;

Conway-Cook v Town Of Kwinana (2001) 108 IR 421;

Easling v Mahoney Insurance Brokers Pty Ltd (2001) 78 SASR 489.

Reasons for Decision

1 Mr Jamieson expressed interest in a position as Manager of the Nannup Visitor Centre in September 2011. The centre is run by the Nannup Tourist Association, and is located in the south west of the State. Mr Jamieson was successful in obtaining the position and says he started work on 28 September 2011. However, matters did not proceed smoothly. As a result of changes to the Board of the Association on 30 September 2011, Mr Jamieson says his appointment became untenable which led to his resignation on 4 October 2011. He now claims to be entitled to three months' salary for the notice he says he was required to give under his contract of employment with the Association.

2 The Association resists Mr Jamieson's claim. It says a number of things in its defence. First, the Association contends there was never a contract of employment on foot with Mr Jamieson as the offer of employment made on behalf of the Association required the formalisation of a number of terms and conditions that were never resolved. Second, if a contract of employment did come into existence between Mr Jamieson and the Association, it did not contain a term of three months' notice as contended by Mr Jamieson. Rather, a period of four weeks' notice would apply. Thirdly, even if this were not so, Mr Jamieson, by his words and conduct, was never ready, willing and able to work out his notice to entitle him to payment of salary for three months as claimed. Finally, and in any event, Mr Jamieson has done nothing to mitigate his loss. Therefore, should the Commission find in Mr Jamieson's favour, he is entitled to no more than nominal damages.

3 I now turn to consider each of these issues.

Was a contract of employment formed?

4 Mr Jamieson testified that he responded to an advertisement in the newspaper for the position of Manager of the Nannup Visitor Centre. On 23 September 2011 he attended an interview with the Chairperson of the Association Mr Avery, along with three other members of the Board. At the interview, the requirements of the Manager's position were discussed. During the course of the interview Mr Jamieson said that conditions of the appointment were mentioned, they being a salary of $50,000 per annum, and all other "normal conditions" to apply that is four weeks' annual leave, 9% superannuation, sick leave etc.: T6.

5 Later, on 26 September 2011, Mr Jamieson received a telephone call from Mr Avery. Mr Avery informed him that he was the successful candidate for the position. Mr Jamieson testified that he was offered and he accepted the appointment during this conversation: T6. As had been arranged, on 29 and 30 September 2011 Mr Jamieson travelled to the Visitor's Centre for what was described as an orientation with the then Manager, Ms Gilmour, who was soon to leave the position. This was for the purpose of gaining some understanding of the day-to-day responsibilities of the job. According to Mr Jamieson, this did not go well. He said Ms Gilmour was not helpful and was "hostile" towards him. This was denied by Ms Gilmour in her evidence.

6 On 30 September Mr Jamieson sent a memorandum to Mr Avery which on Ms Gilmour's evidence, seems to have been prepared whilst he was at the Visitor Centre on that Friday. The memorandum is headed "MANAGEMENT" and formal parts omitted it reads as follows:

> "Appointment Letter is yet to be received however, might I suggest the following in terms of remuneration to myself:
>
> - Employment as a Contractor Manager via my company (Days Inn Pty Ltd) on a monthly basis upon presentation of an invoice. ($4200 per month) which equates to $50,400 per annum.
> - No requirement to pay superannuation contributions saving approx $5000 pa
>
> NVC Manager
>
> 1. It will take at least 6 months for me to acquire the local tourism knowledge required to assist enquiries / visitors.
> 2. Handover from Metta to myself really required two weeks in lieu of 2 days given the extent of her duties, which to be quite frank I could not do at this time.
> 3. I need to refresh myself with MYOB and RMS and learn the BookEasy system which will take time.
>
> Rental Assistance
>
> 1. I will need to rent a property in Busselton until I organise the purchase of something in Nannup.
> 2. Average rental rates will be $330 per week so given my income I would appreciate assistance to the value of $1000 per month for three months.
>
> Summary
>
> There is significantly more to the position than originally anticipated so I will need time to adjust and learn the systems and procedures however, rest assured I will support and inform the Board at all times.
>
> Kind regards
>
> ps: Good luck with your AGM tonight"

7 As the last paragraph of the memorandum refers, the annual general meeting of the Association took place on the evening of 30 September. It was common ground that as a result of some internal tension within the Association, Mr Avery and all but one member of the Board resigned. Towards the end of the meeting, it was also announced that Mr Jamieson had been appointed to the position of Manager of the Visitor Centre. This was referred to in Mr Avery's testimony and also in that of Mr Boak, who was called to give evidence on behalf of the Association.

8 It was Mr Avery's expectation that although as a result of the meeting a new Board would need to be formed, it would "confirm" Mr Jamieson's appointment as the Manager: T51. I pause to observe at this point that there was no suggestion by the Association that under its constitution, the decision of the selection committee under the former Board to offer the position of Manager to Mr Jamieson, did not survive its reconstitution.

9 Following the meeting of 30 September, Mr Avery sent an email to Mr Jamieson to confirm his appointment as Manager following his earlier telephone call of 26 September, in which he offered Mr Jamieson the position. Mr Avery said he also informed Mr Jamieson that he had resigned as the Chair of the Board and that four other Board members had also resigned. Mr Avery testified that he informed Mr Jamieson of this because he had appointed him to the position and had instilled some confidence in him with respect to the professionalism of the Board: T51. On Sunday 2 October Mr Jamieson wrote to the Board of the Association, informing them that he was due to commence work on 3 October based on the confirmation of his appointment by Mr Avery. Mr Jamieson requested a formal letter of appointment.

10 Mr Boak, who was the one member of the Board who did not resign, sent an email to Mr Avery asking him for a copy of any contract he had prepared for Mr Jamieson's appointment. Mr Boak testified that he needed this so he would be able to confirm in writing the details of Mr Jamieson's appointment as the Manager. It was clear from Mr Boak's testimony that he understood Mr Jamieson was to commence as the Manager on 3 October. What he was trying to do, however, in view of the changes in the Board membership, was to "get the paperwork sorted out, sign him up and we'd be away": T68.

11 There were further email exchanges between Mr Boak and Mr Jamieson on that day. In one of them, Mr Boak indicated to Mr Jamieson that until he had confirmed what Mr Jamieson had been offered, he could not consider Mr Jamieson's "terms of employment". Mr Boak proposed to meet the next morning at the Visitor Centre to discuss the matter. Mr Jamieson indicated in reply, that he would be at the Visitor Centre at 9am on 3 October to "take up his duties": exhibit R6.

12 However, in the early morning on 3 October, Mr Jamieson sent an email to Mr Boak to the effect that he had cancelled his trip to the Visitor Centre because he had reconsidered the position. He said it appeared that he was no longer welcome in the position of Manager. Mr Jamieson testified that in part, he formed this view from a telephone call he had received over that weekend from Ms Gilmour, which gave him the impression that the new Board were not going to readily confirm his appointment.

13 Also on 3 October, Mr Avery sent to Mr Jamieson by email, a letter recording what had occurred regarding his appointment. Formal parts omitted, that letter is in the following terms:

> "I advise that the former Board of the Nannup Tourism Association Inc. ("NTA") appointed a selection committee for the purpose of interviewing applicants for the position of Manager for the Nannup Visitor Centre ("NVC") and the selection committee comprising myself as Chairperson, Ian Molyneux as Vice Chairperson, Judith Molyneux and Liz Collins as members of the then Board of the NTA and selecting and appointing the successful applicant.
>
> I confirm that you were interviewed along with other applicants for the position on Friday 23 September 2011 and that after the selection committee conferred they decided to offer you the position of Manager on the following basic terms and conditions:-
>
> 1. Commencement salary of $50,000.00 per annum.
> 2. Salary to be reviewed annually based on performance.
> 3. 9% superannuation.
> 4. 4 weeks annual leave with no leave loading.
> 5. Either party to have the right to terminate the employment contract on 3 months notice in writing.
>
> On Monday 26 September 2011 the other members' of the selection committee empowered me to advise you of your appointment as Manager and consequently I confirm having telephoned you to advise you of your appointment.
>
> On the same day I advised the outgoing Manager Metta Gilmour of your appointment by telephone and I understand that Metta Gilmour contacted you and arranged for you to attend at the NVC on Thursday 29 September 2011 and Friday 30 September 2011 for orientation purposes.
>
> At the AGM of the NTA held on Friday 30 September 2011 your appointment was announced to the members present.
>
> As there are insufficient members of the Board of the NTA at present a Contract of Employment cannot be prepared and signed until the Board is fully constituted and it is hoped this can be achieved within the next 2 to 3 weeks."

14 Also on the morning of 3 October, following his advice to Mr Boak that he would not be attending the Visitor Centre, Mr Jamieson sent Mr Boak a further email advising that as far as he was aware, he had been employed by the Association as the Manager of the Visitor Centre. He said he needed to receive a formal letter of appointment and he would remain at his home in Mandurah in the meantime.

15 The next day on 4 October 2011, Mr Jamieson sent a further letter by email to Mr Boak and the Board of the Association. In the letter he advised that he was resigning from his position and was giving three months' notice of resignation "in accordance with the conditions of my employment contract". Mr Jamieson requested that if the Association wished him to work on site for the next three months could they please advise him. Mr Jamieson also went on to state in the letter:

> "Through no fault of mine I have been dragged into a highly toxic and hostile environment which in my opinion is totally infantile and beggars belief. A bunch of different country people obsessed by self interest and personal animosities.
>
> It was clear to me when I started on Thurs 29 Sept based on a lack of information and negative reaction I received from Metta Gilmour that I was not welcome and no support would be provided. This included an insulting phone call from Metta on Saturday last."

16 Mr Jamieson testified that he remained at home and did not seek other employment. He said he was waiting to go back to work. He did not seek other employment in case the Association wanted him to go back to the Visitor Centre. He stayed unemployed for the three month period.

17 Whether a valid contract of employment was formed in this case is a matter of fact. Contracts of employment may come into existence in very informal circumstances. As the learned authors in *Macken's Law of Employment* 7th Ed observe at par 4.80:

> "Often contracts of employment are entered into with the minimum of formality. [41] A series of telephone calls may give rise to an employment contract. [42] It may be partly oral and partly written. [43] A written contract does not necessarily preclude earlier verbally agreed terms. [44] Discussions will give rise to a legal offer if the words and conduct "would have lead a reasonable person in the position of the other party" to believe that an offer had been made. [45]"

18 In my view, based on the evidence, an oral contract of employment was entered into between Mr Jamieson and Mr Avery on behalf of the Association on 26 September 2011. The evidence of Mr Avery was that he telephoned Mr Jamieson and advised him of the selection committee's decision that he had been appointed to the position on the terms and conditions that Mr Avery outlined. Whilst Mr Avery certainly mentioned that "in due course, a formal contract will be drawn up of employment" (T 42), that does not prevent a contract coming into existence as a consequence of the telephone conversation between Mr Avery and Mr Jamieson. I am satisfied there was a valid offer and acceptance. The offer contained the essential, perhaps not all, terms of the appointment. Mr Jamieson accepted the offer. There was valid consideration passing between the parties and the terms were sufficiently certain for a contract to be formed at that time. The offer of Mr Avery in his telephone call to Mr Jamieson on 26 September was not conditional or subject to a further approval process or a formal contract being prepared: *Yousif v Commonwealth Bank of Australia* (2010) 193 IR 212. A contract can be entered into with its terms to be subsequently reduced to writing, but binding the parties from the point of agreement: *Masters v Cameron* (1954) 91 CLR 353; *Lucke v Cleary and Others* (2011) 111 SASR 134.

19 In my view, adopting the approach in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 by looking at the position objectively, a reasonable person in the position of the parties would understand an agreement to have been reached at the end of the telephone call between Mr Avery and Mr Jamieson on 26 September. It is also consistent with that conclusion, that Mr Jamieson's appointment as the Manager was announced to Ms Gilmour following which arrangements were made for Mr Jamieson to attend an orientation. Furthermore, Mr Jamieson's appointment as the Manager was also announced towards the end of the annual general meeting on 30 September. Mr Boak was certainly well aware of it as he understood that Mr Jamieson was due to commence work as the Manager at the Visitor Centre at 3 October.

20 The Association contended that in the alternative, Mr Jamieson's memorandum of 30 September setting out various issues, including that Mr Jamieson be appointed as a contractor was in reality a counter offer from Mr Jamieson which was not accepted by the Association. I do not think that it was. Taken in the context of all of the events that had occurred up to that time, I consider it more likely that what was proposed was something raised by Mr Jamieson for the Board to consider as an alternative to working as an employee. His evidence was he was aware the Visitor Centre, being funded by the Association, was not strong financially. The "concept" as Mr Jamieson put it, may have saved the Association some money. Mr Jamieson said he did not hear anything further from the Association about this matter. In any event, if an agreement had been reached along these lines, then it would constitute a consensual termination of the contract of employment and the entering into of a fresh contract for services. Of course, that never occurred.

Did any contract require three months' notice?

21 In my view, on all the evidence, despite attempts by the Association to challenge it in the cross-examination of Mr Avery, the terms offered to and accepted by Mr Jamieson did include a three month written notice of resignation term. Whilst this was put to Mr Avery as being somewhat unusual and not consistent with the previous Manager's contract of employment, the tenor of Mr Avery's evidence was that the Association did not want to be "left in the lurch" by a Manager who could leave at relatively short notice. He described the operation of the Visitor Centre as involving a number of facets and that he was looking for some continuity in the position. Whilst the terms of appointment included a probationary period of three months, that does not preclude the parties agreeing to a three month notice period in conjunction with it.

22 I should emphasise at this point, the only evidence called in support of the formation of a contract of employment and its terms, was from Mr Jamieson and Mr Avery. Mr Jamieson was the applicant for the position and Mr Avery was the chair of the Board and on the selection committee which appointed Mr Jamieson. Whilst there was some attempt to challenge Mr Avery's version of the events as an attempt to re-construct what had transpired after the event, I am not persuaded this was so. I accept Mr Avery's evidence that he felt obliged, in the light of what happened to the Board, to record the circumstances of Mr Jamieson's appointment. This is not diminished by the fact that some correspondence was written after he ceased to be a Board member. It would have been open, if such evidence was to be contradicted, to call evidence from other members of the selection committee but none were called to testify.

Mitigation of loss

23 As noted above, Mr Jamieson returned to Mandurah and said he was standing in readiness, as it were, to attend the Visitor Centre as required. He did not seek any alternative employment during the period of his notice. It is well settled that where a person claims damages or compensation for breach of a contract of employment that has been terminated wrongfully, the employee must take reasonable steps to mitigate his or her loss: *Gunton v Richmond-Upon-Thames London Borough Council* [1981] 1 Ch 448; *Dellys v Elderslie Finance Corporation Ltd* (2002) 132 IR 385. The onus is on the employer to establish a failure to mitigate: *Tasman Capital Pty Ltd v Sinclair* (2008) 75 NSWLR 1.

24 The duty to mitigate required Mr Jamieson to diligently seek alternative employment when he did not take up the position of Manager of the Visitor Centre: *Brace v Calder* [1895] 2 QB 253. In the present case, Mr Jamieson cannot claim damages or compensation for loss which could have been averted by seeking alternative employment or accepting comparable re-employment: *Conway-Cook v Town of Kwinana* (2001) 108 IR 421; *Easling v Mahoney Insurance Brokers Pty Ltd* (2001)

78 SASR 489. There was nothing on the evidence to suggest that the Association had done anything to prevent Mr Jamieson from looking for other work. Nor was there any evidence from Mr Jamieson that he was precluded from doing so for good reason. Mr Jamieson cannot recover compensation for losses he could have taken reasonable steps to avoid.

Conclusion

25 In all of the circumstances this is an unfortunate case. Mr Jamieson was a well qualified person who could have been of value to the Association in the position of Manager of the Visitor Centre. Both parties could have benefited from the employment relationship. However, events took place such that this was simply not to be. Whilst I have found a contract of employment to have come into existence between Mr Jamieson and the Association, given Mr Jamieson's failure to take any steps to mitigate his loss I will award only nominal compensation. I will award the sum of $500. An order now issues.

2012 WAIRC 00296

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFF JAMIESON
	APPLICANT
	-v-
	NANNUP TOURIST ASSOCIATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 15 MAY 2012
FILE NO/S	B 172 OF 2011
CITATION NO.	2012 WAIRC 00296

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms S Maddern of counsel and with her Ms R Dawson of counsel

Order

HAVING HEARD the applicant on his own behalf and Ms S Maddern of counsel and with her Ms R Dawson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby–

(1) DECLARES that on or about 29 September 2011 a contract of employment was entered into between the applicant and the respondent under which the applicant was appointed the Manager of the Nannup Visitor Centre.

(2) DECLARES that the applicant was denied the contractual benefit of payment of salary during notice of termination from 4 October 2011.

(3) ORDERS that the respondent pay to the applicant the sum of $500 as nominal compensation within 21 days of the date of this order.

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

2011 WAIRC 01003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VILVAKUMAR MUNIANDY
	APPLICANT
	-v-
	ELITE SELECTION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 8 NOVEMBER 2011
FILE NO/S	B 170 OF 2011
CITATION NO.	2011 WAIRC 01003

Result	Order issued
Representation	
Applicant	Mr V Muniandy
Respondent	Ms C Donoghue

Order

HAVING heard Ms Donoghue on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for filing a notice of answer and counter-proposal be extended to 5:00pm Friday, 23 December 2011.

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

2012 WAIRC 00091

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VILVAKUMAR MUNIANDY
	APPLICANT
	-v-
	ELITE SELECTION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 23 FEBRUARY 2012
FILE NO.	B 170 OF 2011
CITATION NO.	2012 WAIRC 00091

Result	Direction issued
Representation	
Applicant	Mr V Muniandy
Respondent	Mr M Cox of counsel

Direction

HAVING heard the applicant on his own behalf and Mr Mr M Cox of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby directs –

(1) THAT the applicant file and serve further and better particulars of claim by Monday 27 February 2012.

(2) THAT the respondent file and serve further and better particulars of answer by Wednesday 29 February 2012.

(3) THAT the hearing listed on Friday 2 March 2012 be and is hereby vacated.

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

2012 WAIRC 00240

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VILVAKUMAR MUNIANDY
	APPLICANT
	-v-
	ELITE SELECTION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 19 APRIL 2012
FILE NO/S	B 170 OF 2011
CITATION NO.	2012 WAIRC 00240

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Mr M Cox of counsel

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.

2012 WAIRC 00327

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENDA MAY NORMAN
	APPLICANT
	-v-
	BELROSE CARE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 29 MAY 2012
FILE NO/S	U 57 OF 2012
CITATION NO.	2012 WAIRC 00327

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 15 May 2012 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2012 WAIRC 00299

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRANT PRIOR
	APPLICANT
	-v-
	DAVID REID PAINTING CONTRACTORS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 17 MAY 2012
FILE NO/S	U 40 OF 2012
CITATION NO.	2012 WAIRC 00299

Result	Application discontinued
Representation	
Applicant	Ms S Walker (of counsel)
Respondent	Mr D Reid and Mr M Carrington

Order

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

AND WHEREAS on 11 April 2012 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference an agreement was reached between the parties;

AND WHEREAS on 9 May 2012 the applicant advised the Commission to file the Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2012 WAIRC 00328

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDAN RIDINGS
	APPLICANT
	-v-
	JASON RIDINGS BRASH SPRAYPAINTING
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 29 MAY 2012
FILE NO/S	U 63 OF 2012
CITATION NO.	2012 WAIRC 00328

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 15 May 2012 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2012 WAIRC 00325

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARTIN SIMS
	APPLICANT
	-v-
	BARRY CHARLES WILLIAMSON & LEONIE SUE WILLIAMSON T/A FREMANTLE FURNITURE COMPANY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 28 MAY 2012
FILE NO/S	U 25 OF 2012
CITATION NO.	2012 WAIRC 00325

Result	Discontinued
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr B Williamson

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on 27 April 2012 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant's representative was given time to obtain instructions from the applicant about settling this matter; and

WHEREAS on 8 May 2012 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 8 May 2012 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2012 WAIRC 00241

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARYNA LISA TARZIA
	APPLICANT
	-v-
	COLLINS CRUISE AND TRAVEL
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 19 APRIL 2012
FILE NO/S	U 163 OF 2011, B 163 OF 2011
CITATION NO.	2012 WAIRC 00241

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Mr C Paul of counsel

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 01165

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY TAYLOR
	APPLICANT
	-v-
	SHARRYN O'NEIL, DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 20 DECEMBER 2011
FILE NO.	U 83 OF 2010
CITATION NO.	2011 WAIRC 01165

Result	Directions issued
Representation	
Applicant	Mr R Bowker of counsel
Respondent	Mr R Bathurst of counsel

Direction

Having heard Mr R Bowker of counsel on behalf of the applicant and Mr R Bathurst of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby directs –

(1) THAT the effect of s 41 of the Working with Children (Criminal Record Checking) Act 2004 on the application be heard and determined as a preliminary issue.

(2) THAT the applicant file and serve any submissions additional to its submissions filed on 18 August 2010 no later than 14 days prior to the date of hearing.

(3) THAT the respondent file and serve any submissions additional to its submissions dated 10 August 2010 and 31 August 2010 by no later than 7 days prior to the date of the hearing.

(4) THAT the parties have liberty to apply on short notice.

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

2012 WAIRC 00198

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY TAYLOR
	APPLICANT
	-v-
	SHARRYN O'NEIL, DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 APRIL 2012
FILE NO/S	U 83 OF 2010
CITATION NO.	2012 WAIRC 00198

Result	Application discontinued by leave
Representation	
Applicant	Mr R Bowker of counsel
Respondent	Mr D Matthews of counsel

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.

2012 WAIRC 00331

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00331
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 22 MARCH 2012 WRITTEN SUBMISSIONS THURSDAY, 5 APRIL 2012 FURTHER HEARING MONDAY, 30 APRIL 2012
DELIVERED	**:**	WEDNESDAY, 30 MAY 2012
FILE NO.	**:**	B 184 OF 2011
BETWEEN	**:**	JUDITH LOUISE TRIGWELL Applicant AND ROBERT DAVID BRERETON T/AS AIRCRAFT CLEANER EXTRAORDINAIRE Respondent

Catchwords	**:**	Contractual benefits claim - Entitlements under contract of employment - Claim for payment of lump sum - Application upheld - Order issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7, s 26(1)(a) and s 29(1)(b)(ii)
Result	**:**	Upheld and Order Issued
Representation:		
Applicant	**:**	Mr P Mullally (as agent)
Respondent	**:**	Mr D Howlett (of counsel) instructed by Heuzenroeders Lawyers

Case(s) referred to in reasons:

Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Dellys v Elderslie Finance Corporation Ltd [2002] WASCA 161; 82 WAIG 1193

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

Hotcopper Australia Ltd v Saab (2002) 82 WAIG 2020

Jones v Dunkel (1959) 101 CLR 298

Matthews v Cool or Cosy Pty Ltd and Anor (2004) 84 WAIG 2152

McLoughlin v Western Power Corporation (2000) 80 WAIG 3084

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

Read v Robert Brodie-Hall; Leather-Life (2010) 90 WAIG 473

Rogan-Gardiner v Woolworths Pty Ltd [2012] WASCA 31

RPS v The Queen (2000) 1999 CLR 620

Saldanha v Fujitsu Australia Pty Ltd (2008) 89 WAIG 76

Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 121

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

1 On 7 November 2011 Ms Judith Louise Trigwell (the applicant) lodged an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act) claiming that she was due $15,000 under her contract of employment with Robert David Brereton t/as Aircraft Cleaner Extraordinaire (the respondent). The respondent denies that the applicant is owed any monies under her contract of employment.

2 The following was agreed between the parties:

(1) The applicant was employed on a casual basis prior to the respondent buying the business on 1 December 2003.

(2) The applicant did not have a written contract of employment.

(3) The applicant was required to clean aircraft at the Broome International Airport which on average took between 15 and 22 minutes. Following this, the applicant would leave the aircraft and empty the vacuum cleaners and dispose of rubbish bags. The total time to undertake these duties would be approximately 40 minutes.

(4) The applicant was paid $20 per flight.

(5) The applicant varied her working hours on a weekly basis depending on how many aircraft she cleaned and the respondent would clean a maximum of 30 aircraft per week.

(6) On 2 July 2006 the applicant's additional pay, which was paid to her for undertaking non cleaning duties, was increased to $220 per week.

(7) On 30 March 2008 the applicant's additional pay increased to $240 per week.

(8) On 1 July 2009 the applicant's additional pay increased to $250 per week.

(9) During her employment with the respondent, the applicant told the respondent of her grievances about spending her own money on the respondent's business and not being reimbursed and working long hours beyond those for which she was contracted to work (see letters sent to the respondent dated 13 November 2005, 27 June 2011 and 29 June 2011). The applicant resigned on 10 July 2011 but resumed work after a telephone discussion with the respondent.

(10) On 6 September 2011 the applicant again resigned giving one hour's notice.

(11) The applicant returned to work on 9 September 2011 and worked for and managed the respondent's business in Broome as agreed.

(12) On or about 22 September 2011 the respondent told the applicant at the Broome airport that he could not afford to pay her $15,000 as agreed (sic) and would not be making the payment.

(13) Mr Brereton remained in Broome and worked with the applicant cleaning aircraft until the applicant resigned on 28 September 2011.

3 Following is correspondence relevant to the applicant's employment with the respondent.

4 The applicant sent the following letter to the respondent on 27 June 2011:

> Hi Robert
>
> It is time for me to resign.
>
> I feel emotionally and physically wrecked.
>
> This job is getting harder all the time.
>
> **Drug and Alcohol**
>
> All staff are supposed to be tested. Ricky Young contacted me re-DAMP. Some staff did their on-line courses, others didn't because they were unable to access the site. We were then told to wait until things were in place, by Ricky Young. You sent Pathwest forms. That was 18 months/2 years ago and then nothing.
>
> I have had Fred Green -Security Boss - asking why staff have not been tested. I don't know except that I have had no directive to do so.
>
> I was told that if staff members had a letter to indicate what medication they were on and what for, that would suffice for CASA if you tested positive. CASA bailed us up the other day and I am not happy with the information I received. A letter is of no use whatsoever and as manager, if I was aware that someone was on a medication (even if taken last night) I would be liable for the $50,000 fine. No thanks.
>
> **Security**
>
> The allowance for Visitor Passes has changed and any one individual may only have 28 days issued in a 365 day period. Any new staff member must apply for an ASIC immediately, whether they are any good or not.
>
> Rod Evans has commenced at the Airport. He is "to the letter" and there are no grey areas.

Staff

Getting and keeping staff has always been an issue. Admittedly there have been some wonderful staff members, but every time I have to go through the process of advertising and then assessing, it gets harder each time.

I get a lot of Backpackers who just want a little extra income. Can't use them anymore. Usually I end up with the bottom of the barrel from the work centres. They invariably are unreliable or have had convictions or just don't want to work anyway.

Days like yesterday, when I go to work knowing that it is going to be a horrible day because of lack of staff, is draining and hard.

Chris came straight from church to help and I dragged Steve off a building site to grab a bag, otherwise I would have been on my own. Penny and Glenys are both sick with the flu, Renee couldn't stay because of ASIC issues, Sam has finished, Lorani couldn't get a babysitter and Sharon works another job on the weekends.

None of the staff want to take over the business and none of them want to stay when I go.

I have given your business 150% over the last 6 1/2 years and I have had enough. I have other things that I want to do.

My last day will be Sunday the 10th July 2011.

Thankyou

Judie

(Exhibit A1, document 2)

5 On 7 September 2011 the respondent sent the following email to the applicant:

Robert Brereton ([email address])

Wednesday, 7 September 2011 10:54:19 PM

'Judie Trigwell' ([email address])

Hi Judie,

We spoke this morning regarding the possibility of getting you back on the flights to look after our customers.

Thank you for answering my phone call as I really appreciate the opportunity to talk to you further regarding this.

You mentioned that the staff wont (sic) take my calls as they have walked out in protest with you and I am unsure as to what that is in regards to

Other (sic) than your annoyance with me is due to the lack of support that I have provided to you and I apologise for putting you in this position.

You requested that I paid you extra for your base wage until we found a suitable person to take over your role and you mentioned your lack of support with finding suitable staff to obtain asic cards to be able to help you supervise staff. I have found someone who is interested in taking on a position with us and she believes that she will have no problems with getting an asic and the clearances required. Her name is Nadia and her phone number is [telephone number] and she is ready to start work in Broome as soon as you require. Also with regards to Matts (sic) asic which is being processed this hopefully will provide some support to you until we can find further staff however my concern is your grievance and what I can do to rectify this. Is there something that I can offer you to resume your role as manager of the business as in an increase in staff wages, a further increase in your wages or a portion of the business that will help you? Again I am sorry for your frustrations and I apologise for you being put in this position. You have been absolutely wonderful to me for everything that you have done in the past and our customers are extremely happy with what you do and the level of service that you provide and if there is anything that I can do including assigning a portion of the business over to you to help you make the decision to come back to work, i would be incredibly happy to do so.

Rob

(Exhibit A1, document 4)

6 On 9 September 2011 the respondent's lawyer sent the following email to the applicant:

Julie Height ([email address])

Friday, 9 September 2011 3:14:07 PM

'[email address]' ([email address])

Dear Judie

Please be advised that I have met with Mr Robert Brereton in relation to a proposed Agreement sought by you. We shall be in further communications (sic) with you shortly, however in the meantime, if you have any questions please do not hesitate to contact me.

Julie Height

Senior Associate

(Exhibit A1, document 5)

7 On 9 September 2011 the respondent and the applicant exchanged the following series of emails:

Robert Home ([email address])

Friday, 9 September 2011 4:30:27 AM

Judie Trigwell ([email address])

Hi Judie, with regards your grievances, i do need you to put everything in writing so that I have a clearer picture of what your issues are. Firstly though, i need to ask you to put your request to me immediately in a short brief email so that i can meet with the lawyer today and provide them with exactly what you are asking me.

Thank you again

Rob

(Exhibit A1, document 6)

Robert Brereton ([email address])

Friday, 9 September 2011 6:25:57 PM

'Judie Trigwell' ([email address])

Thanks Judie,

How did everything go today and are you feeling ok?

Also if we increase staff wages from per flight do you think this will help,

Also I spoke with Rod Evans about getting ASIC support and he mentioned that you had also spoken with him – was that about the same thing?

Sorry to ask all these questions of you

Rob

(Exhibit A1, document 7)

From: Judie Trigwell [email address]

Sent: Friday, 9 September 2011 4:56 PM

To: Robert Brereton

Subject:

Hi Robert

Sorry about the delay. Hotmail was down and I could not access.

As agreed yesterday via our phone conversation, I would like an agreement with you that in 8 months time, middle of May 2012, I will be resigning (sic) ACE Cleaning and you will pay me $15,000 for the considerable amount of time and money that I have put into the business over the last 7 years.

I will in that time continue managing the business the same way that I have always done, supplying only the very best that we can offer to our clients.

The 8 month time frame is to allow you time to sell the business for what it is worth. So in addition to my normal duties, I will endeavor (sic) to help you any way that I can to secure a good sale.

Judie

(Exhibit A1, document 8)

8 On 12 September 2011 the respondent and the applicant exchanged the following emails:

Robert Brereton ([email address])

Monday, 12 September 2011 9:52:49 PM

'Judie Trigwell' ([email address])

Thanks Judie,

I have just got home from work and have been trying to contact Julie -the lawyer all day on her mobile but phoned her office at 5:15pm and apparently she hasn't been in today. I am worried about being able to speak with her tomorrow morning and then getting everything in place by Wednesday to meeting (sic) your requirements prior to you walking out again with the staff. Did she give you any indication of time or can you give me a bit more as you said you could?

Also sorry to hear that Nadia didn't work out today - do you want me to give her another call or are you happy to follow up with her.

With Sharon - I spoke with Phoenix Perth and they said that they would organise a weekly wage for her through work cover but now Paul has said that he thinks I need to pay that and they will reimburse me - what did they say to you and Sharon?

Rob

(Exhibit A1, document 13)

Robert Brereton ([email address])

Monday, 12 September 2011 10:25:11 PM

Judie Trigwell ([email address])

no, thats fine, thankyou, i need to get them to tell me what they want,

Rob

On 12/09/2011, at 9:18 PM, Judie Trigwell [email address] wrote:

Hi Robert

I am happy to give you more time. I said that what I wanted was by Wednesday or an indication that it was underway and happening.

I have left it up to Nadia to get back to us. She didn't seem that interested in the job.

Sharon has told me that she was told that she would be paid by you and then you claim it back from the insurer. I'm not too sure on how it works. I have been looking on the net and Workcover WA has quite a lot of info about it all. Do you want me to go into the Broome office and follow up and see how it all works?

Judie

(Exhibit A1, documents 15 and 16)

9 On 15 September 2011 the respondent sent the following email to the applicant:

Robert Brereton ([email address])

Thursday, 15 September 2011 1:50:03 PM

Judie Trigwell ([email address])

Hi Judie, the lawyer said that she would have something in writing to me today, i have sent an email with regards to Sharons (sic) pay going in today, i am stressed and trying to get this sorted asap, Rob

(Exhibit A1, document 19)

Applicant's evidence

10 The applicant gave evidence that her duties included managing the respondent's cleaning operations, rostering staff, obtaining aircraft schedules to allocate staff, invoicing and liaising with airport staff. As the respondent's business expanded she undertook an increasing number of duties and the applicant stated that when Mr Brereton left Broome in 2005 he was difficult to contact by phone or email and this resulted in her taking on more and more work and making more decisions. As a result of her frustrations arising from this she wrote to Mr Brereton on 13 November 2005 about her concerns (Exhibit A1, document 1). Even though Mr Brereton responded at the time his support then evaporated.

11 In November 2010 the applicant telephoned Mr Brereton and told him that she would be resigning within a year. In response Mr Brereton said to her that he understood that she was going to buy the business and the applicant told him that some time ago she told him that she was not buying the business and she was giving him notice so that he had time to sell it.

12 On 27 June 2011 the applicant wrote to Mr Brereton referring to her work becoming harder and her managerial responsibilities becoming heavier. There were more regulations to deal with, she was responsible for drug and alcohol testing, she was given no support by Mr Brereton and she lacked relevant information. As a result of her frustrations the applicant tendered her resignation effective 10 July 2011. During a telephone conversation with Mr Brereton on 10 July 2011 the applicant informed him that she was working on her last plane and he told her he was trying to find buyers for the business and asked for her to continue working to give him more time to do so. When she gave him a few more weeks to do this he thanked her. The applicant then contacted Mr Brereton on a few occasions and asked him how things were going but he never responded.

13 The applicant stated that even though Mr Brereton did not tell her, around this time she realised that the additional payment she received from the respondent of $250 per week for managing the business increased to $280 and this amount was then increased to $400 per week after a discussion she had with Mr Brereton about a person called Sharon taking over the management of the business. The applicant told him that if she left, Sharon required to be paid $400 per week for undertaking this role and if Mr Brereton was willing to pay her this amount then she should be paid $400 and he agreed to do so.

14 The applicant stated that by 6 September 2011 she had enough. She rang Mr Brereton and told him that she was the only one with an Aviation Security Identification Card (ASIC) clearance and this meant that cleaning could not be undertaken by others without her being present. She told Mr Brereton she was resigning with one hour's notice and she had told staff not to come to work as she would not be there with her ASIC clearance. The applicant denied that she failed to roster staff at the time and she stated that she had rostered staff that day but they could not undertake their duties as nobody else had an ASIC clearance. She received a call from Mr Brereton the following morning and he told her he did not want to go bankrupt, Qantas was sending up a cleaning team to Broome and he told the applicant he would assign the business or part of the business to her if she would continue to manage the business. The applicant told him that she did not want the business and he asked her if there was anything else that would keep her working with the respondent. The applicant suggested that he could pay her $15,000 for the time, energy and out of pocket expenses she had put into the business to date and she told Mr Brereton that he could pay her this sum when he sold the business. Mr Brereton told her that he could do so but that selling the business would not happen overnight. In response the applicant stated that she would stay on for eight months and she would assist him to find a buyer and if he did not sell the business he was to pay her $15,000 at the end of eight months. The applicant told him that she wanted written confirmation by the following Wednesday that he had contacted a solicitor to write up their agreement and he agreed to do so. It was on this basis that the applicant commenced working again the following Friday. After the applicant received an email from Mr Brereton's solicitor Ms Julie Height about their agreement on 9 September 2011 she rang Ms Height who told her that she needed to speak to Mr Brereton about the agreement and when Ms Height asked the applicant what the $15,000 was for she said it was for her time, effort and expenses incurred over many years.

15 The applicant stated that she continued working as normal and corresponded by email with Mr Brereton about a range of issues. The applicant stated that Mr Brereton came to Broome airport on 21 September 2011 and he told the applicant that

'there was no agreement' (T25) and he was not going to pay her $15,000 as he could not afford it. The applicant stated that she was upset and crying and in response Mr Brereton stated that he had behaved badly and it was not the applicant's fault. They then went back to the applicant's house and had a discussion about selling the business and the applicant gave evidence that she asked Mr Brereton if he would still pay her $15,000 if the business was sold and he said 'possibly' if he had a buyer. The applicant raised someone who may be interested in buying the respondent's business and she was aware that Mr Brereton had a telephone discussion with this person at her home about selling the business. The applicant and Mr Brereton then left her house and they returned to work.

16 On 28 September 2011 the applicant resigned as she felt undermined when Mr Brereton organised for a person named Nadia to undertake cleaning work.

17 The applicant gave evidence that she consulted a solicitor in Broome about her situation during September and October 2011.

18 Under cross-examination the applicant stated that she asked Mr Brereton to confirm their discussion about the payment of the $15,000 in writing and she confirmed that his email dated 7 September 2011 was in response to this request. The applicant gave evidence that even though there was no mention of the agreement to pay her $15,000 in this email it refers to him asking if he can do anything to help her and she trusted that he would do the right thing by her (Exhibit A1, document 4). When it was put to the applicant that there was nothing in writing confirming any agreement to pay her $15,000, the applicant stated that the respondent had verbally agreed to do this and she also had an email from Ms Height referring to an agreement. The applicant reiterated that after she received the email from Ms Height dated 9 September 2011 she contacted her and Ms Height told her that she was having difficulty contacting Mr Brereton and she asked the applicant what the $15,000 was for.

19 The applicant agreed that the respondent paid her for items for which she had claimed reimbursement but she stated that there were a number of items for which she had not made any claim for reimbursement.

20 The applicant gave evidence that during her discussion with Mr Brereton on 7 September 2011 she did not discuss returning to work on the basis of her base rate being increased and the applicant gave evidence that her discussion with Mr Brereton that day revolved around what Mr Brereton could do to retain the applicant as manager and what the applicant wanted for this to occur. The applicant disputed that her reference to an agreement with Mr Brereton in her email dated 9 September 2011 was to a proposal to reach agreement to pay her $15,000 and the applicant stated that Mr Brereton agreed to pay her $15,000. The applicant confirmed that as part of their agreement she would continue working for the respondent, the applicant stated that she only resigned when he told her that he would not pay her the $15,000 and the applicant stated that she continued to work for the respondent after Mr Brereton told her he would not pay the $15,000 in case a buyer was found for the business. The applicant denied that Mr Brereton told her during their discussion on 7 September 2011 that he would seek legal advice about her request and the applicant gave evidence that he said he would contact a solicitor about drawing up a document containing the agreement they had reached and he would have his solicitor contact the applicant to confirm his contact with the solicitor.

21 The applicant again reiterated that she returned to work on 9 September 2011 because Mr Brereton had agreed to pay her $15,000 and not because of the increase in her base rate of pay to $400 per week. The applicant reiterated that even though there was nothing in writing confirming Mr Brereton's agreement to pay her $15,000 they had a verbal agreement to that effect. The applicant also agreed that documents tendered at the hearing related to discussions and proposals about the $15,000. The applicant reiterated that she asked Mr Brereton to confirm the details of their conversation which took place on 7 September 2011 and that he did not specifically do this but she believed that Mr Brereton would do the right thing and that when the business was sold he would pay her $15,000 for the additional work that she had undertaken over many years.

22 The applicant agreed that she was paid for all hours she worked undertaking cleaning duties plus a base rate for undertaking additional duties. The applicant maintained that she had to work seven days a week to undertake her role effectively and the applicant stated that in doing so she used her own phone for approximately four years and her own car to transport items when cleaning houses for the respondent and she stored goods in her shed for the respondent for many years. The applicant maintained that Mr Brereton told her that he would look after her after the business was sold but he did not do so.

23 The applicant stated that when she saw her solicitor on 2 September 2011 they had a general discussion about her options and on 5 October 2011 they discussed the respondent paying her $15,000.

24 The applicant maintained that she did not pressure Mr Brereton to reach an agreement on 7 September 2011 and she said that she returned to work after that date because Mr Brereton verbally agreed to pay her $15,000. The applicant stated that she would have continued working for the respondent for a further eight months under their agreement however when Mr Brereton told her he would not pay her the $15,000 she resigned. The applicant denied that Mr Brereton told her that he would go bankrupt if he paid her $15,000. The applicant stated that she asked the respondent for $15,000 because Mr Brereton continually told her that he would look after her when he sold the business and it was on this basis that she took on more responsibilities.

25 Under re-examination the applicant stated that she sent an email to Mr Brereton on 9 September 2011, which should have been sent on 8 September 2011, because Mr Brereton wanted her to put in writing exactly what she was seeking from him so he could give it to his solicitor. Her reference in this email to '[a]s agreed yesterday' was to their discussion on 7 September 2011.

26 Mr Edward Fleming is a lawyer based in Broome. Mr Fleming made notes of two meetings he had with the applicant on 2 September and 5 October 2011 and a telephone discussion with Ms Height on 5 October 2011 (Exhibit A1, document 21). Mr Fleming stated that on 2 September 2011 he met the applicant to discuss the respondent's business and the applicant's employment with the respondent and on 5 October 2011 they discussed a dispute the applicant had with the respondent. Mr Fleming recalled the applicant telling him that Mr Brereton told her that he would look after her if the business was sold and the applicant had interpreted this to mean that she would receive a financial reward. There was also an issue about expenses the applicant had incurred on behalf of the business and he suggested that she write a list of these expenses and consider putting an offer to Mr Brereton to resolve their dispute. The applicant told him that Mr Brereton was seeking legal

advice and was preparing an agreement and later that day he contacted Ms Height and she told him that she needed to contact Mr Brereton and she anticipated sending a final agreement to Mr Brereton for approval in the next week or so. Mr Fleming asked her to send him a draft of the proposed agreement when it had been approved by Mr Brereton however he heard nothing further from her.

27 Under cross-examination Mr Fleming stated that he expected a proposal to settle the dispute between the applicant and the respondent to come from Ms Height and she told him she had been instructed to prepare a final agreement to send to Mr Brereton but he was unaware of the terms of the agreement. Mr Fleming stated that he had a discussion with the applicant on 2 September 2011 about setting up her own business or buying the respondent's business and their discussion on 5 October 2011 was about quantifying a potential claim against the respondent based on expenditure she had incurred over the years for the business. Mr Fleming was unaware that an agreement had been reached between Mr Brereton and the applicant but he understood that there had been a discussion between the applicant and Mr Brereton about an agreement to be confirmed in writing but the applicant did not tell him the terms of this agreement. The applicant may also have told him at that point that she had resigned. Mr Fleming agreed that during a discussion with Ms Height on 5 October 2011 she told him that she was still obtaining instructions. Mr Fleming could not recall if the applicant told him that Mr Brereton had reneged on an agreement to pay the applicant $15,000.

Applicant's submissions

28 The applicant submits that under her contract of employment the payment of $15,000 to her was agreed orally between the applicant and Mr Brereton on 7 September 2011. The applicant claims that subject to certain terms she would be paid a lump sum of $15,000 which is a benefit for the purposes of s 29(1)(b)(ii) of the Act. The respondent repudiated this condition and the applicant accepted the repudiation by electing to resign and thereupon brought the contract of employment to an end. The applicant then became entitled to claim her lump sum.

29 The applicant submits that for the majority of the period of her employment with the respondent she was left to run the respondent's business as Mr Brereton lived in Adelaide after early 2005. The applicant's job was stressful and involved a range of duties and the applicant felt unsupported by Mr Brereton and she expressed this in three letters to him. Towards the latter part of 2010 the applicant spoke to Mr Brereton by telephone and told him that she would be leaving her employment within a year. In her letter to the respondent dated 27 June 2011 the applicant stated that 10 July 2011 was her final day and on 10 July 2011 she called the respondent to remind him that it was her last day. Mr Brereton said he had several people interested in buying the business and it was on this basis that the applicant agreed to remain working for the respondent to enable him to sell the business. On 6 September 2011 the applicant telephoned Mr Brereton and told him that she had had enough and was resigning. On 7 September 2011 Mr Brereton telephoned the applicant and asked her if she would return to work for him and the applicant maintained that during this conversation they agreed on a lump sum payment of $15,000 being paid to the applicant for previous expenditure by her on the respondent's business and for unpaid hours worked, this payment would be deferred until the sale of the business or on a date eight months from 7 September 2011 whichever occurred first and the applicant would continue working for the respondent. Mr Brereton was also to arrange for a solicitor to prepare a written agreement confirming these terms and the respondent was to have the solicitor confirm directly with the applicant on or before 14 September 2011 that the preparation of the agreement was underway.

30 The applicant gave evidence that Mr Brereton accepted her verbal proposal and the respondent therefore reached an oral agreement with her which was to be confirmed in writing by a solicitor which he was to arrange. The applicant sent an email to the respondent on 9 September 2011 confirming the agreement they reached on the telephone and based on this agreement she returned to work on Friday 9 September 2011 and worked for the respondent until 28 September 2011. On 16 September 2011 Ms Height asked the applicant about the reason for paying her $15,000 and the applicant gave evidence that on 21 September 2011 Mr Brereton arrived in Broome and told the applicant that he would not pay her the $15,000 as he could not afford to do so. The applicant discussed the matter further with Mr Brereton and asked him that if he had a buyer would he change his mind about the $15,000 and she called a person to speak to the respondent about a possible purchase. The respondent stayed in Broome and worked during the following week in the business cleaning aircraft and the applicant resigned on 28 September 2011.

31 The applicant argues that under cross-examination she reiterated that an agreement was reached with Mr Brereton during their telephone conversation on 7 September 2011 and the applicant gave evidence that she did not respond to Mr Brereton's email dated 7 September 2011 as she trusted him to do the right thing and the applicant denies that all that took place between her and the respondent were discussions and proposals.

32 Based on the evidence and documents tendered in the proceedings the applicant submits that the following findings are open to be made. The applicant and the respondent had an employment relationship whereby the applicant had almost the entire running of the business, with Mr Brereton permanently living in Adelaide. In June 2011 the applicant informed the respondent in writing that her last day would be 10 July 2011. On 10 July 2011 the applicant rang the respondent and agreed to continue working whilst the respondent tried to sell the business. On 6 September 2011 the applicant resigned and on 7 September 2011 the respondent rang the applicant with the intention of trying to get her to return to work and during this telephone discussion an agreement was reached for the respondent to pay the applicant $15,000. The applicant submits that this was a new employment contract.

33 The applicant relies on the following evidence given by her in support of the agreement as claimed being in place. The applicant gave evidence that during the telephone conversation with Mr Brereton on 7 September 2011 an agreement was reached with him and she confirmed the terms of the agreement in an email to the respondent which opens with the words 'as agreed' and was not rejected at the time or at all by the respondent (Exhibit A1, document 8). The email from Ms Height on 9 September 2011 confirms that Mr Brereton had met her with respect to a proposed agreement, which is consistent with the applicant's evidence that she had agreed with the respondent that the agreement was to be confirmed in writing by a solicitor. In the absence of any evidence given by Mr Brereton an inference can be drawn that he saw the solicitor to instruct her to prepare the agreement he had concluded orally with the applicant. The conversation the applicant had with Ms Height on

16 September 2011 when Ms Height asked the applicant what the $15,000 was for was consistent with the applicant's evidence that an agreement had been concluded to pay the $15,000. The applicant contacted Ms Height to see what progress had been made about the preparation of the agreement and if no agreement was being prepared at that time Ms Height would have said so. The applicant gave the respondent more time to prepare the agreement and Mr Brereton referred in an email to 'getting everything in place' (Exhibit A1, documents 16 and 17). There was a telephone conversation between Mr Fleming and Ms Height on 5 October 2011 whereby she anticipated sending a final agreement in the next week or so. The approach by Mr Brereton to the applicant on 7 September 2011 when he rang her to try and get her back to work 'and the means by which she would do so' is consistent with the applicant's evidence and she says she came back to him with her proposal which he accepted and agreed to be put into writing by a solicitor (Exhibit R2, point 14). The respondent's statement to the applicant at the Broome airport on 21 September 2011 that he would not pay her the $15,000 is also consistent with an agreement having been reached.

34 The applicant submits that there is evidence supporting the contention that Mr Brereton repudiated the agreement to pay the applicant $15,000. The applicant testified that he came to Broome and told her she was not going to be paid the $15,000 and this is reflected in the respondent's further and better particulars (Exhibit R2, point18). That the applicant accepted the repudiation is evidenced by the applicant testifying that she was shocked and upset by the announcement in Broome on 21 September 2011 and she talked through the matter with Mr Brereton and introduced him to a possible buyer for the business. She hoped that Mr Brereton might change his mind and continued working during the week but on 28 September 2011 she resigned and left the workplace as she said that there was nothing there for her. The applicant submits that this was acceptance of the repudiation.

35 The applicant argues that the benefit being claimed is an industrial matter pursuant to the definition of industrial matter in s 7 of the Act and if this benefit or condition of the contract of employment was repudiated then upon acceptance of the repudiation, the contract of employment came to an end and the applicant thereupon became entitled to claim for the breach (see *Macken's Law of Employment* 339 - 340). The applicant rejects the respondent's reliance on ***Hotcopper Australia Ltd v Saab*** (2002) 82 WAIG 2020 whereby it claims that the quantum claimed by the applicant is not an industrial matter and the applicant submits that this authority with respect to the definition of an industrial matter has been overtaken by the conclusions reached by the Industrial Appeal Court in ***Matthews v Cool or Cosy Pty Ltd and Anor*** (2004) 84 WAIG 2152 and the Full Bench in ***Saldanha v Fujitsu Australia Pty Ltd*** (2008) 89 WAIG 76.

36 The applicant submits that the rule enunciated in ***Jones v Dunkel*** (1959) 101 CLR 298 ought be applied in this case. The rule provides that the unexplained failure by a party to give evidence or to call a witness or tender certain documents may, in appropriate circumstances lead to the inference that the uncalled evidence would not have assisted the party's case and the failure to call a witness or tender documents can allow evidence that might have been contradicted by such a witness or document to be more readily accepted. Further where an inference is open from the facts proved, the absence of the witness or document may be taken into account as a circumstance in favour of drawing the inference (***RPS v The Queen*** (2000) 1999 CLR 620). However the absence of the witness or document cannot be used to make up any deficiency in the evidence and it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot also fill gaps in the evidence or convert conjecture and suspicion into inference (***Schellenberg v Tunnel Holdings Pty Ltd*** (2000) 200 CLR 121). The rule is said to only apply where a party is required to explain or contradict something and what a party is required to explain or contradict is thrown up by the pleadings and the course of the evidence and no inference can be drawn unless evidence is given of facts requiring an answer (***Schellenberg v Tunnel Holdings Pty Ltd***).

37 The applicant contends that the following matters emerge from the evidence and are relevant to deciding the issues in this case and they call for an explanation and contradiction and in the absence of such explanation or contradiction, the Commission should draw adverse inferences against the respondent. These matters include the respondent's appointment of Ms Height and the continuing reference to her work for the purpose of preparing an agreement between the parties, Mr Brereton's call to the applicant on 7 September 2011 and the agreement reached between Mr Brereton and the applicant. There was also a failure by the respondent to reject the applicant's email to Mr Brereton dated 9 September 2011.

38 The applicant therefore submits that she is entitled to an award in her favour that the respondent pay her $15,000, plus interest from 28 September 2011.

Respondent's submissions

39 The respondent relies on the following in support of its claim this application should be dismissed on the basis that the applicant is not owed the $15,000 she is seeking.

40 No document shows that the applicant was required to purchase goods or services on behalf of the respondent's business or to spend her own money in doing so and this activity was not a requirement of her contract of employment with the respondent. Despite not being required to do so the applicant had been paid for all expenses she claimed and she has not made any further claims for expenses. The applicant conceded that she could work as much or as little as she wished and although the applicant would not concede it, there is no evidence that she was required to work as long as she said she did or to do all of the additional tasks that she claimed she undertook. On the contrary many of the applicant's own documents indicate that she did this of her own volition and without the knowledge, permission or approval of the respondent. The applicant also submitted claims for payment based on tasks performed and all of her claims were paid by the respondent.

41 The applicant gave evidence that after her discussion with Mr Brereton on 6 September 2011 she asked Mr Brereton to email the details of their discussion and the things they had agreed and she said Mr Brereton did that. However the email Mr Brereton sent on 7 September 2011 does not contain the terms the applicant says were agreed.

42 The respondent submits that the applicant gave contradictory evidence. The respondent made specific offers for the applicant to return to work and her base payment was increased from $250 to $280 from 11 July 2011. The applicant said there was a discussion with Mr Brereton on Tuesday 6 September 2011 whereby she said Mr Brereton mentioned not wanting to go bankrupt and he said that prospect scared him and in cross-examination the applicant later denied that it was during the

discussion in which she says the agreement was made and she said it occurred 'before we even got to the $15,000 in the discussion' (T68). The applicant's later evidence was that on 21 September 2011 Mr Brereton told her he could not afford to pay $15,000 and immediately after that discussion the applicant invited Mr Brereton to her home for a coffee and she said that she then asked Mr Brereton if he would honour this agreement if he sold his business and she said Mr Brereton said 'possibly'. The respondent also argues that the applicant resigned on 28 September 2011 because she felt that she was being undermined by Mr Brereton by him bringing Nadia to work and because Mr Brereton was 'getting colder' towards her and not because of any repudiation of her contract of employment as claimed.

43 The respondent argues that the weight of evidence supports a finding that Mr Brereton did not make an agreement verbally or otherwise with the applicant to pay her $15,000. The respondent concedes that there was a discussion between the applicant and Mr Brereton in which the applicant asked for $15,000, which is consistent with Mr Fleming's evidence, but Mr Brereton did not at any time concede that he agreed to pay the applicant $15,000 and there is no evidence to corroborate the applicant's assertion that an agreement was reached with Mr Brereton to pay her $15,000. Furthermore, other evidence contradicts this (see Exhibit A1 pages 7, 8, 9, 10 document 8, 14 document 13, 16 document 16 and pages 21 to 23). Mr Fleming was not told of the agreement on 5 October 2011 and even on the applicant's best case the discussion she recounts at the hearing is not evidence that a firm agreement had been reached. The applicant gave evidence that after Mr Brereton is alleged to have first said 'I can do that' the applicant's proposal changed and there was no agreement at that point. There is also no evidence of an agreement being reached before Mr Brereton is alleged to have next said 'I can do that' and when he is alleged to have next said 'I can do that' it is in reply to a combination of propositions from the applicant and it is by no means clear that he is agreeing that an agreement has been made. Mr Brereton's response is in reply to a hypothetical proposal by the applicant as the applicant said: 'I said, "Can we go ahead with this then if I say I will stay on for eight months and I will assist you with finding a buyer and I will continue to look after our clients as I have always done" …'. Mr Brereton's alleged second statement 'I can do that' is, when taken in the context as stated by the applicant, his agreement or an undertaking to see his solicitor about the applicant's proposal. In other words whatever they agreed, once a firm agreement was reached, this would be embodied in a formal agreement drawn by Mr Brereton's solicitor. There is no evidence of terms being discussed and agreed as claimed by the applicant.

44 The email from Ms Height on 9 September 2011 specifically refers to a 'proposed agreement' and not an 'agreement' and this email was sent to the applicant before the applicant sent Mr Brereton her reply to his email and Ms Height's email was sent for the purpose of confirming that Mr Brereton had met her and that is what Mr Brereton had agreed to do.

45 The respondent submits that the content of the applicant's email dated 9 September 2011 sent to Mr Brereton is different to her evidence (see Exhibit A1, document 8). There is no evidence of any instructions from the respondent in relation to preparing an agreement involving payment to the applicant of $15,000 and the respondent submits that the applicant made a proposal and was awaiting the respondent's response which she received on or about 21 September 2011.

46 If it is found that the respondent did make an agreement with the applicant to pay her $15,000, the evidence shows that any such alleged agreement was conditional on the applicant continuing to work for the respondent for eight months and that the applicant would only be paid in eight months' time or when the business was sold whichever occurred sooner. Furthermore, the applicant could not explain the basis of her alleged entitlement to payment of $15,000. In these circumstances and given there is no evidence that the respondent's business has been sold the due date for payment has not and cannot be met. As there was no agreement by the respondent to pay the applicant $15,000 there could be no repudiation and no acceptance of repudiation and the applicant did not resign because of any alleged repudiation by the respondent. The applicant's resignation meant that she could not perform the essential terms of the alleged agreement even if the Commission finds that there was one and even if there was an agreement as alleged by the applicant her resignation does not entitle her to the benefit of the alleged agreement (see ***Dellys v Elderslie Finance Corporation Ltd*** [2002] WASCA 161; 82 WAIG 1193 [37] – [38]). The principles in ***Dellys v Elderslie Finance Corporation Ltd*** were confirmed by the Supreme Court of Western Australia recently in ***Rogan-Gardiner v Woolworths Pty Ltd*** [2012] WASCA 31 [43] – [44] (Newnes JA), [92] (Allanson J).

47 The respondent submits that the alleged agreement about the payment of $15,000 was not a proposed agreement which was connected to the employment contract and is therefore not an industrial matter. All of the applicant's claims for payment had been met by the respondent and the applicant's documents show that the alleged lump sum was for 'time and money' that she allegedly 'put into the business'. The quantum of $15,000 was therefore not part of the employment contract. Other than the agreed employment terms, there was no agreement or requirement to put time and money into the business and as a consequence there was no agreement as to the consideration and that was the purpose of the agreement she was seeking but no agreement was reached in any event. The payment sought by the applicant is connected to events that occurred at an earlier point and the applicant used her ongoing employment as bargaining pressure. The respondent submits that the payment was not connected to her contract of employment but was a retrospective claim for things that the applicant claimed to have done without the knowledge, permission or approval of the respondent. The applicant has been paid for all of the work she was contracted to do and did do and that is why a separate agreement was needed if the applicant was to succeed however for those reasons the proposed agreement crosses the line identified in ***Hotcopper Australia Ltd v Saab*** [27]. The respondent also argues that the definition of an industrial matter in this decision has not been overtaken by ***Matthews v Cool or Cosy Pty Ltd and Anor*** and ***Saldanha v Fujitsu Australia Pty Ltd***.

48 When properly characterised the applicant was attempting to use the bargaining power of her employment, for which she already had agreed terms and conditions, her influence over other staff and the contract the respondent had with the aircraft operator to try to secure a lump sum payment of money unconnected to her employment contract. The applicant thought the respondent was selling the business and the applicant wanted to receive a payment for things she had chosen to undertake and because she thought Mr Brereton did not recognise her efforts. The respondent submits that the applicant did not return to work on 9 September 2011 because she had an agreement in place, as claimed by the applicant, but because of an increase in staff wages and because the applicant had agreed to extend time for Mr Brereton to consider his position and take advice (see Exhibit A1, document 16).

49 The respondent argues that no adverse inference should be drawn because Mr Brereton did not give evidence. The respondent argues that there was sufficient documentation as well as the applicant's evidence and that of Mr Fleming to demonstrate that Mr Brereton and the applicant did not reach an agreement that the respondent pay her $15,000. The respondent also submits that the authority contained in ***Jones v Dunkel*** cannot be used to overcome the problem of the applicant not proving that a concluded agreement was reached in the terms she claims.

50 In summary the respondent says that the alleged 'lump sum bonus' was not agreed to by Mr Brereton but even if it was it was unconnected to the applicant's employment and the alleged agreement for payment of $15,000 was in the nature of a private claim of a commercial nature (see ***Hotcopper Australia Ltd v Saab*** [29], [45]).

Findings and conclusions

Credibility

51 I listened carefully to the evidence given by the applicant. In my view the applicant was an impressive witness. I find that she was careful and considered when giving evidence and her evidence was in the main consistent, it was supported by documentation relied upon not only by the applicant but by the respondent and I find that her evidence was given honestly and to the best of her recollection. I also find that her evidence was not broken down during extensive, repetitive and at times confusing cross-examination. In the circumstances I have no hesitation in accepting the evidence given by the applicant. In my view Mr Fleming gave his evidence honestly and to the best of his recollection and I therefore have no issue with the veracity of his evidence.

52 The claim before the Commission is one for an alleged denial of a contractual benefit. The law as to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to an industrial matter pursuant to s 7 of the Act and the claimant must be an employee, the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service, the relevant contract must be a contract of service, the benefit claimed must not arise under an award or order of this Commission and the benefit must have been denied by the employer: ***Hotcopper Australia Ltd v David Saab*** (2001) 81 WAIG 2704; ***Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)*** (1999) 79 WAIG 1867. The meaning of 'benefit' has been interpreted widely in this jurisdiction: ***Balfour v Travel Strength Ltd*** (1980) 60 WAIG 1015; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307.

53 It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts***).

54 In ***Read v Robert Brodie-Hall; Leather-Life*** (2010) 90 WAIG 473 the Full Bench stated the following with respect to the elements of an agreement which make it a contract capable of enforcement:

> To form a contract the elements required before an agreement will be enforceable are, an intention to create contractual or legal relations; acceptance of an offer; and consideration.
>
> The test of intention is generally objective and is not concerned with the real intentions of the parties. As Le Miere J observed (with whom Wheeler and Pullin JJA agreed) in *Ireland v Johnson* [2009] WASCA 162; (2009) 89 WAIG 2255 [47]:
>
> > There is no legally enforceable contract unless the parties intended to create contractual relations. In *Ermogenous v Greek Orthodox Community* Gaudron, McHugh, Hayne and Callinan JJ explained:
> >
> > > Although the word 'intention' is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties [25].
> >
> > The enquiry whether the parties intended to create contractual relations may take account of the subject matter of the arrangement, the status of the parties to it, their relationship to one another and other surrounding circumstances. The search for the 'intention to create contractual relations' requires an objective assessment of the state of affairs between the parties: *Ermogenous v Greek Orthodox Community*; Gaudron, McHugh, Hayne and Callinan JJ [25].
>
> In this matter whilst the appellant may have intended to create a legally enforceable agreement when what was said by the appellant and the respondent in the conversation that was recorded by the appellant is examined objectively, an intention to form contractual legal relations cannot be inferred. The principle of objectively was explained by the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]:
>
> > This Court, in *Pacific Carriers Ltd v BNP Paribas* ((2004) 218 CLR 451), 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 (*Pacific Carriers Ltd* at 461 - 462 [22]).

…

Even if it could be said that the intention of the parties was to create a legally enforceable contract, without consideration the terms of the contract are unenforceable. To satisfy the requirement of consideration, the appellant must have provided something valuable in return. Valuable consideration may consist of either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other in respect of the promise: *Currie v Misa* (1875) LR 10 Ex 153 (162); *Macken's Law of Employment* (6th ed, 2009) [4.65]. In this matter the appellant provided no consideration. He did not promise to do anything in return. Consequently, his claim must at law fail [91] – [93], [96].

55 Paragraph 2 sets out the agreed facts with respect to the applicant's employment with the respondent.

56 There is no issue in this matter and I find that at all material times the applicant was an employee of the respondent and she was employed under a contract of service and it is common ground and I find that the benefit the applicant is claiming does not arise under an award or order of this Commission.

57 The respondent claims that the $15,000 being sought by the applicant does not relate to an industrial matter. The definition of industrial matter in s 7 of the Act reads in part as follows:

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

After considering the relevant authorities and the applicant's evidence about the basis for this payment being made to the applicant during her discussion with Mr Brereton on 7 September 2011 I find that the applicant's claim is an industrial matter for the purposes of s 7 of the Act (see ***Matthews v Cool or Cosy Pty Ltd and Anor***; ***Saldanha v Fujitsu Australia Pty Ltd***). I find that the quantum the applicant is seeking relates to an industrial matter as defined in s 7 of the Act and her claim arose out of her work as her claim involves a quantum to be paid to her in return for the applicant undertaking an increasing range of managerial duties and time expended by the applicant undertaking these duties which had not been recompensed during her employment with the respondent, as well as recompense for work-related expenses incurred by the applicant in order for her to undertake these duties.

58 I reject the respondent's claim that the additional duties undertaken by the applicant in order to fulfil her managerial role were undertaken of her own volition and without the knowledge and approval of the respondent. I find that Mr Brereton was aware of the additional duties being undertaken by the applicant in her role as manager of the respondent's operations in Broome and I find that he was aware that these duties had become more onerous over time (see applicant's letters sent to Mr Brereton dated 13 November 2005, 27 June 2011 and 29 June 2011 and the applicant's email to Mr Brereton dated 9 September 2011). Furthermore, at no stage did Mr Brereton instruct the applicant not to undertake these increasing managerial duties. I also note that in September 2011 Mr Brereton confirmed in an email to the applicant that he appreciated the efforts she had put into managing the respondent's business to date and the level of service she had provided to the respondent's customers (see Mr Brereton's email to the applicant dated 7 September 2011).

59 The applicant maintains that she and Mr Brereton reached a verbal agreement during a discussion on 7 September 2011 that Mr Brereton would pay her $15,000. This payment was in return for her lengthy and good service with the respondent over many years, it was in consideration of her undertaking a range of managerial duties on behalf of Mr Brereton which increased over time during her employment with the respondent and was also in return for costs incurred by the applicant with respect to a range of items related to her employment including telephone and vehicle expenses. As part of this agreement, and in order to assist Mr Brereton, the applicant agreed that the payment of this quantum could be deferred until the sale of the business or on a date up to eight months from 7 September 2011 whichever occurred first and the applicant would continue working for the respondent during this period managing the business. The applicant also claims that Mr Brereton agreed to make this payment to her in addition to continuing to pay her the normal entitlements paid to her by the respondent. The applicant argues that she resigned from the respondent soon after Mr Brereton indicated to her that he would not pay her $15,000 and in doing so the applicant claims that Mr Brereton repudiated her contract of employment with the respondent.

60 The respondent has not paid the applicant the $15,000 she is seeking as it argues that no agreement was concluded between Mr Brereton and the applicant on 7 September 2011 to pay her $15,000 and their discussion on this date only related to a proposed agreement. The respondent also claims that all monies owing to the applicant by the respondent have been paid to her and any additional duties undertaken by the applicant for which she is claiming $15,000 were undertaken of her own volition and without Mr Brereton's knowledge or approval.

61 After carefully considering the evidence as well as the documentation tendered during these proceedings, I find that the applicant's contract of employment with the respondent included a term that the respondent pay the applicant $15,000 and that this quantum was to be paid to the applicant in addition to her regular entitlements. I find that during a telephone conversation between the applicant and Mr Brereton on 7 September 2011 they agreed that the respondent would pay the applicant $15,000 in return for the applicant having undertaken an increasing range of additional duties and tasks since she commenced employment with the respondent. I also find that this quantum was to compensate the applicant for costs incurred by her notwithstanding that the applicant had not previously formally requested reimbursement from Mr Brereton of these costs.

62 I find that the elements set out in ***Read v Robert Brodie-Hall; Leather-Life*** with respect to the formation of a contract between the applicant and Mr Brereton with respect to the applicant's claim for payment of $15,000 have been met. I find that the term of the applicant's contract of employment that the respondent pay the applicant $15,000 arose out of an intention by the applicant and Mr Brereton to create a contractual relationship whereby both agreed that $15,000 would be paid to the applicant by the respondent in return for the duties undertaken to date by the applicant and expenses incurred by her whilst managing the respondent's business in Broome and I find that the payment of this quantum was agreed to and accepted by both parties. I find that as part of the agreement Mr Brereton had up to eight months to pay the applicant $15,000, given the respondent's cash flow difficulties at the time, and that during this period the applicant agreed that she would continue to manage the respondent's operations. I find that the applicant and Mr Brereton also agreed that if the business was not sold during this period, $15,000 would be paid to the applicant at the end of this eight month period. I find that during this discussion and in order to ensure clarity and confirmation of the terms of this agreement the applicant requested that by the following Wednesday, Mr Brereton arrange to have the terms of this agreement confirmed in writing and he agreed to do so and I find that the applicant's email to Mr Brereton dated 9 September 2011 is in accord with and reflects an agreement being reached between the applicant and Mr Brereton (Exhibit A1, document 8).

63 I find that there was consideration with respect to this agreement as the payment of $15,000 was in return for the applicant having undertaken an increasing range of managerial duties over some years in Broome in Mr Brereton's absence and that this payment was also in return for costs incurred by the applicant in fulfilling her managerial role. Even though Mr Brereton agreed to pay this quantum to the applicant after she had indicated that she was resigning from the respondent and Mr Brereton wanted to ensure that the applicant continued managing the respondent's operations in Broome in the short term at least, I find on the evidence that the payment of the $15,000 was requested by the applicant and not demanded and that the applicant's request for $15,000 to be paid to her was agreed to by Mr Brereton.

64 I find that in line with this agreement and soon after Mr Brereton's discussion with the applicant on 7 September 2011, he contacted Ms Height of Tindall Gask Bentley lawyers in South Australia about reducing the agreement he had reached with the applicant on 7 September 2011 to writing and I find that Ms Height emailed the applicant on 9 September 2011 confirming that Mr Brereton had met her in relation to the payment of $15,000 to the applicant. I find after Mr Brereton indicated in an email to the applicant on 12 September 2011 that he was concerned about 'getting everything in place by Wednesday to meeting (sic) your requirements' the applicant emailed Mr Brereton stating that she would allow him an extension of time in order to confirm their agreement in writing and I find that this also adds weight to my conclusion that the applicant reached an agreement with Mr Brereton on 7 September 2011 in the terms specified by her (Exhibit A1, documents 16 and 17). I find that Mr Fleming's evidence also corroborates the applicant's evidence that she had an agreement with Mr Brereton which would be reduced to writing as he had a discussion with Ms Height about being sent a copy of the agreement between Mr Brereton and the applicant. I find that the applicant continued to work for the respondent without incident subsequent to this date undertaking her normal role, including managerial duties. I find that on or about 21 September 2011 Mr Brereton visited Broome and told the applicant that he was not going to pay the $15,000 he had agreed to pay her on 7 September 2011 as he could not afford to do so and I find that after Mr Brereton indicated to the applicant that he would not pay her $15,000 she resigned on 28 September 2011.

65 The following transcript extracts contain the applicant's direct and uncontradicted evidence whereby she confirms that an agreement was reached between the applicant and Mr Brereton on 7 September 2011 that the respondent pay her $15,000:

> **MULLALLY, MR**: All right. But anyway in that conversation you resigned, but what I want you to look at is the second sentence says: "That the applicant failed to roster staff on for normal duties on that day". What's your evidence with respect to the other staff on that day?---I do my rosters on a Saturday afternoon or Saturday morning, depending on how much time, they go on to my laptop, I print them out and I take a copy to work. They got into a plastic sleeve at work and that copy is then used to scribble on, we make changes if there is staff that need to go – change around. So that's the one we use as a copy to do details on, so to speak. So if there are any aircraft that are late we jot them on there. If there is anything that I needed to be reminded about it gets jotted on there. At the end of the week I then will take it home and I will change my roster on my laptop to reflect the changes on our messy roster and I will send that roster – email that roster, the good roster, to Mr Brereton. So if – on that particular day I had rostered staff on, but when I sent the roster through for pays to be done it had all been cleaned up and showed that there were no staff on there because no staff worked. But on the actual first roster there had been staff well and truly rostered on.
>
> Right. And why didn't the staff work that day?---Because I rang them up and told them that I had resigned and that I would not be there and as far as I knew there was nobody that could take them airside and I hadn't organised anybody to do so.
>
> *All right, okay. Now if you would just put that document to one side then, please. Following your resignation on that day did you receive any – any phone calls from the respondent?---Yes, I did. I received one the next morning at about 8.30. He thanked me for taking the phone call and talking to him, and I said, "Well wouldn't I?" I didn't have a problem talking to him. He said to me, "I don't want to go bankrupt, I've got Qantas sending cleaners up from Perth to clean. I would like to assign the business over to you for the time and effort that you have – and the hard work that you've put in to running my business. Bankrupt – going bankrupt scares me", he said, and I said, "Well I don't want your business, Robert. It's your business and I don't want to take it away from you". And he said, "Well can I assign you a portion of the business to get you to go to work as – to manage for me or is there anything else that I can do for you?" and I said, "Yes", because I'd been thinking about it all week, and I said, "Yes, you can give me $15,000 for the amount of time and energy and expenses that I have put into the business. You don't have to pay now you can pay in – when you sell the business", and he said, "I can do that", he said, "But selling the business won't happen overnight", and I said, "Well, okay", I said, "Can we go ahead with this then if I say I will stay on for eight months and I will assist you with finding a buyer and I will continue to look after our clients as I have always done", and so I said, "Is eight months enough time?" and he said, "Yes, that should be enough", and I said to him that at the end of eight months he will pay me regardless,*

and I said, "I want this done properly through a solicitor this time", and I said, "I want something in writing by next Wednesday to confirm that you have gone to a solicitor to get an agreement made up for what we have agreed on", and he said, "Yes, I can do that", and he said, "When can you restart at work?" and I said, "I can restart again on Friday, I can get staff organised for then", and he said, "Okay", and he agreed totally to everything that I had asked him, and he said that he could do – do that.

All right. And was Friday, 9 September?---I believe so.

All right. Did you return to work on the 9th of September?---I did.

And did you - - -?---Sorry, in that – in that previous phone conversation, I asked Mr Brereton to actually put it into an email, send me a copy of an email with what we had just discussed with our conversation on the telephone regarding the agreement.

And did he send you an email?---He did.

Is that in the book of documents, it's at page 7, I think?---Yes, page 7.

You recall that as the email you received from - - -?---Yes, it is.

- - - Mr Brereton?---Yes.

All right. Did you receive or have any communication from Mr Brereton's solicitor?---Yes, I did. She sent me an email also on the Friday to confirm that Mr Brereton had - - - (emphasis added)

(T 22 - 23)

Do you know what date it was?---I believe it was *the 21st, which was a Tuesday*.

All right. Well what happened on that day between you and Mr Brereton?---I was talking to security out the front. I'd gone to the bathroom and I was talking to security about a loo that needed fixing and suddenly the head security officer called out to me and said that there was someone here to see me. I looked up a few times and seen this gentleman standing there, but I hadn't sort of given much thought to it. So anyway I looked around the room and then I walked back up to the security officer and he was standing with this fellow with the hi-vis vest on and I looked at him and I looked at Fred and I sort of shrugged my shoulders as if to say, "Well who wants me?" and he said, "This fellow here", and I looked closer and it was actually Robert. I didn't even recognise him, it's been that long since I'd seen him. We went through because we had a plane on the ground. I'd already sent my staff out to the aircraft at that point in time. We – Robert and I both went over to the aircraft. We cleaned the aircraft. We came off the aircraft. *Once the staff had cleaned away and had gone away he and I went and sat over in a corner of the yard and started talking, and he told me that there was no agreement and that he was not going to pay me the $15,000 because he couldn't afford it.* I'd actually been crying over all of this because it had been so stressful. He told me not to cry, that he had 'F-d' up really badly and it wasn't my fault that any of this had happened. So he then told me that I wasn't going to get the $15,000 there was nothing on the table because he could not afford it. So we spoke a bit longer and then I said, "Would you like to come home for a coffee?" and – where it was quieter. So I took him home and we spoke for sometime back and forth. I finally said to him, "Well if you sell the business would you still keep your agreement to pay me $15,000?" and he said, "Possibly", and I said, "Well I know someone who I can ring who will – might be interested in the business. Do you want me to ring them now?" and he said, "Yes, if you like". So I rang Simon Graham (?) who had spoken to me a week earlier. He's a pilot on one of the aircrafts. I got him to speak, Robert and Simon spoke for a while, gave the phone back to me, and then I hung up from Simon, we went back to work and cleaned the next plane and then Robert went his way and I went my way. (emphasis added)

(T 25 - 26)

Can I take you to page 10 of those - of the booklet? Down the bottom, with the "8" in the circle there?---Yes.

That's an email dated Friday, 9 September?---Yes.

From - from you to Robert?---Yes.

And it says "As agreed yesterday"?---Yes, because I actually had this formed up and ready to go on the Thursday, but the emails were all down, and I couldn't send any emails whatsoever on the Thursday, and that is my fault, because I did not go back and correct it. When I was drafting it, I put it into drafts. When I could get emails working again, I pulled it back into my inbox, and I just put the bit on the top, and I did not edit down the bottom. So it refers to Thursday that it was.

All right?---I mean, to the Wednesday when I actually spoke to him.

All right. And you say you would like an agreement?---Yes, meaning the documents. I would like an agreement written up, and the documents.

It's not clear from that what you're saying to him at that time, is it?---Well, it seems clear to me, because I'm not a solicitor. So I would like an agreement; so that would be in layman's terms. So I mean documents.

That is what you said to him whenever this conversation took place, isn't it? You did say that you wanted to reach an agreement whereby he would pay you $15,000?---I asked him whether he would pay me $15,000, and what it was for, and he agreed to that.

And you say that there were terms - you proposed terms to that agreement?---That is correct.

You were going to continue working?---That is correct.

Yes, but you didn't do, did you?---No, because he reneged on his $15,000 in paying me, so I resigned because there was no point in being there.

Well, that's not the reason you gave for your resignation this morning?---No, because he had undermined my position, he had already told me, so - and I said "There is nothing left here for me".

That's correct?---That is correct.

That's what you did say. So after he told you he wasn't going to pay you - - -?---Yes.

- - - you stayed on working, didn't you?---I did stay on working.

And then he turned up - - -?---Yes.

- - - something you'd been asking him to do for years?---Yes.

And when he did turn up - - -?---Yes.

- - - no one wanted him there?---No, because of the way he treated us.

No?---Yes.

It wasn't what you said this morning?---But it was the way he treated us.

You said he was slow on the planes - - -?---Yes.

- - - he was getting in the way - - -?---Yes.

- - - he was causing all sorts of problems - - -?---Yes.

- - - and people didn't want him there?---Didn't want him at work; they - and actually doing the work.

In his business?---Excuse me, he didn't know how to do it.

In his business?---Mr Brereton sits here and writes it takes 15 to 22 minutes to clean an aircraft. Well, I'm very sorry; if I took 22 minutes to clean an aircraft, I would be hauled over the coals.

All right. But your reasons for resignation this morning were that he came along with Nadia?---Yes.

He knew that you were going to be leaving, didn't he? You told him you - - -?---At

- - -

- - - you were going to resign if you didn't get the $15,000, didn't you?---Way back.

I think you told him that just - just prior to - at around the times of the discussion?---*When he came to me, and came to the airport, and told me that I wasn't getting $15,000, I was prepared at that point to believe that he would follow through with the agreement when I asked him if he - if I found a buyer for him, would he still go through with the agreement. He said to me "Possibly"*.

That's right?---That's right. So I found a buyer - - -

Well, that's not - - -?---A potential buyer, and I believed that he would follow through with his side.

You made a phone call, you said?---Yes.

You handed the phone to him?---Yes. (emphasis added)

(T 50 - 51)

HOWLETT, MR: No, down a few lines from that.

HARRISON C: *"The respondent advised that he would seek legal advice regarding your demands"?*

THE WITNESS: *No, he never said that at all, because it wasn't a demand at all whatsoever. He never told me he was going to seek legal advice; he told me he was going to contact his solicitor to make up the agreement document, and that he would get her to contact me to confirm that he had been there.*

HOWLETT, MR: *All right. Can I take you to your book of - booklet of documents, page 9? This is Friday, 9 September - - -?---Yes.*

- - - after you've returned to work late in the afternoon. And it says "Regards" - "With regards to your grievances, I do need you to put everything in writing so that I have a clearer picture of what your issues are. Firstly, though, I need to ask you to put your request to me immediately in a short, brief email so that I can meet with the lawyer today, and provide them with exactly what you are asking me". Isn't that consistent with you being told that he would seek legal advice regarding your demands?---No, I don't read it that way. See - and he's got here "My request"; it was a request, not a demand.

All right?---If it had been a demand, he should have written "demand", then.

All right. But change "demand" to "request"; it's accurate, isn't it?---No. Not seeking legal advice; I do not read it like that.

But that's what this document is telling you - asking you here, isn't it, and telling you?---No, he's telling me to put my request in writing so that he can go to his solicitor, and tell her exactly what he needs to tell her to put the agreement forward. That's the way I read that.

All right. And immediately before that is the email from the solicitor in which he's met with the solicitor regarding a proposed agreement, and now he's come back to you and asked you for the details. Correct? You were happy with the email from the solicitor, because you thought at least he's gone and spoken to the solicitor, which is what you'd asked for, isn't it?---In relation to the agreement.

Yes?---Yeah. (emphasis added)

(T 52 - 53)

Yes?---Which one?

HOWLETT, MR: *Well, there's nothing in here that shows an agreement about $15,000, is there?---Not from Robert's side of it, except he agreed verbally to it.*

Yes. So what we've got in these documents is discussions and proposals, correct

?---I suppose so, yes. (emphasis added)

(T 57)

HOWLETT, MR: *- - - where is the entitlement to the $15,000 when you've resigned?---Beg your pardon?*

You were going to keep working for eight months, weren't you?---Yes, yes.

And the - you say the - you say the agreement was that he would pay you $15,000 when he sold the business?---Yes.

And he didn't sell it, did he?---Correct.

Right. As far as you know, he hasn't sold it?---Correct.

Or alternatively, you would keep working for eight months - - -?---Mm.

- - - and he would pay you $15,000 in mid May this year?---Yes.

We're not at mid May this year?---That's correct.

Right. So the time for payment hasn't reached?---Exactly right.

And you resigned and didn't work the eight months?---No, I didn't work the eight months, because he told me he wasn't paying the - me the $15,000.

So how can you get the $15,000 if you didn't work?---Because I would have continued working if he had kept up his end of the bargain, and said he would pay me $15,000. (emphasis added)

(T 64 - 65)

66 I reject the respondent's claim that the arrangement agreed to by the applicant and Mr Brereton on 7 September 2011 that Mr Brereton pay the applicant $15,000 was a proposed agreement and that Mr Brereton did not reach any agreement with the applicant that day to pay her $15,000. The applicant gave clear and uncontradicted evidence during the hearing, which I have no hesitation in accepting, that on 7 September 2011 Mr Brereton agreed to pay her $15,000 for services she had rendered to date to the respondent plus costs incurred by her whilst managing the respondent's business in Broome and there was no direct evidence contradicting the applicant's evidence to this effect. Furthermore, the applicant gave undisputed evidence that Mr Brereton told her on 21 September 2011 that he was not paying the $15,000 to the applicant as he could not afford to do so, not that he was not doing so on the basis that there was no agreement between the applicant and Mr Brereton to pay the applicant $15,000.

67 The respondent disputes that the applicant and Mr Brereton reached an agreement that the respondent pay the applicant $15,000 on 7 September 2011 as there was no specific documentation confirming details of the agreement she claimed was reached between her and Mr Brereton on 7 September 2011. I have already noted that the applicant's email to Mr Brereton dated 9 September 2011 refers to an agreement being reached between the applicant and Mr Brereton on 7 September 2011 (see Exhibit A1, document 8). Furthermore, the respondent produced no documentation or evidence disputing the applicant's evidence that she and Mr Brereton reached an agreement to pay the applicant $15,000 on 7 September 2011. Whilst there is reference to a proposed agreement in Ms Height's email to the applicant dated 9 September 2011 I find that this relates to confirming the terms of what was agreed between the applicant and Mr Brereton on 7 September 2011, which included reducing this agreement to writing.

68 I reject the respondent's claim that if the Commission finds that there was an agreement that the respondent pay the applicant $15,000 the applicant is not entitled to this payment as she did not work for the eight month period after this agreement was reached. There is no dispute and I find that the applicant resigned and did not continue working for the respondent after 28 September 2011. I have already found that the agreement reached between the applicant and Mr Brereton on 7 September 2011 included an arrangement whereby she would continue to work for the respondent for a period of up to eight months if necessary to give Mr Brereton time to sell his business and the applicant could be paid $15,000 before this eight month period elapsed if the respondent sold the business. I find that when Mr Brereton indicated to the applicant on 21 September 2011 that he would no longer be bound by his obligation to pay the applicant $15,000 under any circumstance as agreed to by him on 7 September 2011, which was a term of the applicant's contract of employment with the respondent, he repudiated a fundamental term of the applicant's contract of employment with the respondent such that the applicant was within her rights to resign. I find that in doing so the applicant's resignation did not invalidate the applicant's entitlement to the payment of $15,000 as she had a right to treat her contact of employment as being at an end.

69 I reject the respondent's claim that the applicant returned to work on 9 September 2011 because of an increase to her base payment for undertaking managerial duties and to give Mr Brereton more time to consider his position thereby confirming that there was no agreement reached between the applicant and Mr Brereton on 7 September 2011. This proposition was strongly refuted by the applicant and there was no documentation or evidence given by the applicant or the respondent in support of this claim. The applicant gave the following evidence under cross-examination:

So you were off work at the time of the discussion, and the idea was that you would come back - you said you'd come back if he'd paid you the $400 per week that he was going to pay to Sharon?---No, I didn't say I'd come back to work at all. I was coming back on the agreement of $15,000; the 400 came up - I said to him "If you are going to pay Sharon 400

a week, and she's not going to take the job, you can pay it to me". That was all of it; it wasn't a case of "We'll do that, you pay me this and come back to work". I was coming back to work because of the agreement of the $15,000.

(T56)

70 The respondent did not call Mr Brereton to give evidence with respect to this matter and no reason was given by the respondent for Mr Brereton's non-attendance at the hearing. Whilst an adverse inference could be drawn about Mr Brereton's failure to give evidence, given that I have found that the applicant has proved her claim that Mr Brereton agreed to pay her $15,000 on 7 September 2011 and that this became a term of her contract of employment with the respondent, it is unnecessary to deal further with this issue.

71 The applicant is claiming interest on the quantum due to her under her contract of employment with the respondent. No submissions were made by the applicant or the respondent in relation to this claim however it is clear that the Commission has no power to award interest on a denied contractual benefit claim (see ***McLoughlin v Western Power Corporation*** (2000) 80 WAIG 3084).

72 As I have found that the applicant had an entitlement to be paid $15,000 under her contract of employment with the respondent and when taking into account s 26(1)(a) of the Act considerations and the duty on the Commission to consider the relief being sought on the basis of equity, good conscience and the substantial merits and as this amount has not been paid to the applicant an order will now issue that the respondent pay $15,000 to the applicant.

2012 WAIRC 00339

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUDITH LOUISE TRIGWELL
	APPLICANT
	-v-
	ROBERT DAVID BRERETON T/AS AIRCRAFT CLEANER EXTRAORDINAIRE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 6 JUNE 2012
FILE NO/S	B 184 OF 2011
CITATION NO.	2012 WAIRC 00339

Result	Upheld and Order Issued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Mr D Howlett (of counsel) instructed by Heuzenroeders Lawyers and later Mr R Brereton in person

Order

WHEREAS on 30 May 2012 the Commission issued Reasons for Decision and a Minute of Proposed Order in this matter; and

WHEREAS on 31 May 2012 the respondent requested a Speaking to the Minutes; and

WHEREAS on 5 June 2012 the Commission conducted a Speaking to the Minutes of Proposed Order; and

WHEREAS the respondent requested that the order be amended to include the applicant's payment details; and

WHEREAS the Commission advised the respondent that it was not normal practice to include this information and the Commission was not disposed to amend the order in the terms sought by the respondent; and

FURTHER at the Commission's request the applicant's representative undertook to provide the applicant's bank account details to the respondent the following day by email;

NOW HAVING HEARD Mr P Mullally as agent on behalf of the applicant and Mr D Howlett of counsel on behalf of the respondent and later Mr R Brereton in person, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1 DECLARES that the respondent denied the applicant a benefit under her contract of employment.

2 ORDERS that the respondent pay the applicant $15,000 within 14 days of the date of this order.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
David Ayres	Terry Murphy Dept of Child Protection	U 92/2012	Chief Commissioner A R Beech	Withdrawn
Leigh Smith	Eric & Nicole Corke	U 74/2012	Chief Commissioner A R Beech	Discontinued
Santo La Rosa	Western Meat Packers Group	B 71/2012	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2012 WAIRC 00342

DISPUTE RE POSTING OF PROPOSED GUIDE ROSTER

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 J KENNER

DATE FRIDAY, 8 JUNE 2012

FILE NO/S C 58 OF 2011

CITATION NO. 2012 WAIRC 00342

Result Application discontinued

Representation

Applicant Mr C Fogliani

Respondent Mr R Farrell

Order

WHEREAS the applicant filed a notice of discontinuance, 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.

2012 WAIRC 00350

DISPUTE RE NON RENEWAL OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MS KAYO COX

APPLICANT

-v-

MR ERIC LUMSDEN, DIRECTOR GENERAL, DEPARTMENT OF PLANNING

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 11 JUNE 2012

FILE NO PSAC 11 OF 2012

CITATION NO. 2012 WAIRC 00350

Result	Application dismissed

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of June 2012 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the applicant's representative advised that the applicant wished to withdraw the application; and

WHEREAS the respondent did not object to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

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

2012 WAIRC 00353

DISPUTE RE REVOKING OF CONTRACTUAL BENEFIT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	CITY OF ALBANY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 12 JUNE 2012
FILE NO/S	C 31 OF 2012
CITATION NO.	2012 WAIRC 00353

Result	Order issued
Representation	
Applicant	Ms D Butler
Respondent	Mr D Putland

Order

WHEREAS this application was lodged by the Western Australian Municipal, Administrative, Clerical and Services Union of Employees ("the applicant") on 28 May 2012 pursuant to s 44 of the *Industrial Relations Act 1979* claiming that the City of Albany ("the respondent") had denied one of its members (Mr Barnett) a benefit due to him under his contract of employment with the respondent; and

WHEREAS a conciliation conference was listed for 8 June 2012 for the purpose of conciliating between the parties and at the request of the respondent this date was vacated and a further conference was listed for 11 June 2012; and

WHEREAS on 11 June 2012 the respondent made a further request that the conference listed for 11 June 2012 be vacated and relisted to a date after 18 June 2012; and

WHEREAS on 11 June 2012 the Commission advised the parties that the conference would proceed as listed on 11 June 2012; and

WHEREAS at that conference the respondent was unable to provide any information to the Commission with respect to Mr Barnett's access to the respondent's Professional Rewards Programme which the applicant claims is due to him under his contract of employment with the respondent; and

WHEREAS the Commission is of the view that the matter before it is an industrial matter; and

WHEREAS when taking into account the relevant objects of the Act and in particular s 44(6)(ba) and s 44(6)(bb)(i) of the Act the Commission has formed the view that an order with respect to this application should issue; and

WHEREAS the Commission is of the view that an order should issue that the respondent provide a detailed response to the applicant's claim that its member is due a benefit under his contract of employment with the respondent;

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

THAT by the close of business 13 June 2012 the respondent is to provide to the applicant and the Commission a full response to the applicant's claim that the respondent has denied its member a benefit under his contract of employment with the respondent.

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

2012 WAIRC 00349

DISPUTE RE IMPENDING TERMINATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00349
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	FRIDAY, 6 JANUARY 2012 WEDNESDAY, 22 FEBRUARY 2012 WRITTEN SUBMISSIONS THURSDAY, 26 APRIL 2012
DELIVERED	**:**	MONDAY, 11 JUNE 2012
FILE NO.	**:**	C 57 OF 2011
BETWEEN	**:**	WESTERN AUSTRALIAN MUNICIPAL, ROAD BOARDS, PARKS AND RACECOURSE EMPLOYEES' UNION OF WORKERS, PERTH Applicant AND SHIRE OF NORTHAMPTON Respondent

Catchwords	**:**	Industrial Law (WA) - Dispute re impending termination of union member - Whether Commission has jurisdiction - Trading activities of respondent considered - Commission not satisfied respondent is a trading corporation - Declaration made
Legislation	**:**	*Industrial Relations Act 1979* s 26(1)(a) and s 44 *Australian Constitution* s 51(xx) and s 109 *Cemeteries Act 1986* *Fair Work Act 2009* s 12, s 13, s 14(1)(a) and s 26 *Local Government Act 1995* s 1.3(3), s 2.5, s 3.1(1), s 3.40A and s 3.59
Result	**:**	Declaration made
Representation:		
Applicant	**:**	Mr K Trainer (as agent)
Respondent	**:**	Mr S White and later Mr S Roffey (as agent)

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] [2008] WASCA 254; (2008) 89 WAIG 243

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

Bankstown Handicapped Children's Centre Association Inc v Hillman [2010] FCAFC 11

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

Mid Density Development Pty Ltd v Rockdale Municipal Council (1992) 39 FCR 579

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

R v Trade Practices Tribunal; ex parte St George County Council (1974) 130 CLR 533

Shire of Ravensthorpe v John Patrick Galea (2009) 89 WAIG 2283

Tamara Gillespie v Aboriginal Legal Service of Western Australia Inc [2012] FWA 1156 and [2012] FWA 1157

Reasons for Decision

1 The Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth (the applicant) lodged an application in the Commission on 2 November 2011 in relation to one of its members Ms Dianne Smith who had received a letter from her employer, the Shire of Northampton (the respondent) (the Shire) advising that her employment was to be terminated effective at the end of her shift on 18 November 2011. The applicant sought the Commission's assistance by way of an interim order to prevent Ms Smith's termination so that she could be given a proper opportunity to respond to the allegations raised by the respondent in her letter of termination.

2 The matter was set down for a conference on 9 November 2011 however the respondent refused to participate in conciliation as it maintained that the Commission does not have jurisdiction to deal with this matter on the basis that the respondent is a constitutional corporation and is subject to the *Fair Work Act 2009* (the FW Act). The applicant disputes that the respondent is a constitutional corporation and maintains that the Commission has jurisdiction to deal with this application. The matter was therefore set down for hearing to deal with the preliminary issue of jurisdiction.

3 The respondent's Notice of Answer and Counter-proposal states that the applicant's member, Ms Smith, commenced employment with the respondent on 18 June 2007 as a Caretaker/Supervisor at the Kalbarri Refuse Site and she was terminated on 18 November 2011.

Respondent's evidence

4 In support of its claim that the Commission does not have jurisdiction to deal with this application the respondent relies on the evidence of Mr Jamie Criddle who gave evidence by way of a witness statement with an number of appendices attached including Appendix A titled 'Shire of Northampton - Financials - Trading Activity - as at 30 June 2011' (Exhibit R1). Mr Criddle has been employed as the Deputy Chief Executive Officer at the Shire for three years and he has had 18 years' experience working in local government in Western Australia. Mr Criddle stated that he has a good understanding of the operations and functions of the Shire which is located 475 kilometres north of Perth. The Shire covers 12,499 square kilometres and has approximately 3,204 residents.

5 Mr Criddle stated that the Shire operates as a small business organisation undertaking a broad range of services. It employs 39 people each of whom have some involvement in trading activities in various capacities. Mr Criddle stated that the Shire operates a number of trading activities along with undertaking its statutory functions and these activities are used to generate revenue to subsidise and provide other activities for the benefit of the Shire's residents. Mr Criddle stated that information about income and expenditure on these activities is included in the annual reports for the 2010 - 2011 financial year. Mr Criddle confirmed that the respondent's total operating revenue for the 2010 - 2011 financial year was $5,638,924.

6 Mr Criddle stated that the Shire's trading activities include the following:

(1) child care facility;

(2) aged care units;

(3) doctor's surgery and housing;

(4) staff housing;

(5) sanitation and waste;

(6) health;

(7) community facilities;

(8) road construction and maintenance;

(9) aerodrome;

(10) plant operation;

(11) fire prevention;

(12) land sales; and

(13) interest on investments.

7 Mr Criddle stated that these activities take up approximately 15% of staffing requirements and between 10% and 15% of councillors' time. Mr Criddle gave evidence that the Shire's trading activities are an extremely important revenue source for the Shire as income generated from rates and government funding is insufficient to fund the range of services provided by the Shire. Income from these activities also allows the Shire to keep rates at affordable levels whilst providing a range of facilities and services that would otherwise not be possible to offer. Mr Criddle stated the Shire's statutory functions are complemented through the provision of many of these services and facilities.

8 Mr Criddle gave the following evidence with respect to what he described as trading activities undertaken by the Shire.

Item 1 — Child Care

9 The Shire owns two buildings, one in Kalbarri and the other in Northampton, which are leased as child care centres. Community organisations which lease these buildings are the Northampton Child Care Association and Kalbarri Occasional Care Association. The combined income generated for the last financial year from this activity was $596.87 which was reimbursement for internet costs incurred at these child care centres. Mr Criddle agreed that the leasing arrangement was not operated on a commercial basis when taking into account costs incurred by the respondent to run these premises.

Item 2 — Aged Care

10 Through a joint venture with Homeswest, the Shire supplied land and built eleven aged care units. The Shire provides on-going maintenance for these buildings occupied mainly by residents of Northampton and whilst this is of benefit to the community of Kalbarri there is no requirement for the Shire to provide these facilities. The Shire charges market rate rents for this accommodation and for the 2010 - 2011 financial year this totalled $54,567.73.

11 Under cross-examination Mr Criddle stated that the rent received for this activity was based on a quantum set by Homeswest in liaison with the respondent. Mr Criddle stated that he was unaware if Homeswest levied charges at market rates however rent was based on the Homeswest rate for this type of accommodation. Mr Criddle stated that maintenance costs for these buildings varied from year to year and he confirmed that the expenses for maintaining these units totalled $36,295 in the financial year up to 30 June 2011 and management expenses were not included in the Shire's expenses (see Exhibit R1, Appendix B, schedule 6, page 20). Mr Criddle stated that if rental income from these units was not expended in any year it was placed in a reserve to be used for maintenance that may arise in the future.

Items 3, 4 and 5 — Health Care

12 The Shire provides premises for a doctor's surgery in Kalbarri and Northampton and the Shire receives an income from this leasing arrangement. For the financial year 2010 - 2011 this totalled $31,983.89. The Shire provides housing for the doctor in Northampton and received income from rent and reimbursements in the amount of $7,176.53 for the financial year 2010 - 2011. Mr Criddle stated that both the doctor's surgeries and the doctor's residence are rented out at a market rate.

13 Under cross-examination Mr Criddle stated that a grant was received from the federal government in 2009 – 2010 for additions to the building leased as a doctor's surgery in Kalbarri in the amount of $130,000. Mr Criddle stated that $31,938.89 was the total amount received from the lease of buildings for the doctor's surgeries in Kalbarri and Northampton before expenses. Mr Criddle stated that the cost for maintaining the surgeries at Kalbarri and Northampton was $42,625 which included depreciation of $13,500. Mr Criddle confirmed that the rent paid by the doctor in Northampton for housing was approximately $100 per week and he stated that this was a market rate. He gave evidence that the income remaining after deducting rent of $5,100 from the total income of $7,176.53 represented reimbursements for utilities. Mr Criddle stated that rent on the doctor's house had not been adjusted for the three years he has been employed at the Shire and when it was put to Mr Criddle that this was not therefore a commercial arrangement he stated that this was part of a tenancy agreement between the Shire and the doctor. Mr Criddle confirmed that maintenance costs for the doctor's residence was $13,000 (Exhibit R1, Appendix B, schedule 9, page 30).

Item 6 — Staff Housing

14 The Shire owns three residential dwellings which it rents out to members of the public. Mr Criddle stated that the rental value of these houses takes into consideration the market value along with the 'quality' of the tenant and is currently $130 per week. For the financial year 2010 - 2011 revenue from this activity was $10,060 and Mr Criddle stated that this activity is undertaken on a commercial basis to provide income to the Shire.

15 Under cross-examination Mr Criddle stated that only two of the three houses owned by the respondent were rented in the financial year ending 30 June 2011. Mr Criddle stated that the rates charged for these houses have not changed for approximately two years and they are based on market rates but have been kept low because the tenants had been good tenants. He confirmed that the houses were at Lot 6 Robinson Street, Lot 11 Hampton Road – previously a GEHA house which was sold for a low amount to the respondent - and Lot 74 Seventh Avenue. Mr Criddle stated that management costs for these properties were not included in expenses for this item. The cost of maintaining these houses was $10,950 which did not include $8,500 for capital works on one of the houses to replace the ceiling (see Exhibit R1, Appendix B, schedule 9, pages 29 – 31).

16 Under re-examination Mr Criddle said that the respondent endeavours to spend whatever income is generated in rent for upkeep on these houses.

Items 7 to 11 — Sanitation

17 The Shire generated $3,928.95 in sales of 240 litre carts during the financial year by charging $95 per cart. The Shire owns and operates two refuse sites, one in Northampton and the other in Kalbarri. The commercial rubbish removal charge is $330 per service, which includes both bin pick up and rubbish tip maintenance. In 2010 - 2011 income from commercial and industrial waste collection totalled $168,447.54. Mr Criddle stated that the commercial rubbish service is not carried out as a statutory requirement but for revenue generation and this service is offered in addition to the statutory requirement the Shire has to collect domestic rubbish from its residents. These activities are undertaken at the discretion of the Shire and they operate in a competitive open market environment. The refuse site, which is open to the public, charges fees to deposit waste and the fees for this period totalled $102,015.67. Mr Criddle stated that the fees charged are the same for both refuse sites operated by the Shire and only vary depending on the content of the load. The Shire provides waste services to the three caravan parks within the area and the fees charged over the last financial year for this service totalled $41,580.

18 Under cross-examination Mr Criddle stated that the 240 litre carts are green wheelie bins that are sold when existing bins are lost, stolen or damaged and the bins were sold on a cost recovery basis with a small additional fee (see Exhibit R1, Appendix B, schedule 10, page 31).

19 Mr Criddle stated that fees received by the Shire for operating refuse sites was from income generated by licensed facilities at Kalbarri and Northampton. The expenses for the refuse sites are at Appendix B, schedule 10, page 31 - 32 (see Exhibit R1) and Mr Criddle stated that the expenses for these sites also take into account the expenses for residential waste. Mr Criddle stated that collection of residential waste was undertaken on a cost recovery basis but fees for using the refuse sites were struck on a commercial basis in order to make a profit.

20 Mr Criddle stated that the income from caravan parks of $41,580 was for refuse taken to either the Kalbarri or Northampton refuse sites and expenses for this activity are included in the total refuse site expenses.

21 Under re-examination Mr Criddle stated that the cost for a domestic rubbish removal on which refuse site fees was based constituted $330 per residence.

Item 12 — Health

22 During the 2010 – 2011 financial year the Shire provided health and building surveying work to two other local governments - the Shires of Chapman and Shark Bay - and these services generated $4,156.37.

23 Under cross-examination Mr Criddle stated that this was an activity provided for under local government legislation and the Shire's health and building surveyor undertook this work. The charge for this service was based on a cost recovery basis plus an inconvenience fee of approximately 20%. No fees were charged for managing this activity.

Items 13 and 14 — Community Amenities

24 The Shire provides and maintains two cemeteries, one in Northampton and the other in Kalbarri. The Shire charges for digging burial plots and in the last financial year income for this activity came to $5,327.40. The Shire provides niche wall plaques as a service add on and the Shire generated $2,230 in income for this activity in the last financial year.

25 Under cross-examination Mr Criddle stated that income from burial fees was close to costs incurred in order to undertake this service (see Exhibit R1, Appendix B, schedule 10, pages 39 and 106). Mr Criddle stated that income from wall plaques included a fee for the plaque and a fee to install them and Mr Criddle was unsure if the installation fee constituted reimbursement of the actual costs incurred. Mr Criddle agreed that costs exceeded income with respect to these activities. He also stated that the fee charged for burials was established at rates determined by the Cemeteries Board.

Item 15 — Community Amenities

26 The Shire owns a bus which is hired by community groups at a service fee of 65 cents per kilometre. Hire charges for the last financial year came to $2,582.78. Under cross-examination Mr Criddle stated that the costs incurred for this activity exceeded revenue and he agreed that the rates charged for this activity were less than commercial rates.

Items 16 and 17 — Public Halls and Civic Centres

27 The Shire leases a number of properties and hires facilities to members of the public and businesses including the leasing and hiring of the RSL Hall and Allen Community Centre. The hire rate depends on the person or organisation hiring the facility with businesses and organisations paying a premium rate and local community groups paying a discounted rate. These facilities are not provided under a statutory requirement and this activity competes with other privately owned facilities such as child care centres, commercial properties for lease and hotels. In the last financial year the Shire received $1,830 in income from leasing the RSL Hall and $1,002.72 for leasing out the Allen Community Centre.

28 Under cross-examination Mr Criddle stated that the cost of maintaining the RSL hall significantly exceeded income for this activity. Mr Criddle also agreed that this activity was heavily subsidised by the respondent and it did not return a profit and this was not therefore a commercial activity. Mr Criddle confirmed that only two buildings were hired out by the respondent and that the Allen Community Centre was owned and operated by the respondent.

Item 18 — Swimming Areas and Beaches

29 The Shire owns and maintains the Kalbarri jetty and members of the public and businesses are charged berthing fees to use the jetty. The income for this activity totalled $1,500 in the last financial year.

30 Under cross-examination Mr Criddle stated that the cost of maintaining the Kalbarri jetty and the foreshore area around the jetty, which includes a playground and toilet blocks, is $151,411 and he agreed that the amount of income for this was small. Mr Criddle was not aware of any money spent on the jetty as it as was reasonably new and he stated that the jetty was part of the foreshore facility.

Item 19 — Swimming Areas and Beaches

31 Mr Criddle stated that the Shire owns land in Kalbarri and it has a commercial leasing arrangement with Baileys Fuel for this land to have a fuel bowser for use by crayfishing boats. This generated $7,888.29 in the last financial year.

32 Under cross-examination Mr Criddle stated that costs to maintain this site were minimal as there were limited facilities on this site.

Items 20 and 21 — Recreation and Sport

33 The Shire charges an annual fee of $2,436.40 to Northampton District High School for the use of the town oval and facilities, which are owned and maintained by the Shire. The Shire also charges various sporting clubs an annual fee for use of the town oval and facilities. In the last financial year this totalled $3,481.40.

34 Under cross-examination Mr Criddle stated that the Kalbarri oval reserve and the Northampton recreation oval costs are $209,730. Mr Criddle agreed that the income for this activity was small in relation to costs incurred for the upkeep of the ovals but he maintained that the ovals are leased out as a commercial activity. Mr Criddle stated that lease and rental charges were fees charged by the Shire to sporting groups who used the ovals.

Item 22 — Library

35 The Shire provides a library for use by the community of Northampton and the Shire charges a fee for internet access which in the last financial year totalled $785.73.

36 Under cross-examination Mr Criddle stated that the Shire is not required under statute to provide this service free of charge and he agreed that this income was minor and he was unaware if this amount exceeded the cost of providing the service. Mr Criddle agreed this was not a commercial activity nor were internet fees charged on a cost recovery basis.

Item 23 — Road Construction

37 In the last financial year the Shire undertook private works, which included the construction of two private car parks, one for the IGA supermarket and the other for the Kalbarri Motor Hotel. The Shire charged a commercial rate for the work undertaken totalling $56,011.

Items 24, 25 and 26 — Aerodrome

38 The Shire owns and manages an airstrip and hanger in conjunction with the neighbouring City of Greater Geraldton. The City of Greater Geraldton reimbursed the Shire $10,935.59 as operating costs which is based on a per person land fee for Skywest flights. The Shire also received income of $16,658.67 in the last financial year from landing fees and the lease of the hanger generated $113 in charges.

39 Under cross-examination Mr Criddle confirmed that the costs for these activities were similar to the income received and he stated that this activity was not a statutory obligation on the Shire.

Item 27 — Caravan Parks

40 The Shire owns the land on which three caravan parks are located and the Shire charged lease/rental fees for this land totalling $59,600.20 in the last financial year.

41 Under cross-examination Mr Criddle stated that no costs were incurred by the Shire for leasing the land occupied by these caravan parks and rents were increased based on the Consumer Price Index in accordance with the respective lease arrangements.

Item 28 — Private works

42 The Shire hired out plant equipment for private and commercial use and derived an income of $36,668.86.

43 Under cross-examination Mr Criddle stated that plant was hired out for grading and bitumising driveways for farmers and minor main roads repairs and in the last financial year the Shire made a profit of approximately $14,000 with respect to this activity.

Item 29 — Plant Operation

44 In the 2010 – 2011 financial year scrap metal accumulated by the Shire was sold for $39,111.24. Under cross-examination Mr Criddle stated that this included old cars dumped within the Shire and scrap metal taken to the rubbish tip as part of general waste. Mr Criddle stated that there were minimal costs for this activity and that revenue for this activity was intermittent.

Items 30 and 31 — Fire Prevention

45 The Shire provides fire and emergency services for the Fire and Emergency Services Authority (FESA) and received a grant of $78,772.72 to undertake this service. Some of this funding was a grant for protective equipment and the purchase of a boat engine. The funding for the delivery of the Northampton Brigades and Kalbarri SES services was $40,020.

46 Under cross-examination Mr Criddle agreed that fire prevention is an obligation under statute however he stated that this was income for the operation of the voluntary fire brigade which was over and above the fire service offered by the respondent. Mr Criddle confirmed that the grant from FESA was to operate the fire service and state emergency service and he stated that the Shire applies each year for these funds and that these grants constituted reimbursement of costs to operate these services. Mr Criddle agreed that this income did not generate a profit.

Item 32 — Investments

47 The Shire invests income from activities such as land sales and during 2010 - 2011 the Shire received income of $148,901 in interest from this activity.

48 Under cross-examination Mr Criddle stated that some of the income generated from the sale of land by the respondent went towards funding a new depot and he agreed that the purpose of building the depot was to assist the respondent in discharging its statutory responsibilities.

Land Sales

49 Mr Criddle stated that the sale of land assets is a regular and ongoing trading activity of the Shire. Land is purchased, held until the most opportune time for making a profit and then developed and sold by the Shire. The Shire views land trading as an important sustainable income stream and plans to continue to develop and sell land in the coming years. This land is bought and sold at the Shire's discretion, it is purchased by members of the public and private enterprise and it is developed by contractors appointed by the Shire and the Shire's employees. For example, the Shire builds footpaths and roads in a new subdivision and contractors will clear the land and develop it with power, water and other utilities. This land is marketed using internal expertise and then sold through an appointed external agent. Although land was not sold this financial year a number of sites are currently being developed which the Shire intends selling next financial year. The Shire believes that the history of its land sales should be taken into consideration to demonstrate the regularity and ongoing nature of this activity. Land is not developed and sold as a result of statutory requirement but at the Shire's discretion and sales compete with land being sold privately. Land is also sold at market prices with the prices set after consultation with the appointed sales agents and sold for maximum financial gain. Land sales generate a significant profit for the Shire. For the 2008 – 2009 financial year land sales of 25 blocks generated in excess of $2.2 million and in the current 2011 - 2012 financial year the Shire will sell eight residential blocks in Northampton at between $80,000 and $90,000 each and this is estimated to raise $700,000. In future financial years the Shire will sell at least four blocks in an industrial subdivision which is currently in the planning stage. The sale of land is significant to the Shire as it enables the Shire to offset the losses that it incurs in other areas.

Camping Charges

50 The Shire owns and maintains a camping ground for use by the public. Little Bay camping fees are charged at $15 per car load and income for this activity totalled $3,231.82 in the last financial year.

51 In summary Mr Criddle stated that the total operating revenue from the 2010 - 2011 financial year was $5,638,924 and of this $861,598 can be attributed to the above trading activities equating to a percentage of 15.28%. Mr Criddle stated that the income received from these activities is reasonably consistent from year to year although the total operating revenue may increase or decrease as the Shire's needs and operations change. The Shire's previous trading activities and the total operating revenue have not substantially changed, nor is it expected to in the future.

52 Under cross-examination Mr Criddle stated that the Shire was involved in a range of trading activities whereby it made a profit and he stated that this profit is income generated after expenses were taken into account, without including depreciation. Mr Criddle stated that commercial activities undertaken by the respondent related to activities which generated income for the Shire and were activities undertaken over and above the statutory requirements of the respondent. Mr Criddle stated that the Shire cannot make a profit from activities which are undertaken pursuant to the LG Act.

Submissions

Applicant

53 The applicant submits that the relevant authorities to be applied in relation to this matter are the Full Bench decision ***Shire of Ravensthorpe v John Patrick Galea*** (2009) 89 WAIG 2283 (***Galea***) and the Industrial Appeal Court decision ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]*** [2008] WASCA 254; (2008) 89 WAIG 243 (***ALSWA***).

54 The applicant argues that ***ALSWA*** is binding on the commission in so far as it outlined the principles at [68] to be applied in determining whether an organisation is trading and that these principles are not exhaustive. The applicant submits that another relevant factor to be taken into account in determining whether the entity trades is if the entity involved operates under statutory mandates. In ***ALSWA*** it was not necessary for the Industrial Appeal Court to consider the effect of statutory mandates on the determination of whether the Aboriginal Legal Service of Western Australia (Inc) is a trading concern because the organisation was not established directly under statute nor were its functions determined by statute. In considering the authorities generally, in ***ALSWA*** Steytler P discussed the decision in ***Mid Density Development Pty Ltd v Rockdale Municipal Council*** (1992) 39 FCR 579 (Davies J). Steytler P observed with approval that '[i]mportantly, he [Davies J] also said that the "carrying on of a function of government in the interests of the community is not a trading activity"' [60]. The applicant contends that in the context of this matter, the performance of a function of government is a relevant criterion.

55 The applicant contends that when applying the indicia in ***ALSWA***, where an entity does not make a profit there needs to be a compelling reason for this principle to be overtaken by the other indicia to the extent that an entity is found to be trading. Such a reason would be the company that is developing a product for commercial sale but at the time of the assessment had not developed the product to the point where it had become commercially available. A further example would be a company that is supported by grants or other governmental assistance in order for it to continue operating. Even where the governmental support is to protect or advance the interest of the community, for example maintaining or creating employment, the company would properly be regarded as trading. Whilst there is reference to the income generating activities of an entity, it is the whole of the entity compared to the 'trading activity' which is to be considered.

56 Both the majority and the minority in ***ALSWA*** identified whether an activity was conducted in a commercial fashion as a factor in determining whether an entity is trading. The minority took the view that activities of a commercial nature involved repetition, regularity and being conducted in a business-like way. The applicant argues that business-like should be taken to include identifiable characteristics of clear pricing principles, full accounting, express contractual terms and a systematic approach and the applicant contends that it does not include fortuitous income. The applicant argues that it does not include income where the Shire is reliant on the activities of other parties and will ordinarily involve some positive causative role on the part of the entity said to be trading. The applicant also contends that the concept of 'commercial' excludes functions that are carried out by the Shire, where that function would be carried out either under the *Local Government Act 1995* (the LG Act) or as a result of Shire policy even if there were no moneys derived from the function.

57 The applicant argues that functions undertaken by the Shire for the benefit of its community at a direct cost to the Shire, particularly where they are ongoing, are not trading activities as they are not exceptions (see ***ALSWA*** at [68]). The applicant argues that they are also devoid of a commercial character.

58 The applicant submits that the decision of the majority in ***Galea*** is also binding and is of particular relevance as it proceeds from the decision in ***ALSWA*** and is directly concerned with local government. The applicant adopts the legal analysis commencing at [71] in ***Galea*** including the observations of Ritter AP concerning the process to be followed. Whilst the majority in ***Galea*** closely followed the indicia listed in ***ALSWA***, it is clear from the ***Galea*** decision that the performance of a function of government was expressly considered as a relevant indicia. It is also argued that in this case the relevant indicia includes the status of the Shire as a 'typical' local government entity.

59 The applicant submits that the approach adopted by Spender J in ***Australian Workers' Union of Employees, Queensland v Etheridge Shire Council*** (2008) 171 FCR 102 (***Etheridge***) is also of relevance in the determination of this matter and that this decision is persuasive and although it may not be binding authority it was cited with approval by Ritter AP in ***Galea***. The reasoning in ***Etheridge*** was adopted by Beech CC in ***Galea*** as being consistent with ***ALSWA***. The thrust of ***Etheridge*** is essentially that the 'typical' local government organisation is not organically a trading concern when discharging its statutory obligations.

60 The applicant contends that the decision of the Federal Court of Australia in ***Bankstown Handicapped Children's Centre Association Inc v Hillman*** [2010] FCAFC 11 (***Bankstown***) is not binding on the Commission and argues that to the extent it is in conflict with ***ALSWA*** the latter must prevail. The applicant also does not concede that there is a conflict at all or that the decision represents a different line of authority. In ***Bankstown***, the Court said '[t]he notion of what is a trading corporation for

the purposes of paragraph 51(xx) of the Constitution has evolved and expanded in the last three decades. The applicable principles were conveniently and helpfully summarised by Steytler P in ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]*** (2008) 37 WAR 450, 252 ALR 136' [48]. The Court then went on to repeat the eight principles enunciated by Steytler P. The applicant therefore submits that ***Bankstown*** clearly applies the same principles as ***ALSWA*** and is not a new line of authority. The applicant contends that in any event ***Bankstown*** is distinguishable on its own facts including the absence of the statutory mandates that apply in respect of local government authorities. There are also other distinguishing features such as the capacity to decline a particular transaction (see ***Bankstown*** [55]) and the conclusion to be reached from ***Bankstown*** is that the Court applied the principle that the determination of whether an entity is trading is a matter of 'fact and degree' (see ***ALSWA*** [68]).

61 The applicant submits that the circumstances of local government was considered by the Australian Industrial Relations Commission (AIRC) when making modern awards and in a statement issued by a Full Bench, it was of the view that 'typical' local government organisations were not trading corporations (Statement – Award Modernisation, 25 September 2009, [2009] AIRCFB 865 [142]).

62 The applicant maintains that the Shire does not exhibit the characteristics identified by Fair Work Australia (FWA) that would warrant its categorisation as an atypical shire. The decision in ***ALSWA*** and applied in ***Galea*** has been cited with approval by FWA in ***Tamara Gillespie v Aboriginal Legal Service of Western Australia Inc*** [2012] FWA 1156 and [2012] FWA 1157 as follows:

> The Respondent in this matter has referred me to a decision of the Supreme Court of Western Australia [2008] WASCA 254. This decision concerns the question of whether or not the Aboriginal Legal Service of Western Australia (Inc) was a 'trading corporation' for the purposes of section 51(xx) of the Constitution. By a majority the Supreme Court of Western Australia concluded that the Aboriginal Legal Service of Western Australia (Inc) was not a trading corporation.
>
> There is nothing before me contrary to the Respondent's arguments in this matter.
>
> In the circumstances then I find that the Respondent is not a trading corporation and there is nothing to suggest that that the Respondent is otherwise a constitutional corporation [7] – [9].

63 The Shire is a body constituted under the LG Act as is the Shire of Ravensthorpe and the analysis undertaken by Ritter AP commencing at [34] of ***Galea*** has application to the respondent in this matter. It is a 'typical' local government entity and the respondent does not argue otherwise.

64 The applicant argues that the activities said to be 'trading' by the respondent, even if found to be so, are not of sufficient dimension to change the fundamental character of the Shire (see the discussion of ***R v Trade Practices Tribunal; ex parte St George County Council*** (1974) 130 CLR 533 in ***Galea***).

65 The registration of the Shire's enterprise agreement in FWA was in error and at the time there was no examination of the issue of whether the Shire was a trading corporation, which is the case in respect of the approval of agreements by FWA generally. An identified error as to jurisdiction cannot be perpetuated by the parties or by a court on the basis of the original error (see the approach of Smith SC in ***Galea*** as to the determination of the issue and the authority relied on [189]). Parties are also not able to confer jurisdiction on a court or tribunal which would otherwise be without jurisdiction.

66 The applicant accepts that Mr Criddle's evidence was given to the best of his knowledge but during cross examination the labels 'profit' and 'commercial' were not used in the manner canvassed in ***ALSWA***. In particular, the definition of the Shire's commercial activities as being all activities that fall outside the mandates of the LG Act cannot be adopted. The applicant says that a more forensic approach is necessary which requires an examination of the activity itself and the way in which it is carried out including whether the mode of conducting the activity is business-like (see ***Galea***). The applicant therefore contends that properly viewed, Appendix A attached to Mr Criddle's witness statement is nothing more than a list of sources from which some moneys are derived. The applicant does not contest the actual amounts but contends that it is necessary to probe the totality of the circumstances surrounding this income to identify its true character. The respondent was the only party in a position to put all of the relevant evidence before the Commission that would allow it to make an informed judgment as to each of the activities claimed to be 'trading' in character. In the Shire's accounts for each area of accounting there is an allocated general administrative cost which is not distributed to the individual items and the effect is to reduce the actual costs incurred but because of the method used it is not possible to determine the impact on any given item. The respondent elected not to bring any probative evidence on the matters raised in Appendix A attached to Mr Criddle's witness statement and the applicant contends that to the extent that where there is any doubt in the mind of the Commission about any activity or where the evidence is not clear, then it ought not to reach a conclusion adverse to the applicant. In the alternative the Commission should ask that the parties provide further material.

67 In respect of the functions performed under the umbrella of the LG Act, Mr Criddle stated that the Shire is not permitted by statute to make a profit out of conducting such activities. The applicant maintains that this includes such functions as residential refuse collection, recreation amenities and sporting facilities and the operation of the tip sites is conducted pursuant to the LG Act.

68 The Commission should find on the facts available to it that the Shire is a 'typical' shire as contemplated in ***Galea*** and in the AIRC statement on award modernisation. It is evident that the Shire is a creature of the LG Act and derives its existence from statute. The applicant's contention that the Shire is 'typical' was before the Commission and well known to the respondent prior to the commencement of the proceedings.

69 It was established that the Shire discharges its functions pursuant to the LG Act, Mr Criddle agreed that the role of the Shire is to provide for the good government of the population of the Shire and that the scope of the functions of local government is to be given a wide meaning. The applicant submits that a broad interpretation is to be applied in circumstances such as the Kalbarri foreshore where the function being carried out is the improvement and maintenance of the foreshore area and a part of that is the provision of a jetty for use by the public and tour operators. The moneys paid are incidental to the function of the

Shire under the LG Act and such a view is consistent with the LG Act which mandates a wide interpretation of the obligations under that act.

70 The applicant contends that it is open to draw the inference that the respondent accepts it is a 'typical' shire from the evidence and by reference to the annual reports tendered into evidence.

71 A relevant factor is whether an activity is profitable. In ***ALSWA*** it was said that profit is a usual concomitant of trading and the principle should be applied so that where there is an absence of a profit there are other compelling factors that make the activity trading. The compelling factor would on the authority of ***ALSWA*** have to be the commercial nature of the manner in which the activity is conducted and ***ALSWA*** does not refine the term 'commercial'. It is submitted that it ought to be applied in a way that includes accounting methods that encompass all costs of the activity including the costs of any borrowings and depreciation, that there should be a clear intent for the activity to be profitable at some stage, that factors such as the costs of maintaining the plant, equipment and any asset are incorporated and all staffing/labour costs are expressly allowed for. Without these factors the activity cannot be said to be conducted on a commercial basis. It is of significance that the respondent did not lead any substantial evidence in relation to any of the items to show that they were conducted with the express intention of making a profit and elected not to demonstrate how the activity was conducted on a commercial basis.

72 The applicant submits that the Commission must identify in the first instance what the activity is that is being considered. The mere derivation of money from a component part of an activity does not render that component part severable and identifiable as a trading activity. For example, the applicant contends that the supply of 240 litre refuse carts is not an activity in its own right but is part of the activity of providing residential waste services pursuant to the Shire's obligations under the LG Act. The bins are provided for no other purpose than to facilitate the residential waste services and the Shire properly makes no claim that the other component parts of the provision of the residential waste services is trading. Similarly, the Shire provides a substantial range of recreational centres as a part of its LG Act functions and the applicant submits that this activity is the provision of those recreational centres for the community's use and to focus on one part of the activity, that is the two centres that generate income, is not the correct approach. The Shire correctly makes no claim that the vast majority of their activities are trading and if, as is argued, the trading activity is the provision of recreational centres it is illogical that one part is categorised as trading whilst the vast remaining parts are accepted by the Shire as not constituting trading. In this instance, the Shire conceded that the moneys received were minimal even if considered in their own right. The Shire provides and maintains a substantial number of sporting facilities such as ovals and it has facilities which do not generate any moneys at all and they by inference are conceded as not trading. Again, it is illogical that one part is categorised as trading whilst the vast remaining parts are accepted by the Shire as not constituting trading.

73 The applicant contends that the two grants provided by FESA are not to be considered in isolation as they are part of the activity of fire prevention which has amongst its component parts the maintenance of fire appliance sheds, the purchase and maintenance of fire appliances or equipment and training programs for volunteer firefighters.

74 The applicant submits that the degree of any trading activity found by the Commission should be measured against the total income of the Shire in the period.

Item 1 — Child Care

75 This item is the recovery of utility payments incurred by two organisations which operate the centres. The Shire is responsible for the maintenance of the premises. The amount paid was a reimbursement and not revenue generated by an activity conducted in a commercial way. There is no activity conducted by the Shire in relation to the reimbursements, the Shire provides a building to allow the provision of child care facilities to the community at what is in effect no cost. The evidence does not disclose any commercial considerations attached to the income nor does it disclose any practices that would convey a commercial character. It is therefore argued that a reimbursement cannot constitute trading.

Item 2 — Aged Care

76 The Shire relies on moneys collected from tenants as a trading income in an aged housing development at Kalbarri. These units were constructed as a part of a joint venture with Homeswest and the venture is guided by the Homeswest policy of providing low cost housing for the aged. The units are run by a committee and the Shire is the account holder for the rental account. The mode of operation of the account is that the rents are paid into the account and it is drawn on when and if there are costs incurred in respect of the units. If this in fact is an activity in its own right, the Shire's role is subordinate to the committee and is effectively a collector of the funds and the provider of maintenance services at cost. The units are rented at a rate that is set with the guidance of Homeswest. The Shire is responsible for the upkeep of the units and for any 'blowout' of costs. The method of accounting does not reflect commercial practices nor was it suggested by the respondent that there was any specific element of commercial practices involved and it did not lead any evidence beyond Mr Criddle's statement. It does not reveal periodic inspections which would usually be attached to a lease of property. The applicant says that this claim is not able to be viewed as being conducted in a business-like manner. The management is conducted by a committee whose costs are unknown. The conduct of the function is therefore in the hands of a third party and is not an activity conducted directly by the Shire. The amount claimed also includes $3,300 which is a charge for the domestic refuse collection that the Shire is required to provide under the LG Act. In its annual report the Shire describes its aged care unit involvement in the certified accounts as 'facilitation and administration'.

Item 3 — Health Care

77 This item deals with the moneys paid for the lease of the Kalbarri and the Northampton medical facilities. The Shire is responsible for the maintenance of these premises and additions such as the most recent extension undertaken with the assistance of a federal grant. The applicant says that this mitigates against characterisation of this as a trading activity. Mr Criddle gave evidence that the facilities are provided to 'ensure that the community has health available' and the evidence shows that the costs of maintaining the surgeries and the cost of providing the facility exceeds the income derived. It was also Mr Criddle's evidence that, although there was no formal policy, the Shire approaches the provision of this service from the

community point of view and strongly suggested that the Shire's population would not tolerate a departure from the existing policy and its application.

Item 4 — Health Care

78 The applicant says that this is part of an activity by the Shire to maintain medical services in its community and as part of that the doctor in Northampton is provided with a residence, the rental for which is $5,100. Although it is claimed that the rental is at market rates, that is untrue for a number of reasons. There is no probative evidence as to a commercial basis for the rent in the first instance and the rent has not been adjusted for over three years, which is contrary to ordinary rental procedures inviting the inference that it is not a commercial arrangement. On the evidence the rent is less than that charged to occupants of similar quality residences in the vicinity of the doctor's residence by $30.00 per week. The rental is based on the need to attract and retain doctors. The applicant argues that this combined with the costs for the maintenance of the premise, shown in the accounts as $13,000, invites the inference that the activity of providing facilities for the provision of medical services to the community is based on the community's need and that it is substantially subsidised. It is not carried on from a commercial perspective and it is not directed at making a profit. The applicant says the Commission could and should draw the inference that this activity is governed by a policy of providing and maintaining medical services in the community and that the Shire has an informal policy of meeting the cost of that objective, whatever that cost might be. It follows that properly viewed this is not trading.

Item 5 — Health Care

79 This relates to amounts paid or reimbursed to the Shire for the utility accounts incurred in respect of the premises occupied by the doctor which was rented from the Shire. There was no evidence at all that this was anything other than a reimbursement and it was not clear from the evidence whether it represented all of the utility costs or part of them. There is no suggestion from the respondent that there is any profit made or that it has any commercial aspect and as the Shire owns the premises and meets the cost of the utilities it could be said that this is a further subsidy or concession to the doctor. It is certainly contrary to ordinary practice where a tenant is directly responsible for utility costs. The amount involved is minimal by reference to the Shire's operating revenues and this would not be regarded as a trading activity in any of the decisions cited in this matter and particularly in the case of the majority in ***Galea***. The applicant contends that reimbursements by their very nature cannot be trading activities.

Item 6 — Staff Housing

80 The Shire owns three houses, one of which was part of the land acquired for the new works depot and this property was used as a site office for the works depot and therefore did not generate any rental payments. The other two premises are rented out at what is claimed to be market rates although the evidence shows that the rents were set two years ago and were below market at that time. It is also the case that the Shire rents out other properties such as the doctor's premises referred to earlier and the residence occupied by the Chief Executive Officer. The Shire did not define the activity that it says is involved in this instance and the Shire did not contend in its evidence that it was engaged in the purchase and rent of property in a portfolio as a separate and identifiable activity. The applicant contends that the activity if there is one is renting properties owned by the Shire that are surplus to its immediate needs and this is supported by the fact that one property was used as a works office. The Shire's own evidence shows that they are not rented at commercial rates and the applicant contends that there is not sufficient evidence to show that this activity is conducted on a commercial basis, nor is it done in a business-like fashion. Even if it is an identifiable activity, it does not return a profit. Further, the accounting is deficient in that whilst there are for example repairs carried out at Robinson Street there is an allocation for material only and there are no installation costs. In relation to this property, there are several functions performed for which only the cost of material are shown and the same approach has been used in relation to Lot 74 Seventh Avenue. The evidence was also that a considerable sum had been spent on two of the properties (Lot 74 Seventh Avenue and the doctor's residence) in recent times. Although Mr Criddle contended that there would be recovery over time, the rental rates compared to costs do not support that as a probability and there was no evidence that rents were to be reviewed for that purpose. The inference is that the Shire will bear the costs for the expenditure because the rentals were in place for another two years and Mr Criddle advised that the policy was to spend what was received in rental on the properties each year. These clearly lack the elements associated with a commercial or business like activity and the applicant submits should not be regarded as trading.

Item 7 — Sanitation

81 This income is the replacement for the domestic rubbish collection bins which are damaged or stolen and Mr Criddle gave evidence that the Shire adds a small amount to the purchase price of the bins to cover the cost of their assembly. His evidence did not reveal any commitment to make the replacement profitable, nor did it reveal any commercial characteristics in the transaction. It is the Shire's responsibility under the LG Act to provide a domestic refuse collection service and this was accepted by Mr Criddle and the bins are replacements available at cost to replace stolen or damaged bins and to facilitate the discharge of the Shire's responsibility to its residents. They are provided in a standard design that accommodates the equipment used in rubbish collection and are therefore part of the activity of providing the refuse collection service and not a separate activity. In these circumstances, the act of providing the replacement bins cannot be regarded as a trading activity.

Item 8 — Sanitation

82 The evidence that these rates are 'historic' is insufficient for the Commission to reach a conclusion on the character of the moneys received. The Shire incurs employee costs, for example the applicant was a part-time employee at the tip, as well as licenses required to operate the facility. Mr Criddle contends however that the only costs the Shire incurs are 'burning and burying'. The figures show that the cost of operating the Kalbarri site was $270,805 which is considerably greater than the moneys claimed for the item even when the Veolia contract payments are allowed for. There are other refuse sites operated by the Shire and the applicant says that the activity involved is the operation of the refuse sites. Those locations incurred expenses of some $36,390 which should be considered in the context of the activity claimed. The figures suggest that the provision of refuse sites pursuant to the obligations under the LG Act is a service provided to the community at a loss and the

generation of the material is dependent on a third party and consequently would fluctuate from year to year. Again, this is an example where one component of the activity provides some money and is claimed to be trading where other parts of the activity are conceded not to be trading.

Items 9, 10 and 11 — Sanitation

83 The applicant submits that the Commission is not in a position to reach a final view on these items as Mr Criddle's evidence lacks the detail required to reach a firm conclusion. In response to a series of questions from the Commission, Mr Criddle was not able to provide any probative evidence on the costs of the operation of the tip, nor was he able to tell the Commission precisely how the rates were calculated notwithstanding the Commission pressing the matter at the end of his evidence. The applicant submits that it is not necessary to reach a final view on this item and the approach of Ritter AP in ***Galea*** is to be applied – the Shire is effectively a typical local government entity and the matter can be determined on that basis.

Item 12 — Health

84 The Shire has recently reached an arrangement with two shires, Shark Bay and Chapman Valley, to provide statutory health services to those shires and the evidence was that there is no separate accounting for this because 'we'd have more pages than you'd - you'd care to see' (ts59). Consequently it is not possible to make any qualitative assessment of the function and to ascertain the manner in which it is conducted. Mr Criddle's evidence is both speculative and vague and is not supported by any documentary evidence at all and it is self-evident that this is not conducted on a commercial basis if only because it is not accounted for in a separate way and the evidence of Mr Criddle is not sufficiently clear or supported by probative material for the Commission to conclude that the Shire conducts this function on a business-like basis. The applicant contends that, given the Shire elected not to address this issue in its evidence, the Commission should not draw any inferences from Mr Criddle's evidence that are not supported by probative and soundly based rather than speculative evidence. Furthermore, income generated from this function is minor in the totality of the Shire's operations.

Item 13 — Community Amenities

85 The Shire operates cemeteries which is a discrete activity, this activity is authorised and controlled by the provisions of the *Cemeteries Act 1986* and the Shire operates and maintains the cemeteries as a service to its community. The cost of operating the cemeteries is substantially in excess of the revenue derived and burial rates are determined by the Cemeteries Board and the Shire maintains the grounds to standards that it determines and meets those costs. The Shire elected not to lead any evidence to show that operation of the cemeteries was done in a business-like way and as it is a discharge of a statutory function, the applicant argues that it is not a trading activity. It also does not have any commercial attribute that would allow it to be categorised as trading in any event and income generated is minimal in terms of the Shire's total revenue.

Item 14 — Community Amenities

86 The provision of niche wall plaques at the cemeteries is an activity where a fee is charged for the Shire to provide and install a plaque at the cemeteries. From the evidence of Mr Criddle, it is not possible to conclude that the activity is conducted on a business-like basis and when pressed, Mr Criddle's response was, 'I can tell you that we don't give them away' (ts44). This combined with the other evidence whereby Mr Criddle was not able to identify the costs incurred in producing and installing the plaques leaves the Commission in a position where it is not able to conclude with any certainty that this is a trading activity.

Item 15 — Community Amenities

87 The bus was purchased primarily from a Lotteries Commission grant and it is for community use and is hired out to the community at a rate that is effectively a subsidy. The evidence shows that there is no systematic business approach to the funding of the bus and costs are met as they occur and the accounts show that in the last year it had operated at a loss. Further, in response to a question Mr Criddle drew upon the occasional hire of the bus to commercial operators as the commercial element and by inference the other hirings were not commercial. The schedule does not contain any allowance for depreciation, a usual concomitant of commerciality, hirings are infrequent and do not meet the criteria of regularity cited in the authorities and the respondent provided no evidence that this was a commercial activity. The applicant contends that this is not a trading activity and is in any event a very minor source of income.

Item 16 — Public Halls and Civic Centres

88 The evidence is that the RSL hall is leased from the local RSL group and the hall derives income by being hired out and the evidence is that the income derived is substantially less than the costs of maintaining the building. The Shire elected not to bring any evidence that the management of the facility was done in a business-like way to generate moneys for the Shire and Mr Criddle agreed that this activity was not of a commercial character. The inevitable conclusion is that the Shire operates the facility as a subsidised community amenity and there is no indication that the Shire leased the hall for any other reason. There no prospect that the hall is operated with a view to deriving moneys in some way proportionate to cost and the moneys paid for use of the hall are minimal in the totality of the Shire's operations. There is therefore no basis upon which this item could be considered to be trading.

Item 17 — Public Halls and Civic Centres

89 This relates to one of the facilities operated by the Shire. This is only one of a number of similar facilities throughout the Shire and the applicant argues that the activity involved is the provision of a community hall/civic centre building for the use of the community and that any other use which generates moneys is fortuitous. From Appendix A, the income for the Allen Community Centre is shown as $1002.72 of which 50% was paid by local groups whose fees for the use of the centre were substantially subsidised by the Shire. The evidence from Mr Criddle on this claim is vague or imprecise and it did not reveal any systematic or regular use of the facility. Further, the costs of maintaining the hall are not the basis for the hiring fee and a further cost for the operation of the centre not immediately obvious is the loan of $18,897. The hall is in fact a part of the main administration building and the costs of maintaining the hall form part of the costs for the building as a whole and are not

shown separately even though that could be done from the raw data. The applicant says that these facts inevitably lead to the conclusion that this is not an identifiable and separate activity from the other recreation facilities owned and maintained by the Shire for which no claim is made. Even if the previous proposition is not correct, the absence of any specific accounting for costs suggests that it is not a business-like activity, the income is overall minimal and if the moneys are confined to the hire of the facility to the non-subsidised groups, the amount is even less being in the vicinity of $500.

Item 18 — Swimming Areas and Beaches

90 The applicant submits that the activity involved in this item is that of providing and maintaining facilities for the local community, a core local government function, and that is reinforced by the way in which the jetty is treated in the accounts as an element of the foreshore. The jetty forms part of that function and is available for use by residents as well as the three businesses which appear to have paid an annual fee of $500 each for their access. The amounts involved are small and the evidence from the respondent does not show the costs incurred in provision of the facility and the accounting methodologies do not demonstrate any identifiable business-like practices beyond the proposition to the small businesses that they will have to pay an annual fee. The basis of the fee and its relation to the costs of providing it are unknown. There would also not seem to be any specific allocation for costs to a reserve that may be incurred in the operation of the jetty – just that they will be met when they arise. This is not an attribute of a commercial function and defies any meaningful consideration of whether the function is carried out on a profitable basis. The applicant contends that this is another example where the Shire has simply seen an amount of money being paid and made a claim that it is trading without establishing the fundamental requirements for that categorisation.

Item 19 — Swimming Areas and Beaches

91 There is one lease involved in this item and that is the subject of a lease although the lease was not tendered into evidence and the evidence does not reveal any detail about the costs of, for example, bunding the site. The existence of a formal lease might be seen as an indication that the lease is conducted on a business-like basis but the respondent did not address this. The lack of any probative evidence hinders the assessment of this item but it would seem on the authorities open to be regarded as a trading activity although one of little impact overall.

Item 20 — Recreation and Sport

92 This item is concerned with income received for the use of an oval owned and maintained by the Shire and the user and payer is the Northampton District High School. Some money is also paid by the community sporting clubs that also use the oval. The Shire claims that the income from the clubs is a trading activity however, others in the community are able to use the facility without a cost and the inference from the evidence is that these users are not part of organised sporting clubs. The evidence is that no matter what use is made of the oval, the Shire maintains the facility carrying out regular mowing, fertilising and maintenance and these functions are performed without reference to the usage or any prospective payments for use of the facility. It is argued that the provision and maintenance of the oval can only be seen as a core service under the LG Act and that income collected is fortuitous and does not change the essential character of the function. Again, the respondent did not seek to introduce evidence that the way in which the function was carried out had a commercial component and the income received is minimal in the context of the whole operations of the Shire generally and in relation to the costs of maintaining the ovals in particular.

Item 21 — Recreation and Sport

93 The item relates to income paid by sporting clubs for the use of the Shire's ovals and Mr Criddle conceded that this activity does not generate a profit. Schedule 11 - Other Recreation and Sport in Appendix B of Mr Criddle's witness statement confirms that the cost of these facilities greatly exceed the cost of providing them on a day to day operating basis. The capital expenditure component of the schedule also shows that the Shire incurs considerable expense by way of loans to upgrade the amenities for various sporting clubs. A case on point is the capital of $318,835 used to provide lights at the Northampton town oval. The applicant repeats its contention that this is not a trading activity but rather a part of a function of the local government to provide facilities for the recreation of its residents. The amount derived from the sporting clubs is also miniscule compared to actual expenditure and the applicant submits that the income is nominal.

Item 22 — Library

94 The income cited in respect of the library is derived from use of the internet by members of the public at the Allen Community Centre where the library is located. Mr Criddle was not able to provide any information at all on the actual cost of the service but it is inferred that the moneys gathered are significantly less than the cost of providing the service because there are program licenses, computer hardware, wages or salaries and furniture to be considered. Whilst Mr Criddle maintained that the internet was not a service required under the LG Act it is clearly a part of the library function of providing access to information in various ways including electronic form and this activity is a core shire activity and as such, is not trading. It also cannot be seen as a trading activity because it lacks the commercial characteristics. It is in any event a minor activity.

Item 23 — Road Construction

95 The Shire maintains that this income arises from an agreement to undertake construction of parking for two private businesses in conjunction with the Shire's work on a contiguous road reserve and the applicant maintains that this was a 'one off' road construction for mutual benefit in which the private owners agreed to pay for 'half' the costs involved. Mr Criddle conceded that there were no documents available to verify the claims as to the costs of the two elements of the works compared to the division of the expenses and the project was not separately accounted for from other road works suggesting that it was not done on a business-like basis. The lack of separate accounting does not allow the Commission to come to a conclusion other than this was not done on a regular basis and there was no intent to engage in an ongoing function of this type suggesting that its characterisation as trading based on the authorities is dubious.

Item 24 — Aerodrome

96 This activity is the operation of a regional airport. It is conducted as a joint venture with the Shire of Greenough and this joint venture agreement was attached as an appendix to Mr Criddle's statement (Exhibit R1, Appendix E). The joint venture agreement is not of material assistance in the determination of this issue as it deals primarily with administration and management of the site over which they had been granted a management order. What is clear from the evidence is that neither shire is responsible for the major capital works for example, the resurfacing of the runway was carried out with the assistance of a grant from RADS. The expenses of operating the airport over and above the capital costs exceed the moneys collected by the Shires by some $20,000 and the applicant submits that the Shire has not shown, aside from a management committee, that its portion of this is conducted in a business-like fashion nor has it shown it to be profitable. No evidence was led on the way in which the joint venture was set up and it was not possible to raise this with the respondent's witness because the joint venture dates back to at least the year 2000, well before Mr Criddle commenced with the Shire.

Item 25 — Aerodrome

97 This item is self-evidently not a trading activity. It is not on the Shire's land but on CASA property and is in reality a bowser arrangement.

Item 26 — Aerodrome

98 This item is a reimbursement and is an offset pursuant to the joint venture agreement. Mr Criddle gave evidence that the figures in the Shire's accounts for the aerodrome were confined to the Shire's share and the reimbursement is therefore a 'balancing of the books'. To treat the reimbursement to the Shire as a source of income denies the character of the payment and is effectively double dipping. The applicant contends this is not a trading activity if seen in its own right.

Item 27 — Caravan Parks

99 The Shire owns land leased to the operators of the caravan parks and Mr Criddle maintains that they are the subject of formal leases. The applicant is not in a position to challenge Mr Criddle's statement and is prepared to accept it at face value. Based on the authorities, including the finding of Ritter AP in ***Galea***, the applicant accepts that the Shire is conducting an activity of leasing out caravan parks for a gain in a business-like and commercial way. It follows on the authorities that this is a trading activity.

Item 28 — Private Works

100 The Shire 'hires out' its equipment and operators to private entities and the rate of hire is based on identifying the costs of operating the machinery with the operator and then adding a margin which is a return over costs. Having regard for the authorities this may well be regarded as a trading activity. The evidence in this item is to be contrasted with that relating to the sanitation items discussed previously where there was no evidence of how rates were determined.

Item 29 — Plant Operation

101 The source of moneys in this instance is the scrap metal from vehicles abandoned within the Shire and brought into the Shire tip and from scrap metal brought into the tip. The division of the income between vehicles and other scrap metal cannot be ascertained from the evidence of Mr Criddle who concentrated on the motor vehicles' component. The applicant contends that the inference should be drawn that the bulk of the moneys are derived from motor vehicles that have been abandoned. This income varies substantially and is intermittent and in the year in question, the budgeted figure was $500 and the Shire contends it does not do anything to cause the metals to be brought to the tip so the moneys received are entirely fortuitous. The applicant submits that the amount claimed is clearly a distortion or an aberration given the expectations expressed in the budget and the applicant submits that in considering this item the appropriate measure is the budget allocation and that approach would avoid the characterisation of the item based on an atypical year. The applicant relies on s 3.40A of the LG Act which allows the Shire to collect and to deal with abandoned vehicles and the vehicles in question are of that character. The applicant also submits that, whilst Mr Criddle contends that there are no costs, the other evidence in this matter shows that there are substantial costs incurred in the operation of the tips including staff and Mr Criddle's evidence shows that at least some staff activity is involved and it is not possible to quantify them. The applicant says that viewed objectively this ought not to be seen as an activity conducted by the Shire as it does not initiate any part of the function, that is done by the third parties bringing the material to the Shire's tip. The gathering is done by others disassociated from the Shire. The applicant argues that this is a periodic and fortuitous activity which does not exhibit the requisite commercial characteristics nor is it conducted in a business-like way and is therefore not to be considered as trading.

Item 30 — Fire Prevention

102 The item refers to funding that is provided by way of a grant to operate the local bush fire brigade and these funds are provided by and determined by FESA and the activity of fire prevention involves considerably more that those items covered by the grant. Mr Criddle agreed that the services were provided pursuant to the Shire's obligations under statute and the evidence also showed that the moneys are by way of reimbursement and that not all costs incurred by the Shire are recoverable for example, allocated administrative costs. The costs are set out in Appendix B as $80,008 compared to all moneys paid to the Shire of $51,420 and it is to be noted that there was also $21,000 capital expenditure allocated. There is no element of profit in the transaction and according to the evidence of Mr Criddle the Shire is not permitted to make a profit. The applicant submits that on the basis of the authorities cited earlier this is a function pursuant to statute and cannot be trading and the applicant also submits that the evidence does not reveal any of the essential activities characteristics to suggest that this has a commercial component.

Item 31 — Fire Prevention

103 The considerations for this item are the same as for Item 30. The only distinction is the geographical location.

Item 32 — Investments

104 The evidence shows that this money was derived from the sale of land some two or three years earlier and there have not been any similar sales since that time and it was agreed by Mr Criddle that the moneys could be and were applied to perform

functions within the Shire. One of those was the construction of the new works depot, a building used in the discharge of the Shire's statutory responsibilities. From the evidence, the moneys have been put into a bank account which is a requirement under the LG Act and this amount is diminishing over time. There is no evidence that the Shire did anything more than put the money into the bank as it is required to do. The inevitable consequence was that the bank would pay interest as it does with other moneys banked by the Shire. The income is therefore a consequence of a requirement of the LG Act rather than a product of an activity conducted by the Shire and to describe this as investment is a misnomer. The applicant says that it is devoid of a definable trading activity and the income is a fortuitous by-product of compliance with the LG Act. It is an infrequent occurrence, no sales having taken place in the last three years and the funding is used to provide facilities used in the discharge of responsibilities under the LG Act such as the new works depot.

105 In summary the applicant contends that based on the authorities the Shire is nothing more than a typical local government body. The evidence does not reveal anything to the contrary and the respondent does not challenge that notion. The applicant therefore says that the Shire is not a trading concern based on the decision of the majority in ***Galea***.

106 The applicant argues that even if all of the claims made by the Shire were allowed the percentage is 8.3% ($861,598 divided by $10,485.523(sic)).

107 The applicant says that the following are to be deducted from the claims in Appendix A attached to Mr Criddle's witness statement as indisputably not trading, totalling $63,671.07:

Child Care	$596.87
Health Care reimbursements	$2,076.53
Sanitation (carts)	$3,928.95
Charges – cemetery fees	$5,327.40
Libraries	$785.73
Reimbursement – Kalbarri airstrip	$10,935.59
Fire prevention	$17,670.00
Fire prevention	$22,350.00

108 That would result in a reduction of the total in Schedule A to $797,927.24 or a reduction using operating revenue to 15% or 8% using the Shire's total revenue as the divisor.

109 The applicant further contends that the following items with a monetary value of $108,447.92 should not be regarded as trading for the reasons already set out:

Aged Care	$54,567.73
Health Care	$31,983.89
Health Care (Dr rent)	$5,100.00
Residential rental	$10,060.00
Bus Hire	$2,582.78
Hall hire	$1,830.00
Community Centre	$1,002.72
Education Department oval	$2,436.40
Lease and rentals	$3,484.40

110 The applicant further contends that the following items totalling $103,628.67 are not trading based on the concept of what is an activity:

Refuse site fees	$102,015.67
Kalbarri jetty fees	$1,500.00
Hangar fees	$113.00

111 The applicant maintains that the others to be excluded are set out in the discussion of the individual claims and are reliant on their own reasons for exclusion. Examples include the plant operation, the sale of scrap motor vehicles and investment income. The applicant says that even if the respondent's claims were allowed in full they would be driven by a limited number of items such as sanitation claims, but those functions are not sufficient to change the character of the Shire from a 'typical' local government body. The applicant says that the Shire's claims need to be treated cautiously as they are in reality nothing more than a number of sources from which money is derived. The applicant says that it fell to the Shire to show that it was not 'typical' and that its claims embodied the principles of 'business-like' and 'commercial' and it elected not to produce evidence on these concepts. There is an inference that in not bringing the evidence that the functions were devoid of those characteristics or that the evidence was not available.

112 The applicant submits that there was no evidence that the respondent conducted a number of its trading activities as claimed in order to attract residents to the Shire.

113 In response to the respondent's claim that s 3.59 of the LG Act provides for the Shire to engage in trading activities, the applicant maintains that there was no evidence that the activities the respondent is claiming are trading activities fit into this category and they cannot therefore be regarded as commercial enterprises as contemplated by s 3.59 of the LG Act.

114 The applicant maintains that no specific evidence was given about the extent of employee involvement in the activities the respondent claims constitute trading.

115 The applicants argues that there was no evidence to support the respondent's claim that the profit from leasing reserves subsidised other trading activities of the respondent or that the Northampton District High School and other sporting clubs had exclusive use of its oval or that the presence of the aerodrome brings benefits to the Shire.

116 The applicant argues that the respondent's reliance on income from additional activities such as tourism licenses should be dismissed due to a lack of evidence as to these claims.

Respondent

117 The respondent submits that the character of it as an organisation is that of a constitutional corporation as defined in s 51(xx) of the Australian Constitution and the validity of the federally registered enterprise agreement in place at the Shire is central to the conditions provided to its employees.

118 The respondent submits that the Shire engages in a number of activities of a commercial nature that are both substantial and significant. The respondent has applied the principles included in the prevailing Federal Court of Australia decision of ***Bankstown***. In this decision the Court reiterated the activities test as first described in ***R v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)*** 1979 143 CLR 190 as the means to determine whether an organisation has the character of a trading organisation. The respondent submits that the principles originally collated by Steytler P in ***ALSWA*** with the amendment made in ***Bankstown*** should be applied in this determination of the Shire's trading activities. These criteria are recited in ***ALSWA*** at [68] as follows:

(1) A corporation may be a trading corporation even though trading is not its predominant activity: ***Adamson*** (239); ***State Superannuation Board*** (303 - 304); ***Tasmanian Dam case*** (156, 240, 293); ***Quickenden*** [49] - [51], [101]; ***Hardeman*** [18].

(2) However, trading must be a substantial and not merely a peripheral activity: ***Adamson*** (208, 234, 239); ***State Superannuation Board*** (303 - 304); ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 20; ***Fencott*** (622); ***Tasmanian Dam case*** (156, 240, 293); ***Mid Density*** (584); ***Hardeman*** [22].

(3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: ***Ku-ring-gai*** (139, 159 - 160); ***Adamson*** (235); ***Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*** (1982) 150 CLR 169, 184 - 185, 203; ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Quickenden*** [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: ***St George County Council*** (539, 563, 569); ***Ku-ring-gai*** (140, 167); ***Adamson*** (219); ***E*** (343, 345); ***Pellow*** [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 - 306); ***E*** (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott*** (589); ***Quickenden*** [52], [101]; ***Mid Density*** (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: ***State Superannuation Board*** (294 - 295, 304 - 305); ***Fencott*** (588 - 589, 602, 611, 622 - 624); ***Hughes*** (20); ***Quickenden*** [101]; ***E*** (344); ***Hardeman*** [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: ***Adamson*** (209, 211); ***Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere*** (330); ***Hughes*** (19 - 20); ***E*** (343); ***Fowler***; ***Hardeman*** [26].

119 The respondent submits that number four of the criteria as a result of the ***Bankstown*** decision needs to be amended as the making of a profit is not a 'usual concomitant' to trade. The Court in ***Bankstown*** stated:

> Plainly actually making a profit could not be a usual concomitant other than perhaps over the longer term. A person or organisation engaged in trade may, for a period, do so with limited commercial success and trade at a loss. The statement that profit-making is a usual concomitant of trading appears to be founded on observations of Barwick CJ to that effect in ***R v Trade Practices Tribunal; Ex parte St George County Council*** (1974) 130 CLR 533 which is the first authority noted by Steytler P. The Chief Justice was dealing with an argument that the statute under which the county council was established contained a direction that county councils supply electricity as cheaply as possible to residents of the county district. In effect, Barwick CJ was noting that making as large a profit as possible was effectively precluded by the legislation, but the direction did not prevent a Council making a profit and the county council in question had, in fact, been highly profitable. The Chief Justice observed that profit-making was perhaps not of the essence of trading, but it was a usual concomitant.
>
> In the second authority mentioned, ***Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*** (1978) 36 FLR 134, the first passage referred to was from the judgment of Bowen CJ though appears to be a passage in which the Chief Justice was summarising the argument of counsel and the second passage is a reference to the judgment of Deane J who did no more than indicate that he was inclined to think that the two building societies (which were mutual societies not trading for a profit) were not trading corporations. The reference to the third authority, ***Adamson***, is to a passage in the dissenting judgment of Stephen J and, with respect, can be disregarded. The fourth authority was ***Red Cross***, but the passage referred to involved a discussion by Wilcox J of the commercial activities of the Red Cross which generated considerable income though his Honour noted that those trading activities were not motivated by the hope of the private gain but purely to earn revenue which the relevant Division of Red Cross needed for its charitable activities. However, in one

sense, this question of whether making a profit is a usual concomitant to trade is a barren one because the authorities, as noted in (8) of Steylter P's list of applicable principles, establish that the commercial nature of the corporation's activities are indicative of trading[49] – [50].

120 In the decision the Court stated what the Shire believes is most pertinent to the analysis of it as a local government, as follows:

> Many activities and services which have historically been provided mainly or exclusively by government are now carried on by companies which undertake those activities or provide those services with the objective of making a profit. Examples are legion and included prison services, electricity generation and distribution, potable water collection or production and distribution and the construction and maintenance of roadways. There can be little doubt that, at least in the ordinary course, companies which undertake those activities or provide those services can be characterised as trading corporations. Does the fact that a corporation likewise provides such services, but on effectively a cost recovery basis only, render it inappropriate to characterise that corporation as a trading corporation [51]?

121 The respondent maintains that the ***Bankstown*** decision supplants the rationale applied in both the findings in ***Etheridge*** and the majority in ***Galea***. The respondent submits that the ***Bankstown*** decision confirms the purpose and function of the organisation is only relevant in the context of the activities test and the Court found that even only on a cost recovery basis Bankstown Handicapped Children's Centre Association was a trading organisation. The respondent has taken guidance from the dissenting opinion of Smith SC in ***Galea***, specifically in the evidence necessary for the Commission to accurately assess whether the Shire is a 'trading' corporation. To summarise Smith SC's decision, she explained that the 'first task is to indentify the totality of activities of the appellant' [226] then 'indentify what activities of an organisation can be characterised as trading activities' [227] followed by the requirement to 'evaluate the trading activities against the totality of activities' [228]. The respondent considers this view is in accordance with the ***Bankstown*** decision.

122 Smith SC suggested not just reviewing revenue for trading activities but all other factors as part of making a 'qualitative or relative assessment'[229]. Smith, SC suggested to

> consider among other matters, the following matters:
>
> (a) The number of persons employed by the local government organisation and the nature of work and their activities;
>
> (b) The activities of the council itself;
>
> (c) The number of persons whose work requires them to be engaged in work on trading activities and the extent of the work on or in relation to trading activities in proportion to their work on non-trading activities;
>
> (d) Whether income is generated from work of persons or bodies contracted to work for the local government organisation and whether the work of the contractors is supervised or controlled to any degree by the local government organisation;
>
> (e) The frequency and regularity of each category of trading and non-trading activity [230].

The information suggested has been provided by the Shire to enable the Commission to accurately identify the nature of activities undertaken.

123 Smith SC further explained [236]:

> The specific purpose of each activity is irrelevant. Motive for carrying out activities does not matter: ***E v Australian Red Cross Society*** (343) (Wilcox J). For example in relation to Item 15 (Hall Hire Charges) it is immaterial that this activity is carried on for the benefit of the community. This principle was explained by Mason, Murphy and Deane JJ in ***State Superannuation Board v Trade Practices Commission*** where their Honours said:
>
> > '[T]he judgments "of the majority in ***Adamson*** make it" clear that, in having regard to the activities of a corporation for the purpose of ascertaining its trading character, the Court looks beyond its "predominant and characteristic activity" (cf p 213 per Gibbs J). Barwick CJ (208) spoke of making a judgment "after an overview" of all the corporation's current activities, the conclusion being open that it is a trading corporation once it is found that "trading is a substantial and not a merely peripheral activity". Mason J (234) said that it "is very much a question of fact and degree" having earlier stated (233) that the expression is essentially "a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation."
> >
> > Murphy J (239) said "As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation". Indeed, it was essential to the majority's approach and to its rejection of ***St George*** that a corporation whose trading activities take place so that it may carry on its primary or dominant undertaking, eg, as a sporting club, may nevertheless be a trading corporation. The point is that the corporation engages in trading activities and these activities do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade. As the carrying on of that undertaking requires or involves engagement in trading activities, there is no difficulty in categorizing the corporation as a trading corporation when it engages in the activities.
> >
> > Indeed, we would go on to say that there is nothing in ***Adamson*** which lends support for the view that the fact that a corporation carries on independent trading activities on a significant scale will not result in its being properly categorized as a trading corporation if other more extensive non-trading activities properly warrant its being also categorized as a corporation of some other type (304).

124 The Shire undertakes the following 'trading' activities which it believes give it the characterisation of a constitutional corporation:

(1) child care facility;

(2) aged care units;

(3) doctor's surgery and housing;

(4) staff housing;

(5) sanitation and waste;

(6) health;

(7) community facilities;

(8) road construction and maintenance;

(9) aerodrome;

(10) plant operation;

(11) fire prevention;

(12) land sales; and

(13) interest on investments.

125 The respondent has calculated that the total operating revenue from the 2010 - 2011 financial year was $5,638,924 and this is representative of a small regional local government organisation. Of this $861,598 can be conservatively attributed to trading activities. These activities are representative of normal trading activities of a modern Western Australian local government and results in at least 15% of activity being attributed to trading activities.

126 The following activities are also arguably trading in nature, including:

Road Maintenance – Money from Main Roads for maintenance	$92,219.00
Pre-School – Grants	$30,000.00
Swimming Areas and Beaches – Contributions	$47,899.49
Tourism and Area Promotion – Caravan Park Licences	$3,917.00
Other Culture - Mooneima Centre Reimbursement	$1,511.65
Other Culture - Charges – Old Police Station	$1,071.01

Land sale activity is lower in this financial year than most financial years, when land sales of both commercial and residential blocks have been common.

127 The respondent maintains that trading activities are intertwined with the statutory functions of the Shire as both contribute to improving and maintaining the Shire and the trading activities the Shire undertakes are both significant in terms of the size of their combined activities compared to the totality of all activities and substantial as they contribute approximately 15% of the revenue generated by the Shire.

128 The respondent argues that the activities test refined in ***Bankstown*** combined with the criteria described in ***ALSWA*** confirms the use of the activities test to assess the Shire's claim that they have trading activities of substantial enough size to be characterised as a constitutional corporation. The Shire relied upon these principles to enter into an enterprise agreement with the applicant which was considered and registered by FWA (*Shire of Northampton Union Collective Agreement* [2010] FWAA 6981). The Shire seeks that the Commission confirm that this enterprise agreement is enforceable and that the Shire is a constitutional corporation.

129 The Shire argues the statutory requirements of the LG Act does not limit it engaging in trading activities and providing services and products to existing residents, visitors and organisations as well as attracting people to the Shire. The respondent does not consider the LG Act is restrictive in the role of a local government, such as the previous *Local Government Act 1961*, and s 3.59 provides for local governments to undertake major trading activities and it argues that the LG Act encourages local governments to engage in trading activities.

130 Many of the Shire's trading activities when looked at in isolation would not constitute significant elements of trading but when viewed together are a significant activity of the respondent. The small size of the Shire has produced a situation where its employees are not solely engaged in trading activity however every employee of the Shire spends some time participating in trading activity and some time participating in non-trading activity.

131 It is accepted that for a private enterprise financial reports would be in a different format but local governments are not required to isolate the profitability of each individual activity. The respondent argues however that this is not required for an activity to be categorised as trading in nature. Mr Criddle was not called as an expert witness on constitutional trading activity but to provide evidence on the activities of the Shire. The respondent submits that Mr Criddle's evidence should be treated in this light. Mr Criddle defined profit as, all monies taken outside of expenses with the qualification that local government does not take depreciation generally into account, along with capital expenditure and Mr Criddle defined commercial as, that which is over and above the general statutory requirements, or the receiving of additional funds. The respondent acknowledges that some grant funding is not statutory in function and also not trading in nature. However, it submits that in general Mr Criddle's explanation of trading activity is sound.

Item 1 — Child Care

132 Mr Criddle agreed that the expenditure for this activity was far greater than income in the last financial year as a lot of maintenance work was undertaken. However, this is not the norm as the buildings do not take up a significant amount of the respondent's resources each year. While it is agreed that the rental value is subsidised by the respondent in order to attract and provide services to the community, it is argued that the income for this activity should still be considered as a trading activity. Additionally, the subsidy provided by the Shire for this service to operate is more than repaid through the increased land sale value and the availability of child care is perceived to be an important consideration to many families when looking to move to the area.

Item 2 — Aged Care

133 There is not a statutory requirement on the Shire to support aged care facilities. The aged care properties are the only ones of their kind in the area and therefore could not adequately be compared with other rental properties. While in some financial years the respondent generates a profit with respect to this activity, it is argued that this is not of relevance as the activity is not performed for the purpose of generating profit. The respondent submits that this activity is trading in nature as market rental rates are charged to tenants and rent is received by the respondent and the respondent is then responsible for the maintenance of each unit.

Items 3, 4 and 5 — Doctor's Surgeries and Housing

134 Supplying surgeries and rental properties is not pursuant to a statute, rather a service the respondent chooses to provide to the community. The motivation for the respondent behind assisting this service is to facilitate medical services to be available in the Shire as this is perceived as being of high value to the community. The cost of subsiding medical services is also expected to be repaid through higher income in other areas such as land sales and aged care. The doctor's surgeries are leased to both doctors and a commercial agreement is in place for the use of the buildings.

135 The two houses which the respondent provides the doctors are leased for $130 per week which is a rate determined through a real estate agent. The respondent submits that the infrequent review of the rental rate does not alter the trading nature of the charge as market rates are reasonably stable. The respondent also agrees that there is an unwritten attraction and retention policy to provide the doctors with a rental rate towards the lower end of the market valuation. This activity is therefore commercial in nature.

136 The respondent submits that both the doctor's surgeries and the residence are rented out at market rates at Kalbarri and Northampton.

Item 6 — Staff Housing

137 There is no statutory requirement on the Shire to own and/or rent property. Houses are rented because they are excess to immediate staff needs and not for the specific purpose of generating income. Whilst expenses exceeded revenue in the 2010 - 2011 financial year this was due to unusual circumstances and is not the norm. The properties are rented for $130 per week and Mr Criddle gave evidence that he considers this to be a market value which takes into consideration the quality of the tenant. The respondent maintains that this is a trading activity.

Items 7 to 11 — Sanitation

138 The respondent chooses to provide a commercial rubbish service in order to provide an income to undertake other activities along with subsiding statutory functions in this area. Mr Criddle explained that the respondent undertook a detailed analysis of the costs of residential waste collection as a basis for the charges related to the commercial waste collection as this is a similar activity. Mr Criddle estimated that there is a profit value of around 30% to 40% after employment costs are factored in. The respondent submits that the range of services in the sanitation area that are provided in addition to the statutory services are trading in nature.

Item 12 — Health

139 There is no statutory requirement for the Shire to hire out the services of its Building Surveyor/Environmental Health Officer to provide professional services to neighbouring local governments and those organisations are able to purchase these services from anyone or provide it themselves. The charge for this service is at a premium rate to compensate for the inability of the respondent to use this employee when hired out and the evidence of the respondent that this activity was trading in nature is unchallenged.

Items 13 and 14 — Community Amenities

140 The cost of cemetery maintenance significantly exceeds the amount collected in fees however the respondent chooses to provide the cemeteries as a service to the community and at a standard which is beyond that which is required by statute. There is no statutory obligation on the respondent to provide for the purchase and installation of niche wall plaques for the interment of ashes and the public does not have to use the respondent's service and the fees relating to this covers the costs of materials and installation. General burial fees are dictated by legislation but whether the service is provided is a discretionary one and it is argued that the statutory requirements on how the service is provided does not alter that the nature of these services being discretionary.

Item 15 — Community Amenities

141 Hirers are charged on a per kilometre basis for the use of the bus and there is no statutory requirement for the Shire to provide this service. That the bus was given to the respondent does not impact on the operating costs of the service and the charge would usually cover costs however the evidence of Mr Criddle was that during the 2010 - 2011 financial year there were a few accidents which prevented this. This charge therefore remains trading in nature.

Items 16 and 17 — Public Halls and Civic Centres

142 The evidence confirmed that these facilities are not provided as a result of a statutory requirement and they compete with other privately owned facilities like hotels, child care centres and commercial properties for lease. The provision of these centres makes the Shire a more attractive place to reside however are not sufficient for the cost of maintaining them to currently outweigh the revenue received and the reason for offering these facilities is not one of profit but as a community service.

Item 18 — Swimming Areas and Beaches

143 The Shire charges berthing fees to three tourist boats for the use of the jetty. The respondent maintains berth charges are trading in nature and the Shire is under no statutory obligation to allow members of the public and businesses use of the jetty.

Item 19 — Swimming Areas and Beaches

144 The Shire has a lease agreement for an area of land with a fuel bowser constructed on it and the lease is assessed at commercial market rates. There are no maintenance costs for this service and the money derived from this activity subsidises other trading activities.

Items 20 and 21 — Recreation and Sport

145 The Shire provides various parks and ovals throughout the Shire as part of its statutory obligation and for use by members of the public and the respondent continues to provide and maintain these amenities irrespective of its commercial use. It is also acknowledged that maintenance costs for these amenities far outweigh what it receives in fees charged. The respondent allows for the exclusive use of the oval by Northampton District High School and various sporting clubs on a regular basis and this is additional to any statutory requirement and the income derived from this activity is beyond its statutory requirement. These facilities are hired out for the benefit of community groups and to raise revenue for other activities.

Item 22 — Library

146 Mr Criddle stated that there was no statutory requirement to provide internet usage to the public but a minimal level of income was received from the provision of this service at their library. While this is agreed to be a minor portion of income, it is argued that it goes to the quantum of trading activity undertaken by the respondent. The respondent does not allocate employee costs to this service as these resources are already provided for in the library and office. The provision of the internet is already set up within the Shire's building and costs are covered as the internet is already in place. The respondent chooses to provide this service as a benefit to the community partly as they have the infrastructure in place. The respondent maintains that this service is charged at market rates and covers the cost incurred. The respondent also competes with private enterprise and the users of this service could go elsewhere for this service.

Item 23 — Road Construction

The provision of additional parking at a place of business is a private arrangement performed using existing equipment and staff resources and the respondent shared half the cost of the work from their general roadwork maintenance budget as a statutory community enhancement. Only the additional private income has been counted as trading activity. In the 2010 - 2011 financial year this activity generated discretionary income and this business would otherwise have been undertaken by contractors outside the area. The respondent maintains that this activity was commercial in nature.

Items 24, 25 and 26 — Aerodrome

147 The Shire owns and manages an airstrip and hangars in conjunction with the City of Greater Geraldton. A landing fee is charged for each aircraft which uses the aerodrome and the City of Greater Geraldton reimbursed the Shire for operating costs based on a per person landing fee basis. Even though the expenditure on this activity far exceeds the income the respondent argues the income from this activity is still trading in nature. The existence of the aerodrome also has multiple benefits to the Shire and in turn supports the cost of this activity.

Item 27 — Caravan Parks

148 This land leased by private businesses for caravan parks is under a commercial lease arrangement which generates income and provides other tourism benefits to the respondent. The prices are market based set in competition with other providers and a profit is generated.

Item 28 — Private works

149 The respondent undertook 20 to 30 private works projects in the last financial year and this income is additional to any statutory income. The respondent also competes with hire companies which undertake this work.

Item 29 — Plant Operation

150 Scrap metal that the Shire accumulates is sold and this derives a profit. The metal was accumulated through a combination of commercial waste, abandoned vehicles and metal at the tip and this was sold on the open commercial market to Sims Metals.

Items 30 and 31 — Fire Prevention

151 The respondent has separated grant income from trading income received for providing fire and emergency services for FESA. The statutory obligation to carry out certain fire and emergency services coordination is only enacted once income is received and a local government is not required to perform these services. As with other activities such as operating an aerodrome, it is argued that legislation applies on the operation of the activity as opposed to being required to perform the activity. The Shire argues that while the levy is collected through a statutory requirement it is arguable that this portion is in compensation for a service delivered by the Shire.

Item 32 — Investments

152 The Shire received $148,901.56 in interest from money invested from residential subdivision land sales and the investment is at market interest rates and is invested for the best available return. There is no statutory requirement on the Shire specifying where money should be invested and this is a discretionary trading activity.

Land Sales

153 The Shire has made no major land sales in the financial year under review however this is unusual. The respondent submits that land sales are a frequent undertaking by the respondent and should be considered as such when looking at the totality of its trading activity. The evidence demonstrates that the respondent does not sell land for specific purposes, rather to be held as an investment and spent on various projects when required and this is to provide amenities and services to the people of the Shire as well as make the Shire an attractive place to live. Land sales are a significant activity but have not been relied upon in the 15% calculation of trading activity as a percentage of all operating revenue arrived at for the 2010 – 2011 financial year. It is submitted however that there is a direct relationship between the non-statutory services provided to the community or subsidised by the Shire and the prices obtained in land sold. A block of land would obtain a lower price if there was no doctor, child care, airport or aged care units in the area and this approach is no different from other trading organisations that do not generate direct income from all products but have other reasons for selling them. The respondent submits that land is not developed and sold as a result of statutory requirement but at the sole discretion of the Shire and it competes with land being sold privately.

Camping Charges

154 The Shire owns and maintains land which is used as a camping ground by members of the public. The Shire employs a ranger to service this area called Little Bay and charges users a fee, currently $15 per car.

155 In summary the Shire has been conservative in identifying the trading activities it relies upon. Money received from Main Roads for road maintenance, tourism licences and swimming area fees among others could also be considered as trading in nature. Even without these activities, the $861,598 attributed to trading is significant financially and of importance to the respondent both for its viability and to the role it provides.

156 While it is conceded that ***Galea*** and ***ALSWA*** are decisions of higher bodies than this Commission, it is argued they conflict with each other. The ***ALSWA*** decision is based on applying the activities test while in ***Galea*** a new and unique functions test was created and the respondent argues that this Commission is not able to follow both tests.

157 It is acknowledged that if the Commission deems it is necessary to apply the functions test, then it will find it has jurisdiction over the respondent simply because the Shire is a local government and this would result in the Commission determining that no local government falls within the federal workplace relations system as they all have the same function and purpose. The respondent submits that the function test is an inaccurate and unsafe one and does not believe that the federally registered enterprise agreements which govern the employment conditions of over 11,000 employees in Western Australian local governments are in effect, unenforceable. It is submitted that it is convenient for the applicant to claim that it applying to FWA for an enterprise agreement to be registered for the Shire was an error.

158 The Shire submits therefore that the trading activity undertaken and described through the testimony of Mr Criddle should be evaluated using the activities test as refined by the Federal Court of Australia in ***Bankstown*** and the respondent submits that ***ALSWA*** and the ***Etheridge*** decisions have been superseded by **Bankstown** which applied the activities test. If the activities test is applied, the applicant's submissions about the statutory mandates of an organisation and the generation of profit should be rejected. The statutory requirements of a utility provider or a company to the Australian Securities and Investments Commission are of no relevance to its activities and a local government is no different and the commerciality of an activity is not simply the comparison of the income and expenses in a particular year. The ***Bankstown*** decision corrected the previous view that profit generation for each trading activity was relevant to it commerciality and this decision found that on a cost recovery basis the Bankstown Handicapped Children's Centre Association was a trading organisation.

159 It is argued that in the observation made by the AIRC in 2009 in the Full Bench Decision on Award Modernisation (4 December 2009, [2009] AIRCFB 945) about 'typical' local governments directly refers to the decision of Spender J in **Etheridge**:

> We have previously expressed the view, by reference to the decision of Spender J in ***Australian Workers' Union of Employees, Queensland and Others v Etheridge Shire Council and Another*** (Etheridge Shire Council), that a 'typical' local council is unlikely to be a constitutional corporation such that only a limited number of local government entities will fall into the second of the three categories identified above. We received submissions suggesting that the council the subject of Spender J's decision was not a 'typical' local council. That may be so, however, our view was based on the proposition that if the reasoning in Etheridge Shire Council is correct then such reasoning will mean that a "typical" local council is not a constitutional corporation. It is possible that some of the uncertainty may be removed by legislative means or further judicial decisions [133].

160 It is argued that these comments are not relevant as they were made prior to the ***Bankstown*** decision, they do not clarify what the full bench perceived to be and were *obiter dictum* to the making of the Modern Award. It is agreed however that the respondent is a body constituted under the LG Act as is the Shire of Ravensthorpe and undertakes many similar activities. They are both 'typical' West Australian local governments.

161 The Shire acknowledges that the fees charged do not always cover the cost of providing a service. This is evident in the provision of the aged care units, buildings used for child care, the provision of recreations ovals and the rental properties which are leased to staff and members of the public. However, the Shire submits that it does not need to cover all costs in each financial year, that the benefit to the respondent may not directly relate to costs recovered from a service and furthermore that if there is no statutory requirement to provide an extra service, such as the use of the oval, any monies made are on top of that

which it costs to provide and maintain the oval. The use of the oval by the Department of Education is unrelated to any statutory obligations of the Shire and the Department of Education could develop and use their own oval or hire a facility from another company. The rate charged is based on the market rate for its use and is additional income derived from the 'trade' and the cost of maintaining council assets in relation to the income generated may differ from year to year. The scheduled maintenance on the Shire's assets as well as improvements or upgrades also vary each year.

162 During the hearing much emphasis was placed on the individual components of the argued trading activity and the respondent suggests that more weight needs to be given to the relationship between the elements of the trading activity along with the other services provided by the respondent and where a loss may be incurred in one area, there may be a benefit in another. Employee costs associated with providing a commercial service are often absorbed as part of providing a statutory service and are minimal when looking at the income generated from the commercial service. For example, the inspection of rental properties by the building surveyor who would undertake similar tasks as part of his or her general duties.

163 It is appreciated that local government as an industry and local governments individually do not comfortably sit as either a traditional trading organisation or as a traditional statutory body. However, it is argued that the role of local governments has expanded from the limited governmental role to become the lifeblood of many communities providing services once supplied by state government or private organisations and the role of a local government such as the Shire is not just to provide for the good government of persons in its district but to provide services for the district to survive and grow.

164 The respondent submits it is within the discretion of the Commission to determine that it does not have jurisdiction in this matter and dismiss the application.

Findings and conclusions

Credibility

165 I have no reason to doubt the veracity of the evidence given by Mr Criddle however I do not accept his characterisation of some of the income received by the respondent as being from trading activities. With this qualification, I accept Mr Criddle's evidence.

166 There is no dispute between the parties and I find that in the financial year ending 30 June 2011 the respondent received the income specified in Appendix A which is attached to Mr Criddle's witness statement.

167 Section 14(1)(a) of the FW Act defines a national system employer as a constitutional corporation, so far as it employs, or usually employs, an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines a constitutional corporation as a corporation to which s 51(xx) of the Australian Constitution applies and s 51(xx) of the Australian Constitution provides that corporations amongst others are 'trading or financial corporations formed within the limits of the Commonwealth'. Section 26 of the FW Act states that that act is to apply to the exclusion of all State or Territory industrial laws that would otherwise apply to a national system employee or employer, including the Act. If the respondent is a trading corporation, by virtue of ss 12, 13 and 14 of the FW Act, the jurisdiction of the Commission to deal with the applicant's claim is excluded by s 26 of the FW Act and s 109 of the Australian Constitution.

168 The legal principles with respect to a matter of this nature were reviewed in ***Galea***. In this decision Ritter AP stated the following:

> The relevant authorities were comprehensively summarised by Steytler J in *ALS*. It is unnecessary to repeat that exercise. His Honour also distilled relevant principles from the cases which were set out at [68]. In *R v The Judges of the Federal Court of Australia; ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 (*Adamson*), Mason J at 233 said that the expression "trading corporation" is "a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation". This was, his Honour said, a "question of fact and degree" (234). His Honour also said that not every corporation which is engaged in trading activity is a trading corporation and that "the trading activity of a corporation may be so slight and so incidental to some other principal activity … that it could not be described as a trading corporation" (234). These observations were referred to with approval by three members of the High Court in *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 303-304. The relevant passages of the reasons of Mason J were also quoted with approval by Steytler P in *ALS* at [46]; (and see also [68]).
>
> As set out by Steytler P at [69] of *ALS*, s51(xx) of the *Constitution* does not give the Commonwealth the power to legislate with respect to trading, or even to trading by corporations. The power to legislate is with respect to some, but not all, corporations, including those classified as trading corporations.
>
> At [74], Steytler P concluded that what was done by the Aboriginal Legal Service did not have a "commercial character" and that in all but exceptional cases its services were provided free of charge and for altruistic purposes not shared by ordinary commercial enterprises. Accordingly, and for the other reasons stated by Steytler P, the Aboriginal Legal Service was not a trading corporation.
>
> As stated by Pullin J at [82] of *ALS*, the "decision about whether a corporation is a trading corporation is a qualitative judgment which involves the balancing of many factors which, taken individually, may point either to or against the conclusion that the particular corporation is a trading corporation" [71] –[74].

169 Ritter AP then reviewed the impact of other relevant cases including ***Hughes v Western Australian Cricket Association (Inc)*** (1986) 19 FCR 10, ***Etheridge*** and ***Mid Density Development Pty Ltd v Rockdale Municipal Council*** as well as some of the cases cited therein. Ritter AP then referred to an article titled "*The meaning of 'trading or financial corporations': Future directions*" by Nicholas Gouliaditis (2008) 19 PLR 110. This article considered whether 'municipal corporations' should be characterised as trading corporations. A quote from this article is as follows:

> As Gibbs CJ noted in ***Fencott v Muller***:

> a corporation cannot take its character from activities which are uncharacteristic, even if those activities are not infrequently carried on. It may indeed be wrong to insist on finding activities that are 'primary' or 'predominant', but it is equally wrong to be satisfied with activities that are 'substantial', if the latter activities do not, in all the circumstances, show that the corporation has a character which the *Constitution* requires [***Fencott v Muller*** (1983) 152 CLR 570 at 588].
>
> … it is noted that the majority of cases generally approach the activities test by comparing trading revenue to non-trading revenue. But whether trading is a sufficiently significant proportion of a corporation's activities to mark the corporation as a trading corporation does not depend solely on the proportion of income derived from its trading activities. Revenue data is only relevant in so far as it provides a reasonable indication of the relationship between trading activities and overall activities. For example, a body could earn 100% of its income from trading activities and still not be a trading corporation if that income-generating activity was only a small part of what the corporation did. It is accepted, however, that 'there are difficulties involved in comparing economic and non-economic activities (***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10 at 23 (Toohey J)) (127).

170 Ritter AP then went on to say the following:

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

171 Ritter AP then stated the following with respect to trading:

> As I have said a major plank of the appeal was the argument by the Shire that the Commissioner erred in deciding that a number of its income producing activities were not trading. I will shortly consider this submission. It is important to recognise however that each of the activities conducted by the Shire occurs because of its overriding functions and duties under *the LGA* and other state legislation. In particular, the activities of the Shire must be viewed within the paradigm of its general function under s3.1(1) of *the LGA* being to "provide for the good government of persons in its district".
>
> In ALS, Steytler P at [68] set out relevant principles to be drawn from the High Court and other decisions he had earlier analysed. With respect to trading, the following points were made, omitting citations:
>
> (a) Trading is not to be given any narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trading services.
>
> (b) The making of a profit is not an essential prerequisite of trade, but it is a usual concomitant.
>
> (c) The fact that trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as trade.
>
> (d) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading.
>
> Le Miere J, although dissenting in the outcome in *ALS*, relevantly said at [103]:
>
> '103 The commercial nature of an activity may be an element in deciding whether the activity is a trading activity. But in that context commercial refers to activities which earn revenue and are conducted in a business-like way rather than with a view to profit'. [99] – [100]

172 Ritter AP stated the following with respect to the items the appellant claimed were trading activities:

> From my review of the items considered by the Commissioner it can be seen that I think there were errors in the characterisation of some items as not being trading. In addition, there are items where the Commissioner could or should have ordered that additional evidence be provided before a proper characterisation could be made. The issue on appeal is not however whether the Commissioner erred in her consideration of individual items. It is whether she erred in her characterisation of the Shire as not being a trading corporation. If I was of the opinion that the Commissioner had found the Shire was not a trading corporation when she could not properly do so in the absence of obtaining additional evidence, I would allow the appeal. In my opinion however this is not the present position.
>
> Even if all of the items where the reasoning of the Commissioner is in error or problematic, were to be characterised as trading activities, it remains that the substantial majority of the income received by the Shire is not from trading activities. The substantial majority of its income is, as a local government body, received by way of grants, rates, ordinary service charges and the like. This may be gleaned from the first table set out earlier, where the total revenue received by the Shire for 2007-2008 is in excess of $10.5 million and also exhibit R1, which shows the revenue of the Shire for 2007-2008.
>
> Additionally, the trading activities are generally incidental to the activities of the Shire as a whole – functioning as a local government body for the "good government of persons in its district". A good example is the activity of the Shire running a Westpac Bank agency. This involves the intermittent time of some of the employees of the Shire. Also, the activity would, I infer, be engaged in, overwhelmingly, for the benefit of the residents of the Shire. It is not an activity which on its own, or together with other activities, makes the Shire a trading corporation.

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

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

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

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

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

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

For these reasons, in my opinion, the Commissioner was not in error in characterising the Shire as not being a trading corporation. The Shire's complaints about the Commissioner's reasoning, set out earlier, do not lead to this conclusion [147] – [156].

173 In this decision Beech CC, who agreed with Ritter AP, stated the following:

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

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

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

…

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

…

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

…

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

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

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

The Activities

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

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

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

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

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

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

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

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

It is for these reasons that I agree with the conclusions his Honour the Acting President has reached in relation to each of the activities which the Shire emphasises in its appeal. I find it is not necessary in this case to resolve the differences in approach between the Acting President and Smith SC to activities, such as item 14 Cemetery Charges, because of my ultimate conclusion that the substantial majority of the income received by the Shire is not from trading activities, and that the activities of the Shire which are trading activities are not substantial and are peripheral to the Shire's activities as a whole under the *LG Act*. I do not consider the Shire of Ravensthorpe has made out its grounds of appeal. The Commissioner at first instance did not err [166], [167], [169], [175], [179] - [185].

174 When taking into account the above authority and the authorities referred to therein, the issue to be determined when deciding if the respondent, which is a corporation, is a trading corporation is in short a review of the character of the activities carried out by the respondent at the relevant time within the context of the purpose of the organisation and whether or not the respondent engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation for the purposes of the FW Act.

175 Neither party gave evidence about the respondent's corporate status. However, I note that s 2.5 of the LG Act provides that each local government body in Western Australia is a body corporate and has the legal capacity of a natural person. I therefore find that the respondent is an incorporated body.

176 Section 1.3(3) of the LG Act creates a duty on the respondent to focus on the environment, social advancement and economic prosperity of community members residing within the Shire. Section 1.3(3) reads as follows:

> (3) In carrying out its functions a local government is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity.

177 There is also an obligation on the respondent under the LG Act to provide appropriate governance for its residents. Section 3.1(1) of the LG Act reads as follows:

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

178 Based on the respondent's 2010 - 2011 financial statements and s 3.1(1) of the LG Act I find that the respondent's main role is to provide a range of infrastructure and other services to the residents of the Shire for their benefit. I find that in the main services provided by the respondent are funded from income derived from rates and service charges as well as from other sources, in the main grants (Exhibit R1). I find that during the relevant period amongst other things the Shire was engaged in the collection of rates, governance, council administration, fire prevention, the provision of law, order, public safety and health services, the provision of housing and aged care housing, public works, transport, cemeteries, child care services, community amenities, libraries, refuse collection and waste management, recreation and culture and tourism (Exhibit R1).

179 Income the respondent received from activities which it claims are trading activities, as a percentage of the respondent's total income for the 2010 - 2011 financial year, is as follows:

Item	Description	2010 -2011 Income	% of total income for 2010 - 2011	Expenditure
1	Child Care Contribution/reimbursement	$596.87	0.01	$73,718
2	Aged Care Aged units rental income	$54,567.73	0.97	$35,369
3	Health Care Lease Kalbarri and Northampton surgeries	$31,983.89	0.57	$24,184
4	Health Care Doctor's rent reimbursement	$5,100.00	0.09	$23,490
5	Health Care Doctor's reimbursement of utilities	$2,076.53	0.04	Included in above
6	Staff Housing Residential Rental	$10,060.00	0.18	$15,206
7	Sanitation 240 litre carts - household	$3,928.95	0.07	$4,867
8	Sanitation Refuse site fees - other	$102,015.67	1.81	All costs $832,923 (not separated between residential and commercial)
9	Sanitation Industrial	$132,561.22	2.35	Included in above
10	Sanitation Commercial	$35,886.32	0.64	Included in above
11	Sanitation Caravan parks	$41,580.00	0.74	Included in above
12	Health Health/building surveying services	$4,156.37	0.07	Part of employees' salary, no direct costs itemised

Item	Description	2010 -2011 Income	% of total income for 2010 - 2011	Expenditure
13	Community Amenities Charges cemetery fees	$5,327.40	0.09	$35,355 (all cemetery costs minus niche wall plaques)
14	Community Amenities Niche wall plaques	$2,230.00	0.04	Unspecified
15	Community Amenities Bus hire	$2,582.78	0.05	$6,288
16	Public Halls and Civic Centres Charges hall hire	$1,830.00	0.03	$15,668
17	Public Halls and Civic Centres Allen community centre	$1,002.72	0.02	$61,392
18	Swimming Areas and Beaches Kalbarri jetty berth fees	$1,500.00	0.03	No expenses
19	Swimming Areas and Beaches Reserve leases Kalbarri foreshore	$7,888.29	0.14	No expenses
20	Recreation and Sport Education department oval	$2,436.40	0.04	$166,602
21	Recreation and Sport Leases and rentals	$3,481.40	0.06	Included in above
22	Libraries Internet access fee	$785.73	0.01	
23	Road Construction Contributions	$56,011.00	0.99	Unable to be separated from works expenses
24	Aerodrome Charges – landing fees	$16,658.67	0.29	Included in $22,048
25	Aerodrome Hanger site lease	$113.00	0.002	Included in above
26	Aerodrome Reimbursement Kalbarri airstrip	$10,935.59	0.19	Included in above
27	Caravan Parks Leases/rentals	$59,600.20	1.06	$2,329
28	Private Works Plant hire	$36,668.86	0.65	$22,611
29	Plant Operation Contributions	$39,111.24	0.69	Unspecified
30	Fire Prevention Northampton	$17,670.00	0.31	
31	Fire Prevention Kalbarri	$22,350.00	0.40	
32	Investments Interest	$148,901.56	2.64	
	Total	**$861,598.31**	**15.28**	
	Total Operating revenue	$5,638,924.00		

180 After reviewing the evidence given about the above activities in these proceedings, the purpose and nature of the activities the respondent claims to be trading, income from these activities and the costs incurred to carry out these activities, where specified by the respondent, I find that a number of the activities claimed by the respondent to constitute trading are not trading activities.

181 I find that the income the respondent received from Items 1, 3, 4, 5, 7, 13, 14, 15, 16, 17, 20, 21, 22, 30 and 31 in the 2010 - 2011 financial year does not constitute income from trading activities. I find that the income from these activities lacks the essential commercial character of trading and I find that these activities were in the main conducted by the respondent to provide services for the benefit of the local community as one would expect of the activities of a local government entity given its charter under the LG Act.

Items 1 and 22 – Child Care and Libraries

182 Income from child care constitutes reimbursement of internet expenses incurred by community organisations operating the child care centres in the amount of $596.87. Expenditure on the child care centres was $73,718 and this reimbursement is the only income received by the respondent from the operation of these centres. The Shire also received $785.73 as reimbursement for internet use at the library in Northampton in the 2010 - 2011 financial year based on a fee for service arrangement. The specific cost of providing these activities was not stated by the respondent.

183 I find that the income from these activities lacks a commercial character. These activities did not generate a profit and I find that they are provided for the benefit of the community. I therefore find that the income from these activities does not constitute trading.

Item 3 – Health Care

184 The Shire received $31,983.89 in income by leasing surgeries to doctors at Kalbarri and Northampton and the Kalbarri surgery building was partly funded by a federal government grant of $130,000. The cost to the respondent of maintaining these surgeries appears to be a total of $29,212.

185 I find that the main purpose of this activity is to encourage medical practitioners to work in the Shire for the benefit of residents and I find that this activity lacks a commercial character as income and expenditure for this activity was close to even and some costs associated with this activity are not included in this amount for example, management costs. In the circumstances I find that the income from this activity does not constitute trading.

Item 4 – Health Care

186 The Shire received rent of $5,100 made up of a rental charge of approximately $100 per week for the provision of a house for a doctor in Northampton. The cost of maintaining this house in the 2010 – 2011 financial year was $23,490.

187 I find that the income from this activity lacks a commercial character as the rent received for the doctor's residence is substantially less than the cost of providing this service. I also find that the provision of housing for the local doctor by way of a low rent is to ensure that the Shire's residents have access to medical care which is for the benefit of the community. In the circumstances I find that this activity does not constitute trading.

Item 5 – Health Care

188 $2076.53 was paid to the respondent as reimbursement of utility costs related to the doctor's residence. As the income from this activity constitutes reimbursement of utility costs incurred by the occupier with respect to premises leased from the Shire, this lacks the commercial character required of a trading activity.

Item 7 – Sanitation

189 The Shire received $3,928.95 in income for the replacement of 240 litre rubbish carts and the cost of providing this service was $4,867. These carts were sold on a cost recovery basis with a small additional fee.

190 I find that as this is a service provided by the respondent to community members and is related to its statutory obligations with respect to domestic rubbish collection and as this service is provided to support the local community on a close to cost recovery basis, this activity lacks the commercial character of a trading activity and does not constitute trading.

Items 13 and 14 – Community Amenities

191 In the 2010 – 2011 financial year the Shire received $5,327.40 for digging burial plots at its two cemeteries and the fees charged were those set by the Cemeteries Board. The cost of maintaining the two cemeteries and providing this service was $35,355, excluding the cost of providing niche wall plaques. I find that as this activity is regulated by statute under the *Cemeteries Act 1986* and as the right to obtain income from cemetery charges and the right to payment for the service is created by statute and not by any negotiation, bargain or agreement that has the hallmarks of trade, this does not constitute income from a trading activity (see Smith SC in ***Galea*** [238]).

192 The Shire received $2,230 in the 2010 – 2011 financial year for the provision of niche wall plaques, which included a fee for the provision of each plaque and a charge to install it. The cost of providing the plaques was unspecified. As no evidence was provided about the cost of this activity I am unable to determine if this activity has a commercial character and is therefore a trading activity.

Items 15, 16 and 17 – Community Amenities

193 In return for hiring out its bus the respondent received income of $2,582.78 in the 2010 – 2011 financial year. The cost of providing this service was $6,288. The Shire also leased the RSL Hall and the Allen Community Centre and received $2,832.72 in income in the 2010 - 2011 financial year. The cost of providing these facilities was $15,668 and $61,392 respectively.

194 I find that these activities are not trading activities on the basis that bus hire and leasing and hiring of the RSL Hall and Allen Community Centre are provided for the benefit of the local community. I also find that these activities were not provided to the respondent's residents on a commercial basis as the income the respondent received from these activities was significantly less than the cost of providing these services and therefore lacks a commercial character.

Items 20 and 21 – Recreation and Sport

195 In the 2010 - 2011 financial year the Shire received $2,436.40 for leasing the town oval and its facilities to the Northampton District High School and the Shire received $3,481.40 for leasing its oval to other organisations. The cost of maintaining the oval was $166,602 during this period.

196 I find that the leasing of the town oval and its facilities does not constitute a trading activity. I find that this activity is provided for the benefit of the local community and that the income received from this activity lacks a commercial quality as the income is insignificant compared to costs incurred by the respondent for providing this service.

Items 30 and 31 – Fire Prevention

197 The Shire received grant funding from the state government in the amount of $40,020 to deliver fire and emergency services and this funding was by way of reimbursement from the state government of the costs of operating this service.

198 I find that the income received for these activities was provided under a grant by the state government for performing services for the benefit of the community, these activities were not undertaken to generate a profit and lack a commercial character. Additionally, I find that these activities form part of the role of a local government body. I find that the income from these activities does not therefore constitute trading.

199 I find that income received by the respondent from the following activities arises out of activities which are trading activities. I find that this income arises out of activities which have a commercial character and that these services were provided by the respondent to generate a profit. I also find that these services were provided over and above the statutory requirements on the Shire as a local government entity.

Item 2 – Aged Care Units Rental Income

200 The respondent supplied land and built aged care units at Kalbarri as a joint venture with Homeswest. Even though rent paid by clients for renting these units appears not to be levied on a commercial basis, income the respondent received from this activity was $54,567.33 and expenses for this activity, excluding management fees, was $35,369. As the respondent made a profit from this activity and received income in return for providing a service I find that this activity is commercial in character and constitutes trading.

Item 6 – Staff Housing

201 The Shire received $10,060 in the 2010 - 2011 financial year by way of rent for two of three properties owned by the Shire which are rented to the public. The cost of maintaining these properties in the 2010 - 2011 financial year was $15,206, excluding management costs.

202 Even though the income received from this activity is less than expenses incurred for providing these houses I find that this activity constitutes trading as housing was provided to the public in exchange for income.

Items 8, 9, 10 and 11 – Sanitation

203 The respondent received income of $102,015.67 from fees paid by the public for use of the Shire's refuse sites. In the 2010 – 2011 financial year the Shire received an income of $132,561.22 for the collection of industrial waste and in the 2010 – 2011 financial year the Shire received an income of $35,886.32 for commercial waste collection based on a domestic rubbish removal charge of $330 per service. In the 2010 – 2011 financial year the Shire received an income of $41,580 for providing waste services to caravan parks in the Shire.

204 The cost of providing these four services is included in the total of refuse site costs of $832,923.

205 I find that the provision of these services has a commercial character as these services were provided in return for fees being charged. Whilst it is unclear from the figures provided by the respondent if a profit was made from these activities I find that as these activities were provided in exchange for income they therefore constitute trading.

Item 12 – Health

206 In the 2010 – 2011 financial year the Shire was paid $4,156.37 to provide health and building surveying works to two other local government entities and these charges were levied on a cost recovery basis plus an inconvenience fee of 20%. No fees were charged for managing this service and there were no direct costs itemised for providing this service.

207 Even though health and building surveying services is an activity carried out by the respondent pursuant to its role as a local government authority I find that this service was provided to two other local government authorities in return for income and therefore has a commercial character and constitutes trading.

Items 18 and 19 – Swimming Areas and Beaches

208 In the 2010 - 2011 financial year the Shire received $1,500 in jetty berthing fees for use of the Kalbarri jetty which it owns and there were no costs for providing this service. The respondent also leases part of the land it owns on the Kalbarri foreshore for a fuel bowser which is located there and in the 2010 - 2011 financial year it received $7,888.29 in return for providing this land. There was no cost to provide this activity.

209 I find that berthing fees were paid for the use of the Kalbarri jetty and that the lease of land on the Kalbarri foreshore was provided to users in return for fees being charged. As a profit was made from these activities I find that these activities have a commercial character and constitute trading.

Item 23 – Road Construction

210 The Shire received income of $56,011 for constructing two private car parks in the 2010 - 2011 financial year. The cost of providing this activity was unspecified.

211 I find that as this activity was provided in return for fees being charged and as I accept Mr Criddle's evidence that commercial rates were charged for these activities this constitutes a trading activity.

Items 24, 25 and 26 – Aerodrome

212 The Shire's airstrip and hangar are jointly owned and managed with the City of Greater Geraldton. In the 2010 - 2011 financial year landing fees of $16,658.67 were paid to the Shire, the Shire received $113 for the lease of the hangar and the Shire received $10,935.59 as reimbursement from the City of Greater Geraldton towards the operating costs of the aerodrome based on a per person landing fee. The costs of providing these activities are included in the total operating costs for the airport of $22,048 in the 2010 – 2011 financial year.

213 The respondent made a small profit from charging fees for the aerodrome's use by private individuals and businesses. I find that these activities constitute trading as they operated on a commercial basis as income was received in return for the provision of services.

Item 27 – Caravan Parks

214 The Shire owns the land on which the three caravan parks are situated and income for the lease/rental fees for these sites totalled $59,600.20 in the 2010 – 2011 financial year. The cost of providing this activity in the 2010 – 2011 financial year was $2,329.

215 As the lease of the land that the caravan parks are situated on generated a substantial profit by way of fees being paid in return for the provision of a service I find that this activity has a commercial character and therefore constitutes trading.

Item 28 – Private Works

216 In the 2010 – 2011 financial year some of the Shire's plant was hired out for private work and income from this activity totalled $36,668.86. The cost of providing this activity was $22,611.

217 As the respondent made a profit from hiring out plant to the public and fees were charged for providing this service, I find that this activity is commercial in character and constitutes trading.

Item 29 – Plant Operation

218 The Shire sold accumulated scrap metal for $39,111.24 in the 2010 – 2011 financial year. The cost of providing this activity was unspecified although Mr Criddle gave evidence that any costs for this activity were minimal. As the respondent appears to have made a significant profit from this activity I find that this activity has a commercial character and constitutes trading.

Item 32 – Investments

219 The Shire received $148,901.56 in interest on funds invested in the 2010 – 2011 financial year. I find that the income from investments constitutes trading as this investment activity generated a profit and constituted a commercial activity.

220 Mr Criddle gave evidence that the Shire owns and maintains land which is used from time to time as a camping ground by members of the public. Little Bay camping fees are charged at $15 per car load and income received from this activity totalled $3,231.82 for the last financial year and the Shire employs a ranger to service this area. As no breakdown was given about expenditure to conduct this activity I am unable to conclude that this activity constitutes trading.

221 The respondent submitted that the Commission take into account land sales which it undertakes from time to time but there was no activity in this area in the financial year 2010 - 2011. Whilst I accept the respondent is involved in this activity this issue is not relevant to the income the respondent received from trading in 2010 - 2011. The Commission also cannot consider income from other additional activities it referred to in its submissions which it claimed constituted trading as no evidence was given about these activities and any income generated or expenses incurred from undertaking these activities.

222 I therefore find that income from the activities conducted by the respondent which constitute trading amounts to 13.45% of its total operating revenue.

223 I find that the respondent is not a financial corporation as there was no evidence that the respondent engaged in any financial activities.

224 I find that the registration of an agreement covering the respondent's employees in FWA is not a relevant consideration as there is no evidence that the issue of FWA's jurisdiction to register this agreement was determined when this agreement was registered.

225 I have found that a number of activities the respondent claims to constitute trading do not constitute trading activities and I have found that the activities conducted by the respondent which constitute trading amount to 13.45% of its total operating revenue. When considering all activities conducted by the respondent collectively I find that the substantial majority of the income received by the respondent is not from trading activities. I also find that the trading activities conducted by the respondent are insubstantial and peripheral to its primary activities as a local government body and I find that overall the respondent does not exist for or conduct activities which are of a commercial character. I therefore find that the respondent was not a trading corporation during the relevant period for the purposes of this application.

226 For the reasons set out above I will declare that the respondent is not a trading corporation and the substantive matter will be listed for hearing on a date to be fixed.

2012 WAIRC 00355

DISPUTE RE IMPENDING TERMINATION OF A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ROAD BOARDS, PARKS AND RACECOURSE EMPLOYEES' UNION OF WORKERS, PERTH
	APPLICANT
	-v-
	SHIRE OF NORTHAMPTON
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 13 JUNE 2012
FILE NO.	C 57 OF 2011
CITATION NO.	2012 WAIRC 00355

Result	Declaration issued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr S White and later Mr S Roffey (as agent)

Declaration

HAVING HEARD Mr K Trainer as agent on behalf of the applicant and Mr S White and later Mr S Roffey as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby declares:

THAT the respondent is not a trading corporation.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The State School Teachers' Union of WA (Inc)	Director-General of the Department of Education and Training	Scott A/SC	C 56/2011	11/11/2011 15/11/2011 16/11/2011 21/11/2011 22/11/2011 23/11/2011 24/11/2011 28/11/2011 29/11/2011 5/12/2011 7/12/2011 8/12/2011	Dispute re parties reaching an agreement	Concluded
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	City of Greater Geraldton	Harrison C	C 17/2012	23/03/2012	Dispute re redundancy	Concluded
Western Australian, Municipal, Administrative, Clerical and Services Union of Employees	Qantas Airways Limited	Harrison C	C 27/2011	5/05/2011 26/08/2011	Dispute re Long Service Leave entitlements & access to records of union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2012 WAIRC 00333

DISPUTE RE ABOLISHMENT OF POSITIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 30 MAY 2012

FILE NO PSAC 18 OF 2011

CITATION NO. 2012 WAIRC 00333

Result Interim Order Rescinded

Order

WHEREAS on Friday, 25th day of November 2011 the Public Service Arbitrator (the Arbitrator) issued orders to prevent the deterioration of industrial relations between the parties in respect of the matter until conciliation or arbitration could resolve the matter; and

WHEREAS the Arbitrator has convened a number of conferences and the parties have met and exchanged information and views on many occasions since the order was issued; and

WHEREAS the Arbitrator is satisfied that, while all matters associated with the dispute are not resolved, given the progress made through conciliation and negotiations, and that is now necessary for the respondent to implement changes which are prohibited by the terms of the Order, and given that the applicant consents to the rescission of the Order, it is now appropriate to rescind the Order; and

NOW THEREFORE, the Arbitrator, pursuant to the powers conferred the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT The Order issued by the Arbitrator on 25th day of November 2011 [2011 WAIRC 01074], corrected by Order of 29th day of November 2011 [2011 WAIRC 01080] and varied by Order of 7th day of December 2011 [2011 WAIRC 01095] be and is hereby rescinded.

(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
Main Roads CSA Enterprise Bargaining Agreement 2012 PSAAG 5/2012	(Not applicable)	The Civil Service Association of Western Australia Incorporated, Commissioner of Main Roads, Main Roads Western Australia	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Bunbury Cathedral Grammar School Inc (Enterprise Bargaining Agreement) 2012 AG 25/2012	23/05/2012	The Independent Education Union of Western Australia, Union of Employees and Head of School Bunbury Cathedral Grammar School	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
identitywa and United Voice Direct Care Workers Agreement 2012 AG 21/2012	22/05/2012	United Voice WA	Catholic Care (ABN: 30 585 628 518) trading as identitywa (WA BN11436529)	Commissioner J L Harrison	Agreement registered
Main Roads APEA Enterprise Bargaining Agreement 2012 PSAAG 1/2012	23/05/2012	The Association of Professional Engineers, Australia (Western Australian Branch), Commissioner of Main Roads, Main Roads Western Australia	(Not applicable)	Commissioner S J Kenner	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Main Roads AWU Enterprise Bargaining Agreement 2012 AG 22/2012	23/05/2012	The Australian Workers' Union West Australian Branch, Industrial Union of Workers, Commissioner of Main Roads, Main Roads Western Australia	(Not applicable)	Commissioner S J Kenner	Agreement registered
Western Australian TAFE Lecturers' General Agreement 2011 AG 24/2012	15/05/2012	The Department of Training and Workforce Development	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered

NOTICES—Appointments—

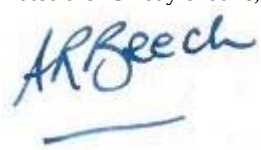
2012 WAIRC 00364

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, 2012.

Dated the 15th day of June, 2012.



CHIEF COMMISSIONER A.R. BEECH

2012 WAIRC 00303

Designation of Officers

Sections 81D and 99D

Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the Industrial Relations Act 1979:

Pursuant to sections 81D and 99D of the *Industrial Relations Act 1979,* **I DESIGNATE** THE PERSON NOMINATED being Sally Leeanne Mason to be the CLERK OF THE INDUSTRIAL MAGISTRATES COURT and to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 22 June to 20 July 2012 inclusive.

SUSAN BASTIAN
Acting Chief Executive Officer,
Registrar
Department of the registrar

7 May 2012

2012 WAIRC 00305

Designation of Officers

Sections 85(9) and 99D

Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the Industrial Relations Act 1979:

Pursuant to sections 85(9) and 99D of the *Industrial Relations Act 1979*, **I DESIGNATE** THE PERSON NOMINATED being SALLY LEEANNE MASON to be the CLERK OF THE COURT for the WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT and to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 22 June to 20 July 2012 inclusive.

SUSAN BASTIAN
Acting Chief Executive Officer,
Registrar
Department of the registrar

7 May 2012

2012 WAIRC 00306

Designation of Officers

Sections 93(IAB) and 99D

Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the Industrial Relations Act 1979:

Pursuant to sections 93(IAB) and 99D of the *Industrial Relations Act 1979*, **I DESIGNATE** THE PERSON NOMINATED being SUSANE HUTCHINSON to be the REGISTRAR and to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 22 June to 20 July 2012 inclusive.

SUSAN BASTIAN
Acting Chief Executive Officer,
Registrar
Department of the registrar

7 May 2012

PUBLIC SERVICE APPEAL BOARD—

2012 WAIRC 00308

APPEAL AGAINST THE DECISION OF THE EMPLOYER TO NOT ALLOW THE APPELLANT TO RETURN TO WORK

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00308
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER J L HARRISON- CHAIRPERSON MR B DODDS- BOARD MEMBER MR D NEWMAN- BOARD MEMBER
HEARD	**:**	TUESDAY, 20 MARCH 2012 WRITTEN SUBMISSIONS: TUESDAY, 3 APRIL 2012, TUESDAY, 10 APRIL 2012
DELIVERED	**:**	TUESDAY, 22 MAY 2012
FILE NO.	**:**	PSAB 22 OF 2011
BETWEEN	**:**	YONGHUA CHENG Appellant AND MR MENNO HENNEVELD MAIN ROADS WA Respondent

Catchwords	:	Industrial Law (WA) – Public Service Appeal Board – Appeal against decision to not allow appellant to return to work – Preliminary issue – Whether appellant resigned – Application referred outside of 21 day time limit - Appellant resigned – Application to extend time refused – Appeal dismissed
Legislation	:	*Industrial Relations Act 1979* s 80I and s 80J
		Industrial Relations Commission Regulations 2005 r 107(2)
Result	:	Dismissed
Representation:		
Appellant	:	In person
Respondent	:	Mr B Kirwan

Case(s) referred to in reasons:

Andrew Collins v Medicare Australia [2005] AIRC 1057

David John Mennie v Adsteam Harbour Pty Ltd [2006] AIRC 201

Gallo v Dawson (1990) 64 ALJR 459

Grant Raymond Lukies v AlintaGas Networks Pty Ltd (2002) 82 WAIG 2217

Jones v National Foods Australia Pty Ltd t/as National Foods Milk Ltd [2010] FWA 2120

Malik v Paul Albert, Director General, Department of Education of Western Australia (2004) 84 *WAIG 683*

Maureen Dehnel v Dr Neale Fong, Director General, Department of Health and Others (2006) 86 WAIG 3310

Michael Christian Nicholas v Department of Education and Training (2008) 89 WAIG 817

Pawel v Australian Industrial Relations Commission [1999] FCA 1660

Stephen Kelly v Director General, Department of Justice (2003) 83 WAIG 1283

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board (the Board).

2 On 9 December 2011 Yonghua Cheng (the appellant) lodged an appeal to the Board pursuant to s 80I of the *Industrial Relations Act 1979* (the Act) against a decision by Mr Menno Henneveld Main Roads WA (the respondent) not to allow him to return to his former position with the respondent.

3 The appellant maintains that he had an ongoing employment relationship with the respondent subsequent to ceasing work with the respondent on or about 27 February 2004. The appellant argues that on 27 November 2003 the then Commissioner for Main Roads Mr Menno Henneveld gave him an undertaking that when he was well enough to return to work he could do so and it was on this basis that he maintains that his employment with the respondent has been continuous since that time even though he did not undertake any work for the respondent after 27 February 2004. The Board must determine whether the appellant continued to be employed by the respondent after 27 February 2004 and was given permission to return to work with the respondent when he wished to do so.

4 After the hearing into the preliminary issue the Board asked the parties to make submissions with respect to whether the Board should accept this application, which was lodged on 9 December 2011, if the Board found that the employment relationship between the appellant and the respondent was not ongoing after 27 February 2004.

5 The appellant commenced employment with the respondent on 3 June 1997 as a Level 2 Engineer in the metropolitan planning section.

Relevant documents

6 The following documents were submitted as evidence during the proceedings.

7 A file note from the appellant to Mr Neville Binning dated 8 February 2002 with respect to the appellant's application to work from home (in part):

> File : ~~**N/A**~~ **E0049165**
>
> To : **MANAGER ROAD ASSET PERFORMANCE (NEVILLE BINNING)**
>
> Subject : **Working From Home**
>
> 1. On the 25th of December 2001, my daughter [name] was born. My parents are helping my wife [name] look after [daughter's name] on a short term visa. Soon my wife will need return to continue her PhD study at Royal Perth Hospital (She need do a lot of laboratory work).
>
> …
>
> 4. … To have a better future for [wife's name] and my family, we have decided I make a sacrifice and to apply for part-time (30 hours) working from home to assist the family.
>
> …

6. In order to have enough time commitment to my work, I apply for part time only (30 hours) working from home. My intended working from home starts from 1 April 2002 and ends at 31 March 2003 (Ideally [wife's name] completes her thesis around this time). I will need relevant computer equipment / internet access if my application is approved.

7. It will be greatly appreciated if you could approve this application.

(Exhibit R1, document 4.1)

8 A series of emails sent, dated 15 October 2003 to 26 November 2003, with respect to the appellant's resignation:

From: TAYA John (EDHR)

Sent: Wednesday, 26 November 2003 9:41 PM

To: PALMAN Cheryl (HRC)

Cc: WILLEY Neville (MOED)

Subject: RE: URGENT: Resignation

Cheryl,

I confirm that I advised Chess that he would not be entitled to a redundancy as his position had not been made redundant and there was no intention at this stage to do so

John

-----Original Message-----

From: PALMAN Cheryl (HRC)

Sent: Wednesday, November 26 2003 1:17 PM

To: CHENG Chess (RPPA)

Cc: TAYA John (EDHR); HENNEVELD Menno (CMR)

Subject: RE: URGENT: Resignation

Chess

Firstly, let me apologise for not getting back to you sooner.

Following on from our conversation on Monday 17 November I would like to confirm the acceptance of your voluntary resignation by John Taya on 16 October 2003, with an effective date of 30 November 2003. As discussed in our conversation I am now in the position to confirm the payout of your entitlements:-

- outstanding annual leave
- public service holidays
- outstanding flex credits up to 40 hours

The payout you receive will properly compensate you for all of your outstanding entitlements. As you have been advised previously Main Roads are not able to proportion your long service leave as there is no provision in the award to allow pay out of prorata long service leave. You have also been advised that you are not entitled to a redundancy payout as this is not a redundancy but a resignation. I trust this clarifies the issues for you.

Main Roads wish you all the best in the future.

Regards

Cheryl Palman

A/Principal Organisation Development Consultant

Phone [number]

Fax [number]

[email address]

-----Original Message-----

From: CHENG Chess (RPPA)

Sent: Tuesday, November 25 2003 2:20 PM

To: PALMAN Cheryl (HRC)

Cc: TAYA John (EDHR); HENNEVELD Menno (CMR)

Subject: URGENT: Resignation

Importance: High

Hi Cheryl,

On Monday last week (Nov 17), you called me after I sent you the below email. You said you would call me on Tuesday (Nov 18) or Wednesday (Nov 19). Today is 25 Nov (Tuesday). I have not received any call from you.

Is this the way Main Roads treat its employees? or only I was treated in this way. Is this the way Main Roads make people more stressed?

My current situation is contributed by Main Roads. There is no future for me in Main Roads. To have a normal life and good health, I submitted my resignation under conditions I get properly compensated (I had told Mr John Taya when I had a meeting with him, I also briefed you last week over the phone). I summarise these settlements are:

1: My long service leave should be proportionally rewarded.

2: Main Roads compensate me for 3 months for my health. I am on the anti-depression medication. Main Roads is aware of this for a long time.

3: My annual leave

4: My flex time credit

5: Any other leaves

6: I should be given redundancy package. My position is redundant because of limited work in the branch. There may be more excess positions in that branch.

I am not voluntary resigning from Main Roads. All these were contributed by Main Roads.

If Main Roads does not agree with me on these, I would like to withdraw my resignation.

Your immediate response is appreciated.

Chess Cheng

---Original Message-----

From: CHENG Chess (RPPA)

Sent: Thursday, November 13 2003 11:20 AM

To: PALMAN Cheryl (HRC)

Cc: TAYA John (EDHR)

Subject: RE: Resignation

Cheryl, I am not well and may not be at office. I can be contacted on [telephone number].

-----Original Message-----

From: TAYA John (EDHR)

Sent: Thursday, October 16 2003 3:13 PM

To: CHENG Chess (On Leave)

Subject: RE: Resignation

Hi Chess,

Thank you for meeting with me on Monday 6 October.

I appreciate you taking the time to make me aware of your feelings and where you believed you were at with your career. I accept your resignation and can only express my sincere best wishes with whatever you now decide to pursue both at a professional and personal level.

I will ask Ms Cheryl Palman to contact you with respect to your entitlements.

Take care of yourself

Regards

John

-----Original Message-----

From: CHENG Chess (On Leave)

Sent: Wednesday, October 15 2003 12:03 PM

To: TAYA John (EDHR)

Cc: HENNEVELD Menno (CMR)

Subject: Resignation

Hi, John,

Since I arrived in Australia in Dec 1996, I have been experiencing ups and downs in this new world. I have many friends in Australia and Main Roads. I was full of energy to realise my dreams and develop my potential. However, I have found the environment in Main Roads (may (sic) only this branch) has been so difficult towards a migrant. Now, I am reliving (sic) myself from this stressful environment and pursuing my normal life.

As I indicated in my claim and brief meeting with you, I have decided to resign from Main Roads on the 30th of November 2003.

I wish you make proper arrangement to proceed with my resignation.

All the best to Main Roads.

Chess Cheng

(Exhibit R1, document 2.1)

9 An email sent by the appellant to a number of people on 13 November 2003, which was forwarded to Mr Neville Willey by Mr Binning on that date:

From: BINNING Neville (MRAP)

Sent: Thursday, 13 November 2003 12:26 PM

To: WILLEY Neville (MOED)

Subject: FW: Resignation

Neville,

Attached email FYI.

Neville Binning

----Original Message-----

From: CHENG Chess (RPPA)

Sent: Thursday, November 13 2003 11:54 AM

To: KNIGHT Kathleen (On Leave); BINNING Neville (MRAP); REYNOLDS Dave (PPM); O'BRIEN Helen (IPPM); KELLEY Julia (RIPA/A); TOLLEFSEN Ray (AMO); SULLIVAN Kay (NPO); MARTIN Kathryn (AMPPM); WATTS Chris (BG); TRETHOWEN Neil (DSSM); KENNEDY David (AMC)

Subject: RE: Resignation

Hi, All,

You may be aware I submitted my resignation from Main Roads. I will leave Main Roads by the end of November. Because I am not well, I am taking flex time until I leave. If you have any requests regarding my work, please call me on [telephone number].

Regards,

Chess Cheng

(Exhibit R1, document 2.2)

10 A letter from Mr Henneveld to the appellant dated 28 November 2003 with respect to deferring the appellant's resignation:

I refer to our discussion in my office yesterday, during which you discussed with me your resignation from Main Roads, which was to take effect on 30 November 2003. During the meeting I undertook to look at means by which Main Roads could assist you while you determine your future after you leave Main Roads.

I am prepared to defer your resignation for three months and continue to employ you at the level you were on at the time that you tendered your resignation. This means that your effective termination date will be deferred from 30 November 2003 until 27 February 2004. I confirm that your entitlements at termination will remain as outlined previously to you.

You will receive a letter next week outlining several projects and work arrangements that you will be able to work on from home over the three month period until you finish work on 27 February 2004. If you wish, you may terminate your employment at any time during that period.

I am aware of the allegations you have made against a number of Main Roads staff and consider they have no foundation. Since our meeting I have also been made aware of a meeting that you had with Cheryl Palman, Neville Willey and John McKelvie on Wednesday, 24 November 2003 during which you became abusive to the point that the meeting had to be terminated. I consider this behaviour and conduct to be unacceptable, and if it were to recur, may lead to your summary dismissal.

In summary your last day of employment with Main Roads has been deferred from 30 November 2003 until 27 February 2004, however you have the right to terminate your employment at any time during that period.

(Exhibit R1, document 2.3)

11 An email from the appellant to Mr John Taya, the respondent's Executive Director Human Resources, dated 28 November 2003 with respect to the appellant's resignation:

From: CHENG Chess (RPPA)

Sent: Friday, November 28 2003 4:52 PM

To: TAYA John (EDHR)

Subject: RE: MOU

Sorry John, that hotmail account is not available. The new hotmail account is [email address]

-----Original Message-----

From: CHENG Chess (RPPA)

Sent: Friday, November 28 2003 4:16 PM

To: TAYA John (EDHR)

Cc: HENNEVELD Menno (CMR)

Subject: MOU

Hi, John,

As we talked over the phone, I agreed to take the proposal as you indicated. With regards to my experience at Main Roads, even on Wednesday and Thursday (This week), I would like to repeat the points as you made.

1. From next week, I will not come to Main Roads as CMR said during our conversion. It would not do any good to me. People know I am resigning from Main Roads from the end of this month. Therefore, I will still say I am leaving if someone asks.

2. Given my health condition, I am not able to do a lot of work. I experienced that people tried to make point in the past when I was doing a review report. I will do if it suits me. If it does not, I will let go. I will not argue with anyone anymore because it only do worse to my health. As we discussed over the phone, you also indicated it would suit me and my health condition and it would not be a problem.

3. Over the conversion, you said you would contact Dr Paul Skerritt (I gave you the Doctor's number). He works as a specialist in Joondalup Health Campus. I did not know him prior to the referral by my GP. You agreed Main Roads would pay for my visit and medication. Given my experience with Main Roads regarding this, I would like Main Roads give me or Dr Skerritt's credit information. Dr Skerritt charges each visit at the account. He does not issue invoice. I was agreed by Denial (sic) Ludlow/Neville Willey to visit two months ago, and said that I paid first and then got reimbursed. But, I sent the invoices to Main Roads and made many contacts, Main Roads did not reimburse me (I also told you about that when we had the meeting several weeks ago). Fees for medication, I will pay first and send invoices to you and marked "confidential".

4. I do not bring my computer or other equipment along with me

5. Over the phone, I accepted I would leave after 3 months. I hope, with proper counselling and rest, my health will be getting better. The most important is Main Roads do not trigger that. One trigger could destroy the whole effort. My contact to Main Roads should be treated with respect - "such as I send an email but get two or three weeks to respond, even a minor question", such situation should be avoided.

6. After two months I would contact you (or your nominated person), regarding anything to do with my leave from Main Roads.

7. I will create an hotmail account as [email address]. Experience shows hotmail account is not reliable. I prefer Main Roads contact me by mail or phone [telephone number].

Regards,

Chess Cheng

(Exhibit R1, document 2.4)

12 A file note dated 2 December 2003 to Mr Taya from Ms Cheryl Palman, Human Resources Consultant in relation to the appellant:

JT.

1. Skerritt's secretary states that she/doctor needs written signed approval from Chess authorising the doctor to speak to us. She will not accept an email.
2. Gary is drafting a letter to Chess outlining the work plan & work arrangements for the 12 week period. I suggest that we need to include in the letter 2 things.
   - medical clearance from Dr Skerritt stating that Chess is fit to undertake work.
   - Sign-off from Skerritt to the workplan + work arrangements.
3. This puts the onus back on Chess to have these matters addressed as soon as possible.
4. I think we should put a timeframe for the two clearances to be obtained.

CP 2/12/03

(Exhibit A3)

13 A letter dated 5 January 2004 to Dr Paul Skerritt from Mr Taya (formal parts omitted):

EMPLOYEE: CHESS CHENG

At a meeting with the Commissioner of Main Roads, Chess and myself on 27 November 2003 the option for Chess to undertake project work from home until 27 February 2004 was considered. This would remove him from the office environment that he claims he has found stressful.

To ensure that Main Roads is adhering to our responsibility to Chess under our Duty of Care, I gave Chess a commitment that I would contact you to discuss the details of these work arrangements before any final agreement. Chess subsequently emailed me his endorsement of this arrangement and I have attached a copy of this email. As such, I endeavoured to contact you at your office on 2 December 2003 with the intent of discussing the 'Work from Home' arrangements, but I was informed by your office that I would have to obtain Chess's approval in writing before I could speak with you, as an email was not sufficient. I have delayed implementing any work arrangements with Chess as I consider that your professional opinion that these arrangements will not be detrimental to Chess's health and state of mind critical.

Chess has informed his case manager Neville Willey, Manager Organisation & Employee Development, in a telephone conversation last week that he has an appointment with you on 8 January 2004. It is therefore an opportune time to provide you with the details of the scope of the project work to enable you to discuss directly with Chess his capacity to perform the duties.

Main Roads has worked carefully to put together this package of work for Chess and consider that it is within Chess's skills, knowledge and experience to deliver this package of work by 27 February 2004. I therefore seek your opinion in relation to the following:-

- If you consider Chess is able to carry out the specified package of work, as detailed.
- If you consider Chess has any incapacity for work as a result of any condition, and I would appreciate your reasons based on your clinical findings.

As you will appreciate Chess is keen to progress this matter as soon as possible so I would also appreciate your response to the above by Monday 12 January 2004. If you are unable to do so or should you wish to discuss this letter please do not hesitate to contact his Case Manager Neville Willey on [telephone number].

Main Roads has the welfare and best interests of Chess in mind in agreeing to the 'Work from Home' arrangements and will not pursue them if you have any reservations or concerns.

I would like to thank you for your assistance with this matter.

(Exhibit A5)

14 A letter from the appellant to Mr Henneveld dated 1 September 2011 with respect to the appellant returning to work with the respondent:

I have recently been advised that Gary Norwell, Neville Binning and Kathryn Martin have all left Main Roads.

As you promised me when I met you personally at your office that I could come back to Main Roads any time when I was ready.

Given that Gary Norwell, Neville Binning and Kathryn Martin all left Main Roads now, I do not have any fears and would like to go back to Main Roads to continue my profession.

I would like to start on 2 January 2012.

(Exhibit R1, document 3.1)

15 A letter from Mr Henneveld to the appellant dated 16 September 2011 in response to the appellant's letter of 1 September 2011:

I refer to your letter dated 1 September 2011.

When you resigned from Main Roads Western Australia in 2004 I would have advised you that if in the future you wished to re-commence your career as a professional Engineer with Main Roads Western Australia then there would be opportunities for you to apply for positions as they are advertised and you would be considered along with any applicants for those positions at the time. I certainly would not have given you an undertaking that you could return to Main Roads without the appropriate recruitment processes being undertaken.

For your information, it is not possible for me to employ you or any other person without going through the appropriate merit based recruitment and selection process. If I took this course of action I would be in breach of the Public Sector Recruitment, Selection and Appointment Standard.

My advice to you is that if you see any vacancies advertised for Main Roads' positions in the future then you should apply in accordance with the details on the advertisement and you will be considered for the roles along with any other applicants that may apply. The process for selection will then be in accordance with Main Roads Recruitment, Selection and Appointment Policy and Guidelines.

(Exhibit R1, document 3.2)

16 A letter from the appellant to Mr Henneveld dated 21 September 2011 with respect to the appellant's employment with the respondent:

I have received your letter dated 16 Sep 2011.

Your explanation was not justified. I did not resign when I had the meeting with you at your office. I told you that I was worried about the future. That was the whole reason I drove back to Main Roads out of shock when John Taya told me I must leave Main Roads (He ignored what the Development Manager told me no one could force me to resign).

I was badly treated by Main Roads (Gary Norwell, Kathy Martin and Neville Binning) and under enormous stress at the time. When Neville Binning came back and he arranged me to stay at home for one year which further aggravated my injuries. When the human resource officer (a woman) contacted me I could not come to work, I was very furious and I immediately talked to the professional manager at the time who told me nobody could force me to resign. But when I told the woman again she then referred me to John Taya. John Taya told me I must leave on the phone. I was shocked and rushed to the office to see you if you could recall. I was worried for my family. I knew the difficult to find a job for a migrant. I insisted John Taya not sit at the meeting if you could recall.

I did remember few things you said and you and Gary Norwell did after; You said Main Roads could not force me to resign; You also said the relationship between me and Kathy Martin, Neville Binning and Gary Norwell were untenable and might further escalate; You asked me to stay at home to look after my health first because my unstable status at the

time; and You promised that I could return at any time if I was ready. I remember I was crying at the office. (also other things you said). I did not resign at the meeting with you.

It is my right to go back where I was. I had been denied an equal opportunity by Gary Norwell and Kathy Martin's unprofessional, harsh and unconscionable conduct. I had never been treated by anyone in my life; even when I worked for a highly regarded Chinese government. I reported to Main Roads numerous times and requested Main Roads to shift me to other areas. But Main Roads did nothing over 2-3 years. When Neville Binning came back, he did not try to rectify the issue but arrange me to work at home which further aggravated my injuries. Then outrageously, Main Roads (John Taya) even wanted to force me to resign. Until I saw you, you showed a bit sympathy. This is how an Asian migrant who did excellent job was treated by a Western Government department.

Your third and fourth paragraphs are not relevant.

I reiterate that it is my right to go back where I was as you promised. I would like to start on 2 January 2012. I appreciate Main Roads make an appropriate arrangement.

(I am sorry I do not feel well when I am writing this letter. My letter may be a bit of out of blue. Please do not take it personally. Every time when I recall that terrible period of time, the anger would fill my head)

(Exhibit R1, document 3.3)

17 A letter from the appellant to Mr Henneveld dated 10 November 2011 with respect to the appellant's employment with the respondent:

I sent you my response to your letter on 21 Sep 2011. So far I have not received any response from Main Roads. I believe you have now recollected your promise at the meeting I had with you in that afternoon.

I have learnt that Main Roads is rebuilding Road Planning area. Given my significant knowledge, skills and experience in the planning area, I would like to work in the planning area rather than the asset management area.

Please advise me as soon as possible which branch I will be working in and whom I report to, then I can communicate with them.

Should you have any questions, please contact me on [telephone number].

(Exhibit R1, document 3.4)

18 A letter from the appellant to Mr Henneveld dated 22 November 2011 with respect to the appellant's employment with the respondent:

I am very disappointed so far I have not received any response from Main Roads (I sent my letters to you on 21 Sep 2011 and 10 Nov 2011 respectively).

Please advise me by 30 Nov 2011 on whatever decision you have made on my request. Then I could take relevant action accordingly.

Thank you for your immediate attention please.

Should you have any questions, please contact me on [telephone number].

(Exhibit R1, document 3.5)

19 A letter from Mr Henneveld to the appellant dated 28 November 2011 in response to the appellant's correspondence about his employment with the respondent:

I refer to your letters dated 21 September 2011, 10 November 2011 and 22 November 2011.

For your information I have been overseas and interstate since the last week of September 2011 to the first week of November 2011 and as such I have only recently seen your last couple of letters.

As I pointed out to you in my letter dated 16 September 2011 when you resigned from Main Roads in 2004 I would have told you that if you wished to re-commence your career as a Professional Engineer with Main Roads in the future then there would be opportunities for you to apply for positions as they are advertised and that you would be assessed along with any other applicants based on the appropriate selection criteria for the positions. This is still the case Chess and if you wish to apply for any positions with Main Roads Western Australia then you should visit the Main Roads Western Australia website www.mainroads.wa.gov.au and click into employment icon and follow the instructions in relation to applying for a position.

In respect to your comment that you make in your letter dated 10 November 2011 where you state that "I believe you have now recollected your promise at the meeting I had with you in that afternoon" I would like to advise you that this is not correct. I would not have made any promises to you about future employment with Main Roads Western Australia and your comments that you believe I have recollected my promise is incorrect.

(Exhibit R1, document 3.6)

Appellant's evidence

20 The appellant has a Bachelor of Engineering and a Master's degree in Road Engineering from the Tongji University in Shanghai and he and his partner came to Australia from China in 1996.

21 The appellant gave evidence that he never resigned from his employment with the respondent even though he tendered a written resignation to Mr Taya on 15 October 2003 and the appellant stated that when he was threatened with being sacked, he was forced to resign. The appellant maintains that at a meeting with his manager Mr Binning in September 2003 he was told he would be sacked because he criticised his mismanagement of some contracts and this resulted in him sending an email to Mr Taya on 15 October 2003 stating that he wished to resign. The appellant gave evidence that in 2001 the respondent placed

an additional person into the position he was acting in and this caused him stress which resulted in him being depressed and he was still suffering depression at the time he sent in his resignation to Mr Taya. The appellant stated that he did not voluntarily resign from the respondent at the time and this was confirmed by his email to Ms Palman dated 25 November 2003. The appellant maintains that the email sent to him by Ms Palman on 26 November 2003 confirming the acceptance of his resignation by Mr Taya was not received by him as he was not at work that day because he was working from home and he did not have a computer (Exhibit R1, document 2.1). The appellant gave evidence that after sending an email to Ms Palman on 25 November 2003 he had a telephone conversation with her on 27 November 2003 and she told him he had to leave the respondent in the next few days. In response he told her that he had withdrawn his involuntary resignation and Ms Palman then told the appellant that Mr Taya had told her that he had to cease employment with the respondent. The appellant followed this up with a discussion with Mr Willey, Professional Development Manager, who told him if he did not want to resign he could not be forced to and he reported this to Ms Palman who had a further discussion with Mr Taya. Ms Palman then rang him and told him that Mr Taya said he had to leave the respondent. The appellant then drove to the respondent's offices. He then went to Mr Henneveld's office and after waiting half an hour he had a meeting with Mr Henneveld. The appellant told him what had occurred including having another person work in his position at the same time and he discussed his working from home arrangement in 2002 and 2003 and how he had suffered from depression. Mr Henneveld told him that no-one could force him to resign and the appellant told Mr Henneveld that he did not know what to do and that he was very distressed. In response Mr Henneveld stated that he recognised that the appellant was distressed and unstable and told him to look after his health. Mr Henneveld said that he would arrange a special project for him to undertake at home and he then told him that when he was better he could return to work when he felt like it. The appellant understood that Mr Henneveld then spoke to Mr Taya.

22 The appellant confirmed that he worked from home after 30 November 2003 until approximately 27 February 2004 undertaking special projects and during this period he was paid his normal wages.

23 The appellant stated that he did not receive the letter from Mr Henneveld dated 28 November 2003 until after he lodged this application (Exhibit R1, document 2.3).

24 The appellant confirmed that he lodged a workers' compensation claim against the respondent in April 2004 and his claim was settled in 2005 by the payment of a lump sum. Following is a file note from Mr Taya to Mr Brian Ballard dated 23 August 2004 with respect to the workers' compensation claim made by the appellant:

To : BRIAN BALLARD

Subject : Response To Claim By Yong Cheng – 02/4811/RO5

In Mr Cheng's summary at 4) he makes a number of allegations against senior staff in the Human Resources Directorate. Unfortunately I am unable to reconcile the position titles used by Mr Cheng with members of my staff.

4)a. Who was the HR Manager who allegedly insulted Mr Cheng in 2000?

4)e. Mr Cheng claims to have reported the bad treatment to the Employee Relations Manager but he didn't do anything about the situation. There has been no male in the Employee Relations Manager position for at least 5 years, and the position itself has been vacant for the last 2 ½ years. Prior to that Ms Bastian was in the role in an acting capacity.

4)g. I met with Mr Cheng on one occasion at a coffee shop away from Main Roads offices. This was at his request. At the outset of the meeting I advised Mr Cheng that I was willing to listen to what he had to say and would help in any way I could. He started to make a number of allegations against his line management but within the first five minutes stated that he was finding it too stressful and stated that he believed it was in his best interests to resign so that he could recover his health and get on with the rest of his life. He wanted me to sack two of his line management, Neville Binning and Cathy Martin. I advised him that I was not in a position to do anything with them without some evidence. Mr Cheng then stated that he was not going to provide any evidence as it was all too stressful and that he was going to resign.

I advised him that resigning was a very serious decision and that he should rethink it. I also informed him that his health and well being was Main Roads major concern and we would assist him in any way we could through employee support but that we would respect any decision he made about resigning from Main Roads for health reasons. Mr Cheng was very emotional and irrational during this meeting. He got up from his seat at the café on at least 2 occasions to walk away. He ended the meeting after approximately 17 minutes and walked away stating it was too stressful to continue.

Mr Cheng subsequently telephoned me on two occasions and I met with him on another occasion in the presence of the Commissioner of Main Roads, Mr Menno Henneveld. At no time did I raise the issue of Mr Cheng resigning from Main Roads or coerce him into resigning.

[signature]

John Taya

Executive Director Human Resources

23 August 2004

4) Summary of my suffering in the past:

a. In 2000, I was insulted by a HR manager during a meeting, which I had counselling lessons by a psychologist for more than a month. Main Roads paid for my visit. The doctor should have all the records what happened to me.

b. [deleted]

c. [deleted]

d. [deleted]

e. I reported to The Employee Relations Manager for every occasion of the bad treatment. He had never done anything regarding the situation. I asked him to put me in other areas for more than a year, but nothing happened. Eventually I got very sick and would not be able to go to work. After I ran out of my sick leave, I had to leave Main Roads. The Employee Relations Manager is a liar and told he said "WHITE" and tomorrow changed to "BLACK".

f. [deleted]

g. I was cheated by John Taya (Executive Director Human Resources) to tender my resignation.

h. [deleted]

i. [deleted]

j. [deleted]

5) [deleted]

----------end----------

Extract –

Statement by Mr Chess Cheng in regard to Workers Compensation claim 02/4811/RO5

(Exhibit A6)

25 The appellant stated that he sought to return to work with the respondent on 1 September 2011 because his wife faced the prospect of losing her job and because of his family responsibilities. Mr Norwell, Mr Binning and Ms Martin had also left the respondent. The appellant stated that it would have been difficult for him to return to the respondent before September 2011 because they continued to work for the respondent. The respondent was also now forming a planning department which would be relevant to his skills. The appellant stated that he had unsuccessfully sought alternative employment prior to September 2011.

26 Under cross-examination the appellant agreed that after sending an email to Mr Taya on 15 October 2003 tendering his resignation he sent an email on 13 November 2003 to colleagues at Main Roads telling them he had resigned. The appellant could not recall sending an email to Mr Taya dated 28 November 2003 confirming the details of his agreement with the respondent prior to working from home after 30 November 2003 (Exhibit R1, document 2.4) and the appellant stated that he was angry when he received the letter from Mr Henneveld dated 16 September 2011 because he had promised him that he could return to work when he was better (Exhibit R1, document 3.2). The appellant said that he did not resign in October 2003 as his resignation at the time was involuntary, he was sick and he had family responsibilities and he retracted his resignation in his email dated 25 November 2003. The appellant stated that even though he requested to work from home in February 2002 because of family responsibilities, he wanted to do so because of work related issues.

Respondent's evidence

27 Mr Taya is currently the Executive Director Organisational Development and between 2001 and 2004 he was the respondent's Executive Director Human Resources. Around August 2003 Mr Taya became aware that the appellant had work related issues and he stated that staff who reported to him were assisting him to deal with these issues. Mr Taya understood that the appellant was under stress at the time.

28 Mr Taya stated that the appellant contacted him in early October 2003 to arrange a meeting which took place on 6 October 2003 and they discussed the appellant's problems at work and the appellant wishing to resign. Mr Taya stated that the appellant emailed him on 15 October 2003 with his resignation after he indicated to the appellant on 6 October 2003 that he should reflect on his intention to resign because he was stressed at the time. He also told him to think about it and let him know his decision and Mr Taya stated that he did not tell the appellant at any time that he should resign. Mr Taya stated that after their meeting on 6 October 2003 he understood that the appellant had considered whether he should resign and he then tendered his resignation on 15 October 2003.

29 Under cross-examination Mr Taya stated that he was unaware why two persons would have been appointed to the position the appellant was acting in, in 2001, and he said he was surprised if this was the case and if he was aware of it he would have dealt with the issue. Mr Taya could not recall being approached by Mr Willey about the appellant's difficulties and he was aware that the appellant was having issues at work when he applied to work from home in 2002. Mr Taya understood that the email the appellant sent to Ms Palman on 25 November 2003, which refers to the appellant withdrawing his resignation, concerned issues relating to entitlements to be paid to the appellant on resignation and he stated that the respondent had already accepted the appellant's resignation and it was on this basis that the appellant's resignation remained in place. Mr Taya stated that the appellant's resignation could not be withdrawn because he had already had a discussion with him about considering his resignation prior to it being lodged and the appellant's resignation was therefore accepted when it was tendered.

30 Mr Taya gave evidence that he had a discussion with Mr Henneveld after the appellant had a discussion with him on 27 November 2003 and they talked about helping the appellant by allowing him to work for an additional three months to assist him to obtain alternative employment.

31 Mr Taya could not recall having a conversation with the appellant on 27 November 2003 about withdrawing his resignation and he denied that the respondent took advantage of what the appellant called his involuntary resignation. Mr Taya stated that he had a long discussion with the appellant on 6 October 2003 whereby the appellant offered his resignation a number of times

and Mr Taya told him to go away and think about his position and Mr Taya stated that at no time did he suggest at this meeting that the appellant resign. Mr Taya stated that the appellant indicated that he did not wish to remain working at the respondent's office and he asked him to contact his treating medical practitioner on his behalf which he did. When it was put to Mr Taya that it was unfair to 'push' the appellant out of work when he did not want to leave and when he was unwell, Mr Taya stated that it was the appellant's choice to resign.

32 Mr Henneveld is the respondent's Managing Director. From December 2002, and at the time of the events involving the appellant in November 2003, he was the Commissioner of Main Roads. Mr Henneveld stated that the first time he met the appellant was on 27 November 2003 when he came to see him. Mr Henneveld stated that the appellant was upset and he told him that he had tendered his resignation and he was concerned about the impact of this on him and his family. Mr Henneveld advised him that he would see what he could do when the appellant had asked to extend the date of his resignation. He then spoke to Mr Taya and the respondent agreed to extend the appellant's resignation date by three months and the respondent would allow the appellant to work from home during this period. Mr Henneveld stated that this would assist the appellant to prepare himself and to clear his thoughts about his decision to resign. Mr Henneveld stated that he did not have a discussion with the appellant about him having ongoing employment with the respondent and he gave evidence that he would have said to him when things get better and if the appellant wanted to return to Main Roads then he would be welcome as an employee. Mr Henneveld stated that he wrote a letter to the appellant on 28 November 2003 confirming that the date of his resignation had been extended to 27 February 2004. Mr Henneveld stated that he was not contacted by the appellant or anyone on his behalf between the meeting on 27 November 2003 and receiving the appellant's letter dated 1 September 2011 and Mr Henneveld stated that his correspondence to the appellant after he contacted him to return to work was in line with him not making any promise to the appellant that he had a job to come back to. In any event he could not make such a promise given the respondent being bound by public sector processes with respect to recruitment and appointment.

33 Under cross-examination Mr Henneveld stated that he was aware that the appellant was distressed at their meeting on 27 November 2003 and he could not recall the appellant stating at this meeting that he wanted to withdraw his resignation. Mr Henneveld stated that he had sympathy for the appellant's situation and Mr Henneveld recalled that the appellant was emotional and he told him that he had sent in a resignation letter. Mr Henneveld again stated there was no discussion at this meeting about the appellant withdrawing his resignation and he stated that he had no reason at the time to suspect that the appellant had been forced to resign. Mr Henneveld could not recall the appellant raising his discussions with Ms Palman and Mr Willey at this meeting.

Appellant's submissions

34 The appellant submits that he involuntarily resigned.

35 The appellant claims that the respondent installed a person in the position in which the appellant was acting in 2001 which caused significant stress to the appellant and the respondent did nothing to help over a long period such as providing counselling. The respondent arranged for the appellant to work from home to avoid further conflict with the branch members, which further aggravated the appellant's mental health because of his isolation and dissociation with people and the appellant then had to be taken care of by Dr Skerritt, a mental health expert. Additionally, Mr Binning threatened to sack the appellant when he criticised his mismanagement of two contracts and it is within this context that the appellant sent Mr Taya an involuntary resignation on 15 October 2003 when he was unwell.

36 On 25 November 2003 the appellant sent an email to Ms Palman detailing what had been promised to him by Mr Taya as compensation upon his resignation and the email states that if these conditions are not met he would withdraw his involuntary resignation. When the respondent did not respond the appellant thought that his involuntary resignation had therefore been withdrawn. When Ms Palman phoned the appellant on 27 November 2003 and told him to leave the respondent the appellant panicked and contacted Mr Willey who advised him that 'nobody could force you to resign if the Appellant do not want to' and the appellant then contacted Ms Palman about what Mr Willey said. Ms Palman contacted Mr Taya and in response she told the appellant that Mr Taya said he must leave because of the 'email'. The appellant then contacted Mr Taya and despite what Mr Willey had said Mr Taya repeated that he had to leave the respondent regardless of what Mr Willey said. In response to this the appellant drove back to the respondent's premises from home and stormed into Mr Henneveld's office and he told Mr Henneveld what happened to him and that he was scared and he did not want to leave a permanent job given the difficulties for a migrant finding a job. The appellant also discussed his health and family. Mr Henneveld said the respondent could not force him to resign and he also said the relationship between Ms Martin, Mr Binning and Mr Norwell and the appellant was untenable and might escalate further because of his mental health issues. Mr Henneveld suggested the appellant stay at home and look after his health because the appellant was unstable and he promised the appellant he could return to work at any time when he was ready.

37 The appellant argues that the cases relied on by the respondent are materially different to the appellant's situation and therefore do not apply and the appellant maintains that the respondent's arguments lack foundation. The appellant claims that the respondent did not provide relevant documents and files to him nor did the respondent summons Mr Binning to challenge his claim about the threat he made in relation to the appellant criticising his mismanagement of contracts. The appellant submits that the Board can therefore infer that when the appellant criticised Mr Binning about his mismanagement of two contracts, Mr Binning threatened the appellant with the sack.

38 The appellant believes Mr Henneveld's letter dated 28 November 2003 was made up by Mr Taya because he was the person who met Mr Henneveld after the appellant left Mr Henneveld's office and he was the person who pushed the appellant 'out' from the respondent. It can also be inferred that Mr Taya took advantage of the appellant's involuntary resignation because he had raised 'wrongdoings' at Main Roads.

39 Mr Henneveld confirmed that the appellant was seriously distressed on 27 November 2003 and he agreed it was unusual for a staff member to 'storm his office' to see him. Mr Henneveld could not remember why the appellant was in such an unstable

state and he omitted several details about the meeting even though the meeting was more than half an hour. He could also not recall the appellant raising that he did not wish to leave the respondent. A reasonable inference can be drawn that the appellant told Mr Henneveld that he did not want to leave the respondent because of his health status, young family and potentially dire financial situation but Mr Taya wanted to force him out even though he had withdrawn his involuntary resignation. Given the mental state of the appellant an inference can be drawn that Mr Henneveld gave his promise that he could return to work with the respondent or he misled the appellant. Mr Henneveld also accused the appellant of abusive behaviour at a meeting with Ms Palman, Mr Willey and Mr McKelvie but the appellant never had a meeting with them. The respondent was fully aware of the appellant's mental health status as confirmed by Mr Taya and Mr Henneveld about their meeting him and Mr Taya instructed his staff to contact Dr Skerritt.

40 The appellant maintains that the Board can infer that either the employment relationship never stopped or the respondent constructively dismissed the appellant by taking advantage of his involuntary resignation dated 15 October 2003. In summary the appellant argues that the Board should reach the following conclusions:

(1) The appellant did not voluntarily resign.

(2) The appellant withdrew his involuntary resignation which was lodged after being threatened by Mr Binning on several occasions.

(3) The respondent treated the appellant harshly and unconscionably:

(a) by installing a person in the position which the appellant was acting in without the appellant and the branch manager's knowledge while the appellant was doing an excellent job and working hard, which caused significant stress to the appellant;

(b) by arranging for the appellant to work from home to isolate him and this aggravated the appellant's health;

(c) by Mr Binning threatening to sack the appellant when the appellant criticised his mismanagement of two contracts;

(d) by Mr Taya pushing out the appellant when Mr Willey said 'nobody could force you to resign if you do not want to' which seriously aggravated the appellant's mental health; and

(e) by taking advantage of the appellant's mental state during his meeting with Mr Henneveld when he was forced to leave a job which he, as a migrant with limited skills, had worked so hard to obtain.

41 The appellant relies on the principles set out in ***Maureen Dehnel v Dr Neale Fong, Director General, Department of Health and Others*** (2006) 86 WAIG 3310 in support of his claim that this application should be accepted outside of the required timeframe if the Board finds that the appellant resigned on or about 27 February 2004. The Public Service Appeal Board in that matter stated that 'doing justice' is the correct interpretation of the Act:

> However, it is reasonable to conclude that the purpose or object of the provisions of the IR Act relating to the Board are to allow a Government officer to have the Board review the interpretation, decision, determination or recommendation of the employer. The object of a provision allowing for an extension of time is to allow the Court (or in this case the Commission) to do justice between the parties (***Gallo v Dawson*** (1990) 64 ALJR 459 at 459 per Mc Hugh J). Therefore, an interpretation of the provisions relating to the Board which supports the Board doing justice between the parties is preferred [58].

42 The appellant submits that equity, good conscience and the merits of the case are considered superior to time:

> In *Re Coldham and Others; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (HCA) 64 AILR 215 … [t]he unanimous decision of the Court said:
>
> …
>
> 'The powers given to the Commission by s 41(1) include powers to:—
>
> "(k) allow the amendment, on such terms as it thinks fit, of any proceedings;
>
> (l) correct, amend or waive any error, defect or irregularity, whether in substance or in form;
>
> (m) *extend any prescribed time*."
>
> The provisions of the Act should be construed to give effect to its objects … in the hearing and determination of an industrial dispute or in any other proceedings before the Commission:—
>
> "(a) the procedure of the Commission is, subject to this Act and the regulations, within the discretion of the Commission;
>
> (b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks just; and
>
> (c) *the Commission shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms*."
>
> …

> … cannot be regarded as intended to place a technical impediment in the way of the settlement of an industrial dispute on its merits, or as denying to the Commission the power to extend the time prescribed for instituting an appeal when the Commission in its discretion considers that such an extension would be desirable [59].

43 The appellant relies on ***Maureen Dehnel v Dr Neale Fong, Director General, Department of Health and Others*** where the Public Service Appeal Board concluded:

1. The Board has jurisdiction to determine its own jurisdiction.
2. The time prescribed by s.80J and Reg. 107(2) is a prescribed time, falling as it does within the IR Act and the Regulations, and is amenable to an extension of time pursuant to s.27(1)(n).
3. The language used in setting out the prescribed time is not prohibitive, nor is it mandatory. It does not contain an essential condition to the right to lodge the appeal.
4. The language is directory and procedural.
5. The requirement to comply with the prescribed time is not an essential preliminary to the exercise of statutory power.
6. The Board has jurisdiction to extend time in which an appeal is to be lodged [74].

44 The appellant argues that when dealing with the 21 day statutory limitation (see ***Maureen Dehnel v Dr Neale Fong, Director General, Department of Health and Others***) the Board can extend time as the Board sees fit. As McHugh J stated in ***Gallo v Dawson*** (1990) 64 ALJR 459 cited in ***Michael Christian Nicholas v Department of Education and Training*** (2008) 89 WAIG 817 'the relevant provision in the rules of the High Court empowered the Court to extend time upon such terms as the *justice* of the case may require' [14] (sic).

45 The appellant maintains that the cases relied on by the respondent and the cases decided by other Public Service Appeal Boards show that there is no similarity with the appellant's case and the Board is entitled to decide on a case by case basis rather than on a subjective time limitation (see ***Gallo v Dawson***). The appellant argues that because he was seriously mentally ill, he did not realise that he had been constructively dismissed and he had thought that Mr Henneveld had promised him that he could return to work at any time when he was ready. The respondent harshly mistreated the appellant and equity needs to be done to preserve justice. The appellant is an excellent, hard worker and a person of integrity, he was wronged by the respondent and he did nothing wrong. The appellant maintains that he regularly contacted the respondent to see if the three employees with whom he had a difficult relationship had left the respondent and this justifies a compelling case to extend whatever time is required to do justice. The appellant was highly praised as a person of high integrity, he was a hard worker and he had high technical expertise and the appellant's skills have very limited application outside of the respondent's operations.

46 In conclusion the appellant submits that he has made out a compelling case and the time limitation should be extended to do justice for the appellant.

Respondent's submissions

47 The respondent submits that the appellant's resignation was not initiated by the respondent nor was he forced to resign because of any conduct on the part of the respondent and if the appellant claimed he was forced to resign then the appropriate mechanism to contest this decision was an unfair dismissal process, rather than a process challenging a decision not to allow him to return to work.

48 The respondent disputes that the appellant's resignation was involuntary. In his email of 15 October 2003 the appellant tendered his resignation relying on dissatisfaction with management and a stressful environment. The appellant's email to Ms Palman dated 25 November 2003 also refers to the importance of looking after his health (see ***David John Mennie v Adsteam Harbour Pty Ltd*** [2006] AIRC 201).

49 The respondent submits that there was a delay of about 10 days between when the appellant stated he was going to resign and making a written resignation and the appellant was counselled by Mr Taya to seriously rethink resigning when he first raised the issue of resigning with him (see ***Pawel v Australian Industrial Relations Commission*** [1999] FCA 1660).

50 The respondent submits that the appellant does not have a general right to withdraw his resignation. The appellant first indicated that he was seeking to resign from the respondent on 6 October 2003 and he then tendered a written resignation via email on 15 October 2003 after he was counselled to rethink his resignation. A period of 10 days lapsed for the appellant to reconsider lodging a written resignation and he still chose to do so and his resignation was accepted shortly afterwards. It was seven weeks after verbally advising the respondent he was going to resign and five weeks after formally lodging his resignation that he indicated he may withdraw his resignation if he did not receive extra financial benefits. In the email whereby the appellant attempted to withdraw his resignation sent on 25 November 2003 the appellant also did not state he was definitely withdrawing his resignation, only that he may if certain requirements were not met. On 26 November 2003 an email was sent by the respondent confirming that his resignation had been accepted, the basis of his termination entitlements and wishing him the best in the future and this effectively meant that the respondent would not allow or consent to the withdrawal of the appellant's resignation.

51 The question of an employee being 'forced to resign' is a different concept to that of whether an employee can later withdraw a resignation once it has been accepted. The respondent argues that 'being forced to resign' equates to an employee being forced to lodge a resignation and is often a precursor to an employee lodging a 'constructive' dismissal claim against an employer

(see ***Andrew Collins v Medicare Australia*** [2005] AIRC 1057 and ***Jones v National Foods Australia Pty Ltd t/as National Foods Milk Ltd*** [2010] FWA 2120).

52 The respondent rejects the appellant's claim that at the meeting with Mr Henneveld on 27 November 2003 a promise was made that the appellant could return to the respondent at any time once he was ready. Even though there may have been miscommunication at this meeting Mr Henneveld indicated that it was quite possible he stated words to the effect that the appellant could always seek to return to the respondent or could return to the respondent if the opportunity arose and this indicates that the cessation of the employment relationship was amicable and indicates that no bias or discrimination would occur if he applied for jobs in the future with the respondent. However, it was not an open job offer. If Mr Henneveld gave the appellant an open job offer this was inconsistent with Mr Henneveld immediately arranging for only a three month extension of the appellant's resignation date. Mr Henneveld also then sent a letter to the appellant on 28 November 2003, the day after the meeting, confirming the extension and there was no mention of the appellant returning to work at any time and the appellant discussed the extension of his resignation date with Mr Taya before he left the respondent's premises that day. Mr Henneveld also stated that public sector employment processes preclude him making a promise of ongoing employment.

53 In conclusion the respondent argues that the evidence demonstrates that the respondent did not force the appellant to resign nor was it the respondent's conduct that made the appellant resign, it was his choice. The appellant's resignation was still valid up to and throughout his meeting with Mr Henneveld as the appellant did not have a general legal right to unilaterally withdraw his resignation and Mr Henneveld immediately arranged a three month extension to his resignation date and did not make a promise that he could simply return to the respondent's employment at his own choosing.

54 If this application was lodged after the required timeframe the respondent relies on the requirement that an appeal is to be commenced within 21 days of the date of the decision and if the Board finds that the appellant was terminated in February 2004 the appellant's application would be lodged just over eight years out of time. The respondent submits that the tests for accepting an appeal out of time are set out in the decision of the Industrial Appeal Court in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** (2004) 84 WAIG 683. The tests, as set out by Hasluck J, include that prima facie time limits should be complied with unless there is an acceptable explanation for the delay which makes it equitable to extend time.

55 In this instance it has taken the appellant over eight years to lodge his application, which is well over the 21 days and the appellant's explanation for such an extraordinary delay is unknown. The respondent maintains that the appellant's termination was voluntary, he resigned of his own accord and the respondent accepted his resignation. The respondent argues that there is no evidence indicating that the appellant was placed in a position whereby he was forced to involuntarily resign and there is therefore no merit to his case. The appellant has had eight years to contest his termination and has not done so and he was fully aware that his resignation had been accepted and that his services with the respondent had ceased. The respondent argues that eight years is an unreasonable timeframe in which to accept an appeal and the respondent would be significantly disadvantaged should the application be accepted. The respondent also believes that given the effluxion of time between the appellant's termination and this application being lodged, it would suffer prejudice meeting any further proceedings.

Findings and conclusions

Credibility

56 We listened carefully to the evidence given by the appellant and the respondent's witnesses and closely observed them.

57 The Board finds that some of the evidence given by the appellant was confusing and some of his evidence was inconsistent with documentation tendered during the hearing. We also find that evidence given by the appellant about when he ceased working for the respondent lacked veracity. When asked when he ceased undertaking work for the respondent we find that the appellant was deliberately vague. The appellant could not recall receiving a crucial letter from Mr Henneveld dated 28 November 2003 confirming his last day of work as being 27 February 2004 even though he agreed that he worked from home subsequent to 30 November 2003. The appellant also sent an email to Mr Taya dated 28 November 2003 confirming that he agreed to cease working with the respondent as at 27 February 2004 which is inconsistent with his evidence at the hearing (Exhibit R1, document 2.4). Other documents also confirm that the appellant ceased working for the respondent on that date (see Exhibits A3 and A5). In contrast we find the evidence given by Mr Taya and Mr Henneveld was clear and consistent, their evidence was supported by documentation where relevant and their evidence was not broken down during cross-examination. The Board therefore accepts the evidence they gave. In the circumstances where there is any inconsistency in the evidence we prefer the evidence of Mr Taya and Mr Henneveld to that given by the appellant.

58 In our opinion, having regard to all of the evidence before the Board, the fundamental elements of a constructive dismissal or involuntary resignation do not apply in this instance and we find that the appellant brought his contract of employment with the respondent to an end of his own volition, effective 27 February 2004.

59 The appellant argues that he was forced to resign from his employment with the respondent. A resignation can constitute a dismissal for the purposes of the Act but whether or not a particular resignation will do so depends upon the circumstance of each case. The relevant law to be applied in this matter was set out by Beech, SC in ***Grant Raymond Lukies v AlintaGas Networks Pty Ltd*** (2002) 82 WAIG 2217:

> The Industrial Relations Commission of South Australia in ***Lucky "S" Fishing Pty Ltd v Jex*** (1997) 75 IR 158 at 164 also considered the decision of the Court of Appeal of New Zealand [***Auckland Shop Employees' Union v Woolworth's (NZ) Ltd*** (1985) 2 NZLR 372]. It noted that the Court of Appeal stated that there has been a modification of the test in the ***Western Excavating (ECC) Ltd v Sharp case*** (1978) ICR 221 at 226 which stated that if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat

himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The Court of Appeal suggested that in constructive dismissal cases the relevant test is whether the conduct complained of is calculated or likely to seriously damage the relationship of confidence and trust between the parties and is such that the employee cannot be expected to put up with it [34].

60 The Board finds that there was no action by the respondent which constituted conduct calculated or likely to seriously damage the relationship of confidence and trust between the parties such that the appellant could not be expected to put up with it and we find that the appellant's resignation on 15 October 2003 was not due to any actions on the part of the respondent towards the appellant. Whilst it is clear that the appellant had concerns about the conduct of some of the respondent's employees around the time he indicated to Mr Taya that he was resigning these problems appear to have been ongoing for some years prior to this meeting and it may well have been the case that the appellant was experiencing work related problems but he chose not to pursue this in a formal manner with the respondent. The appellant sought and was granted the opportunity to work from home in 2002 and he raised the necessity for this to occur with the respondent on the basis of family responsibilities however at the hearing he maintained that he sought to work from home due to work related problems caused by the respondent. The appellant relied on having an additional person acting in his position in 2001 constituting unconscionable behaviour towards him on the part of the respondent but we accept Mr Taya's evidence that if this indeed was the case and if this had been brought to his attention he would have dealt with the matter because it was inappropriate that this occur. The appellant had the opportunity to raise the issue of his claims about Mr Binning's conduct with senior management but he chose not to do so. The Board accepts that during the meeting which took place between the appellant and Mr Taya on 6 October 2003 the appellant was upset and distressed and he raised having problems with particular employees but notwithstanding this on 15 October 2003 and after being counselled by Mr Taya to seriously consider whether he should resign the appellant wrote to Mr Taya indicating that he wished to proceed with his resignation and this was accepted by Mr Taya by email dated 16 October 2003 (see Exhibit R1, document 2.1). There was no evidence before the Board that work related problems were raised by the appellant in any manner which the respondent had the opportunity to deal with formally when these issues were alleged to have occurred and given the vague, unsubstantiated assertions made by the appellant about these matters and his claim that some employees be terminated without any supporting evidence we find that there is insufficient information before the Board to demonstrate that the respondent breached its duties and responsibilities towards the appellant during his employment such that the appellant had no choice but to resign as at 15 October 2003.

61 The Board rejects the appellant's claim that his resignation, which he sent to Mr Taya on 15 October 2003 and was accepted by Mr Taya by email dated 16 October 2003, is of no effect because he withdrew his resignation on 25 November 2003. We find that after the appellant indicated to the respondent that he wished to resign on 15 October 2003 and after it was accepted by the respondent the following day he did not follow through with his claim that he would withdraw his resignation in his email to Ms Palman dated 25 November 2003. After the appellant tendered his resignation and it was accepted by Mr Taya emails were exchanged between the respondent and the appellant about outstanding entitlements the appellant maintained were due to him including a redundancy payment. In the email sent by the appellant to Ms Palman dated 25 November 2003 he indicated to the respondent that he was not voluntarily resigning and his resignation resulted from the actions of the respondent and that if he was not paid the quantums he was seeking he would 'like to' withdraw his resignation. The appellant was advised the following day of the entitlements to be paid to him and that he would not be entitled to a redundancy payment and long service leave accruals claimed by the appellant as his position had not been made redundant and he was not entitled to the long service leave payments he was claiming. We find that after receiving this advice the appellant did not pursue the statement he made in his email to Ms Palman that he would withdraw his resignation if he was not paid all of the entitlements he was claiming because after receiving Ms Palman's email dated 26 November 2003 the appellant did not indicate in writing to the respondent that as he was not being paid the additional entitlements he was claiming he wanted to withdraw his resignation. The appellant also had the opportunity to seek to withdraw his resignation during his discussion with Mr Henneveld the following day however we accept Mr Henneveld's evidence that the focus of this discussion was not about the appellant withdrawing his resignation and we find that the main issue during this discussion was dealing with the appellant's request that the respondent give him more time to consider his options given his decision to resign. The Board finds that the appellant's email dated 25 November 2003 was therefore overtaken when the appellant told Mr Henneveld that he wished to continue with his resignation and have his last day of employment with the respondent extended to a date approximately three months after 30 November 2003. We find that this is supported by the content of the email the appellant sent on 28 November 2003 to Mr Taya, with a copy to Mr Henneveld, confirming that he would be leaving the respondent 'after 3 months' (see Exhibit R1, document 2.4).

62 The appellant claims that Mr Henneveld told him at the meeting on 27 November 2003 that he could return to work with the respondent when he was better and it was on this basis that he continued as an employee of the respondent for an unspecified period and was effectively on leave without pay subsequent to 27 February 2004. In our view this claim has no substance. We have already found that during the appellant's conversation with Mr Henneveld on 27 November 2003 a discussion took place about the appellant's resignation date being extended to a date subsequent to 30 November 2003 and that at this meeting the appellant requested that the respondent allow him additional time to reflect on his future given that he had resigned. We find that after discussing this with Mr Taya, Mr Henneveld extended the date of the appellant's resignation and allowed him to remain as an employee and to continue working for the respondent from home until 27 February 2004 and a letter from Mr Henneveld to the appellant dated 28 November 2003 confirms this arrangement and confirms that the appellant's last day of employment with the respondent was 27 February 2004 (Exhibit R1, document 2.3). There was no documentation or correspondence generated by the appellant stating anything contrary to what was contained in this letter nor was there any evidence that the appellant disputed that his last day of employment was 27 February 2004. We find on the evidence that Mr Henneveld did not tell the appellant that he was to continue as an employee of the respondent subsequent to ceasing work for the respondent on 27 February 2004 on the basis that he could return to work for the respondent when he wished to do so and we accept Mr Henneveld's evidence that he did not and could not have given the appellant this undertaking given the requirements contained in the relevant public sector management standard with respect to appointment, recruitment and

selection. The Board therefore finds that the appellant resigned from his employment with the respondent and ceased being an employee on 27 February 2004.

63 As the Board has found that the appellant ceased his employment with the respondent as at 27 February 2004 it is appropriate to consider whether or not time should be extended to accept this application which was lodged on 9 December 2011 and is therefore seven years and 265 days outside of the required timeframe.

64 Section 80J of the Act provides that an appeal under s 80I of the Act shall be instituted in the prescribed manner and within the prescribed time. Regulation 107(2) of the *Industrial Relations Commission Regulations 2005* provides that an appeal may be commenced within 21 days after the date of the decision, determination or recommendation in respect of which the appeal is made and pursuant to s 27(1)(n) of the Act the Board may extend the prescribed time for lodging such an appeal (see ***Maureen Dehnel v Dr Neale Fong, Director General, Department of Health and Others***).

65 The tests which apply to an application lodged outside of the required timeframe are contained in ***Stephen Kelly v Director General, Department of Justice*** (2003) 83 WAIG 1283 as follows:

> Until the application for extension is granted, there ought be no assumption made that the extension will be granted as a matter of right. The question is whether the circumstances meet the tests for an extension of time. Those tests are set out in ***Esther Investments Pty Ltd v Markallinga Pty Ltd*** (1989) 2 WAR 196; ***Tip Top Bakery v TWU*** (1994) 74 WAIG 1189; ***Ryan v Haselby and Lester trading as Carnarvon Waste Disposals*** (1993) 73 WAIG 1752 and ***Robowash Pty Ltd v Michael*** (1997) 78 WAIG 2323. They are as follows–
>
> (a) Prima facie time limits imposed by the Act are to be complied with and it is for to the applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;
>
> (b) an extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;
>
> (c) it is for an applicant to demonstrate that strict compliance with the legislation will work an injustice and be unfair in all of the circumstances;
>
> (d) considerations relevant to whether it would be unfair to not extend time include–
>
> (i) the length of any delay;
>
> (ii) the explanation for the delay;
>
> (iii) the steps taken if any, by the applicant to evidence non acceptance of the circumstances challenged;
>
> (iv) the merits of the substantive application in the sense that there is a case to be answered; and
>
> (v) whether there would be any prejudice to the respondent in granting the application to extend time, although the absence of prejudice to the respondent without more, is not a sufficient basis of itself, to grant an application for an extension of time [69].

66 We find that on the issue of merit the appellant does not have a strong case. The Board has already found that the appellant was not constructively dismissed and that he resigned of his own accord. Even though the appellant has made claims about inappropriate actions by some of the respondent's managers towards him prior to the cessation of his employment with the respondent, we find that his case is weak as there was no evidence of any specific transgressions or actions by any of the respondent's employees which could have resulted in the appellant being constructively dismissed.

67 We find that there has been an inadequate explanation as to the delay in this application being lodged. The appellant gave limited evidence as to why he was unable to return to work prior to this application being lodged or why he waited until 1 September 2011 to write to Mr Henneveld. The appellant did not give any supporting evidence about any adverse medical conditions during this period other than making a statement that he had 'mental health issues' (T34) that may have impacted on his ability to return to work. The appellant maintained that it was inappropriate to return to work prior to September 2011 as a number of employees he had difficulties with remained employed by the respondent and they were now no longer employed by the respondent as at 1 September 2011, he was therefore able to return to work. It is our view that the ongoing employment of these employees was not an insurmountable issue for the appellant if he wished to return earlier given the size of the respondent's operations and it is also the case the appellant did not take any steps between 27 February 2004 and 1 September 2011 to indicate to the respondent that at some point he would be seeking to return to work with the respondent.

68 The Board finds that the disadvantage suffered by the respondent with respect to its ability to call relevant evidence in relation to the issues in dispute is severely undermined by the significant delay in the lodgement of this application. Even if the Board accepts that the appellant was unaware he had ceased employment with the respondent on 27 February 2004 until 16 September 2011, when he received Mr Henneveld's letter confirming this and this application was therefore lodged 63 days outside of the required timeframe, when balancing fairness between the appellant and the respondent and when taking into account equity and fairness we find that the disadvantage and prejudice to the respondent far outweighs the disadvantage to the appellant if time was extended to lodge this application. In all of the circumstances we find that time should not be extended for filing this application and this application will be dismissed.

2012 WAIRC 00307

APPEAL AGAINST THE DECISION OF THE EMPLOYER TO NOT ALLOW THE APPELLANT TO RETURN TO WORK

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YONGHUA CHENG
	APPELLANT
	-v-
	MR MENNO HENNEVELD MAIN ROADS WA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON - CHAIRMAN
	MR B DODDS - BOARD MEMBER
	MR D NEWMAN - BOARD MEMBER
DATE	TUESDAY, 22 MAY 2012
FILE NO	PSAB 22 OF 2011
CITATION NO.	2012 WAIRC 00307

Result	Dismissed
Representation	
Appellant	In person
Respondent	Mr B Kirwan

Order

HAVING HEARD the appellant on his own behalf and Mr B Kirwan on behalf of the respondent the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 00341

APPEAL AGAINST TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEAN EKEROTH
	APPELLANT
	-v-
	DEPARTMENT OF PREMIER AND CABINET
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR ANDREW DORES - BOARD MEMBER
	MR DAVID SOLOSY - BOARD MEMBER
DATE	WEDNESDAY, 6 JUNE 2012
FILE NO	PSAB 1 OF 2012
CITATION NO.	2012 WAIRC 00341

Result	Appeal dismissed

Order

WHEREAS this is an appeal to the Public Service Appeal Board (the Board) pursuant to s 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of March 2012 the Board convened a hearing for the purpose of scheduling and dealing with any interlocutory matters; and

WHEREAS at the hearing the parties agreed to enter into discussions with a view to resolving the appeal; and

WHEREAS on the 30th day of May 2012 the appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, 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.] On behalf of the Public Service Appeal Board.

2011 WAIRC 01142

APPEAL AGAINST THE DISCIPLINARY DECISION BY EMPLOYER AGAINST A UNION MEMBER ON 13 SEPTEMBER 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS MICHELLE GRANTHAM
	APPELLANT
	-v-
	THE DIRECTOR-GENERAL, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR D SOLOSY - BOARD MEMBER
	MR M COE - BOARD MEMBER
DATE	MONDAY, 12 DECEMBER 2011
FILE NO	PSAB 16 OF 2011
CITATION NO.	2011 WAIRC 01142

Result	Order issued
Representation	
Appellant	Mr M Shipman
Respondent	Mr S Barrett

Order

HAVING heard Mr M Shipman on behalf of the appellant and Mr S Barrett on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the notice of appeal be and is hereby amended in accordance with the notice of application filed on 28 November 2011.

(Sgd.) S J KENNER,
Commissioner.
[L.S.] On behalf of the Public Service Appeal Board.

2011 WAIRC 01154

APPEAL AGAINST THE DISCIPLINARY DECISION BY EMPLOYER AGAINST A UNION MEMBER ON 13 SEPTEMBER 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS MICHELLE GRANTHAM
	APPELLANT
	-v-
	THE DIRECTOR-GENERAL, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR D SOLOSY - BOARD MEMBER
	MR M COE - BOARD MEMBER
DATE	TUESDAY, 13 DECEMBER 2011
FILE NO	PSAB 16 OF 2011
CITATION NO.	2011 WAIRC 01154

Result	Order issued
Representation	
Appellant	Mr M Shipman
Respondent	Mr S Barrett

Order

HAVING heard Mr M Shipman on behalf of the appellant and Mr S Barrett on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders-

THAT the hearing dates of 16 and 19 December 2011 be and are hereby vacated with the appeal to be relisted on dates to be fixed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 00289

APPEAL AGAINST THE DISCIPLINARY DECISION BY EMPLOYER AGAINST A UNION MEMBER ON 13 SEPTEMBER 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00289
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER- CHAIRMAN MR D SOLOSY - BOARD MEMBER MR M COE - BOARD MEMBER
HEARD	**:**	WEDNESDAY, 9 NOVEMBER 2011, THURSDAY, 23 FEBRUARY 2012, WEDNESDAY, 22 FEBRUARY 2012, WRITTEN SUBMISSIONS 27 FEBRUARY 2012
DELIVERED	**:**	THURSDAY, 10 MAY 2012
FILE NO.	**:**	PSAB 16 OF 2011
BETWEEN	**:**	MS MICHELLE GRANTHAM Appellant AND THE DIRECTOR-GENERAL, DEPARTMENT OF TRANSPORT Respondent

Catchwords	:	Industrial Law (WA) - Appeal against disciplinary decision of employer - Jurisdiction of Appeal Board to overturn finding of Inquirer under the Public Sector Management Act 1994 - Findings as to credibility of witesses - Appeal upheld.
Legislation	:	Public Sector Management Act 1994 ss 78(1)(b), 86(4)(a), 86(8), 86(9).
Result	:	Appeal upheld
Representation:		
Appellant	:	Mr M Shipman as agent
Respondent	:	Mr S Barrett

Case(s) referred to in reasons:

Director General Department of Justice v Civil Service Association of Western Australia Incorporated (2006) 86 WAIG 231

Reasons for Decision

1 The appellant Ms Michelle Grantham is employed as a Level 3 employee at the Passenger Services Business Unit of the Department of Transport. Ms Grantham appeals against a decision by the Department to impose a fine of five days' salary by reason of a finding of a breach of discipline, arising from events in March 2010. This followed an investigation under the former disciplinary provisions of the Public Sector Management Act 1994. Ms Grantham seeks an order quashing the decision. This is based on a challenge to the findings of the Inquirer and in turn, the penalty imposed by the employer.

Common ground

2 There is considerable common ground in this appeal. The parties filed a detailed statement of agreed facts and the following is largely drawn from it.

3 In the period between January and March 2010 Ms Grantham was the Acting Checking Supervisor at the Morley Licensing Centre. As the Acting Supervisor, Ms Grantham's duties involved accessing departmental records to assist in customer service, staff operations and generally resolving problems.

4 On 28 January 2010 Ms Grantham was presented with a letter from Mr H, containing concerns about the medical capacity of his former wife, Ms K, to possess a driver's licence. It is not necessary for the purposes of these reasons to explore the detailed grounds of complaint raised in the letter. Ms Grantham, at the time she received the letter, was in the position of Acting Checking Supervisor, a busy job, which required her to make between 60 and 100 file enquiries on any working day. Given the very busy nature of the Morley Licensing Centre, the Manager of the centre, Ms Hills-Wright, accepted that on many occasions staff do not have the time to make record notes in the client history of the TRELIS system setting out the reason for access or the result of that access, in every case.

5 Because of the content of the letter and the serious nature of the matters that it raised, Ms Grantham did not feel confident in dealing with the complaint and accordingly, gave it to a colleague Ms Wellbourne-Wood, a Senior Supervisor. This was on the same day she received it, that being Thursday 28 January 2010. The attendance record and roster for the Morley Licencing Centre indicated that Ms Wellbourne-Wood was not at work on this day. Those records were inaccurate. This is because the attendance record is not updated daily and the roster is subject to change without notice. Whilst Ms Wellbourne-Wood generally worked one day a week on a Friday, she also attended work on other days as the need arose.

6 Late in the afternoon on 28 January 2010 at about 3:30pm, Ms Wellbourne-Wood spoke to Mr Thompson at the Driver Assessment Section by telephone. She asked him how she should deal with the complaint from Mr H. She was requested to send a copy of the complaint by fax to Ms Portelli at the Driver Assessment Section, referring to her request that the matter be progressed. Ms Wellbourne-Wood did so, and whilst the fax was dated 29 January 2010, the fax transmission record reveals that it was sent on 28 January. Mr Thompson received it late that afternoon and delivered it to Ms Portelli's desk as she had left for the day. When Ms Portelli arrived at work early the following morning on Friday 29 January, she passed it to Mr Dowding who actioned it and prepared a letter to be sent to Ms K and made a TRELIS record of this.

7 The TRELIS system is a confidential database, containing amongst other things, personal details concerning the holders of drivers' licences and registered motor vehicles. The system as operated by employees of the Department is accessed by a user name and password. When accessing the system, a warning message is displayed in the following terms:

> "The information from this system is confidential and must neither be disclosed to unauthorised persons under any circumstances, nor accessed for personal reasons"

8 When a user accesses TRELIS, the system can remain accessible for up to 15 minutes before it is automatically logged out. Whilst accessible in this way, any person can operate the system without further access permissions being necessary. Generally, client files are accessed for training purposes and where this happens, no record is made in the client history field to evidence entry. As a matter of normal practice, Customer Service Officers in the Licensing Centre can and do assist other staff in the course of ordinary business. As a part of day-to-day business, staff members can request that others access files in TRELIS on their behalf, however, when this occurs, a comment to this effect should be made in the client contact history field.

9 In terms of training in the TRELIS system, it was common ground that Ms Grantham, since her commencement in 2007, had not received any formal training in its operation or the policies and procedures regarding unauthorised usage. However, various departmental circulars have identified the importance of the confidentiality of information in the TRELIS system, and the requirement for access of valid and genuine licensing enquiries. Despite this, the Department has not given the issue of

unauthorised access to the TRELIS system much focus, until over the last one to two years. When commencing employment, however, Ms Grantham did sign a confidentiality undertaking, that she would not disclose any confidential information to unauthorised persons.

10 In terms of the access by Ms Grantham to TRELIS on 8 March 2010, this was not disputed. The audit log for that day revealed an access to Ms K's details briefly at 10:22am. The screen accessed by Ms Grantham displayed basic information such as the person's name, date of birth, driver's licence status with any preconditions, the person's residential address and customer identification. Any further information sought requires a higher level of access permission. At the time of the access by Ms Grantham on 8 March 2010, it was accepted that she did not know Ms K or her family, and there was no personal reason for her accessing the record. Furthermore, Ms Grantham did not disclose the content of the record to any unauthorised persons. It is not in contest that in accordance with her duties, Ms Grantham was and is required to access TRELIS on a regular basis.

Jurisdiction

11 Ms Grantham originally appealed against the Director-General's decision to impose a penalty of five days' pay and sought that it be substituted by the imposition of a written reprimand. Subsequently, the grounds of appeal were amended to seek to have the finding of the Inquirer overturned and the penalty quashed. Given that the appeal arises from disciplinary proceedings commenced under the Public Sector Management Act 1994 prior to the commencement of amendments to the legislation effected by the Public Sector Reform Act 2010, Ms Grantham made submissions about the Appeal Board's power to overturn an Inquirer's findings.

12 In short, it was contended that the appeal provisions are governed by s 78(1)(b) of the Public Sector Management Act. As an appeal before the Appeal Board is in the nature of a hearing de novo, it was submitted that it is open to the Appeal Board to find that the decision of the decision maker, in this case the Inquirer, was fundamentally flawed. That being so, the Appeal Board may relieve the employing authority from its obligation under s 86(9)(a) of the Public Sector Management Act to accept the finding of the Inquirer. This is so, according to the submission, as it would be ultra vires to enforce the employer under that provision of the legislation, to accept a finding that on the balance of probabilities, the Appeal Board determines could not have been arrived at by any reasonable Inquiry.

13 This contention is essentially put on two bases. The first is that it is open to the Appeal Board to effectively "stand in the shoes" of the Inquirer and make findings for itself on the basis of the evidence which the Inquirer could have made under s 86(8)(a). Alternatively, it is open to the Appeal Board to overturn a finding of an Inquirer submitted to an employer under s 86(9) on the basis that the finding is so fundamentally flawed that no reasonable employer could accept it. In this case, Ms Grantham says that the findings of the Inquirer were fundamentally flawed such that the findings should be overturned and the penalty imposed based upon them should be quashed.

14 In my view, for the following reasons, the Appeal Board has jurisdiction and power to overturn the findings of an Inquirer resulting from an Inquiry under the former disciplinary provisions of the Public Sector Management Act. Relevantly, s 78(1) under the repealed provisions was as follows:

> "**78. Rights of appeal and reference**
>
> (1) Subject to subsection (3) and to section 52, an employee who –
>
> (a) is a Government Officer within the meaning of section 80C of the *Industrial Relations Act 1979*; and
>
> (b) is aggrieved by a decision made in the exercise of a power under section 79(3)(b) or (c) or (4), 82, 86(3)(b), (8)(a), (9)(b)(ii) or (10)(a), 87(3)(a), 88(1)(b)(ii) or 92(1),
>
> may appeal against that decision to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the *Industrial Relations Act 1979*, and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to that Division."

15 Section 86(8)(a) under the former legislation dealt with a "finding" by an Inquirer appointed to conduct an Inquiry under s 86(4)(a). Under that provision where an Inquirer found that a breach of discipline was committed by an employee, that finding was to be submitted to the employing authority with a recommendation. Section 86(9)(a) required the employing authority to "accept the finding" and sub-par (b)(ii) required the employer to accept the Inquirer's recommendation and to act accordingly or to take other action that could have been recommended.

16 In my view, properly construed, the combined effect of the former ss 86(8) and (9) of the Public Sector Management Act when read together with the right of appeal under s 78(1)(b), means that it is open in the present case for Ms Grantham to challenge both the finding of the Inquirer of a breach of discipline and the imposition of a penalty by the employer. Section 78(1)(b), set out above, refers to the capacity of an employee who was aggrieved by a decision under s 86(8)(a) and (9)(b)(ii), to appeal against that decision. That is, the capacity to challenge a decision in the form of a finding by an Inquirer under s 86(8)(a) was expressly contemplated under the former provisions. This was separate to and independent of the capacity for an aggrieved employee to appeal against a decision of an employing authority to impose a penalty in reliance on the power under s 86(9)(b)(ii) of the Public Sector Management Act.

17 Put another way, there would seem to be no purpose to be gained from identifying the decision in the form of a finding by an Inquirer in s 86(8)(a) separate to that of the decision of the employing authority under s 86(9)(b)(ii), if the Parliament did not intend that a decision in the nature of a finding by an Inquirer could be challenged on appeal to the Appeal Board. The obligation on an employing authority under the former s 86(9)(a) to accept the finding of an Inquirer, was arguably for the purpose of ensuring that disciplinary proceedings follow a specified process, involving steps taken by an Inquirer to investigate, find and recommend, and the employing authority to act accordingly and impose an appropriate penalty. Nothing

in the former s 86(9)(a) could be construed as limiting or otherwise precluding the Appeal Board from exercising its jurisdiction and powers to overturn on appeal, a finding of an Inquirer, when such a right of appeal was expressly conferred by the former s 78(1)(b).

18 Alternatively, even if the former s 78(1)(b) of the Public Sector Management Act did not expressly confer a power to challenge a finding of an Inquirer before an Appeal Board, this would not seem to preclude an Appeal Board, as part of determining an appeal, from coming to a conclusion that an Inquirer's finding is so fundamentally flawed, that no reasonable Inquirer could have made it. It would be an extraordinary thing if an employing authority, under the former disciplinary regime, being obliged to "accept" such a finding, could defend a finding by an Inquirer which was, for example, so manifestly flawed as to be ultra vires, in the broad administrative law sense: (See generally *Laws of Australia* Chapter 2.4 at par 2.4.93 et seq). Whilst the Appeal Board, like a Public Service Arbitrator, does not exercise any broad supervisory jurisdiction, as part of dealing with an appeal and "adjusting" under s 80I (1) of the Act, decisions from which appeals are brought, it would seem that the Appeal Board could form a view about such things in the course of dealing with an appeal, as long as it was necessary for the "adjustment" of the decision under appeal: *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* (2006) 86 WAIG 231.

Contentions of the Parties

19 Whilst accepting that the appeal proceedings were a hearing de novo, Ms Grantham submitted that the findings of the Inquirer, which form the basis for the penalty imposed on her, were fundamentally flawed. This was put on a number of bases. Firstly, it was contended that the conclusion of the Inquirer that Ms Grantham and Ms Wellbourne-Wood could not possibly have both been at work on 28 January 2010, when the complaint regarding the capacity of Ms K to drive was made, was a central finding affecting the credibility of Ms Grantham. She submitted that this finding, in effect, led the Inquirer to conclude that Ms Grantham's explanation surrounding the incident was a concoction. This conclusion was flawed, according to Ms Grantham's submissions, because the material upon which the Inquirer relied, that being rosters and attendance records for the Licensing Centre, have been subsequently shown to be unreliable. It is now conceded, as an agreed fact, as referred to in the summary above, that Ms Grantham and Ms Wellbourne-Wood were both in attendance at work on Thursday 28 January 2010.

20 Thus, Ms Grantham was correct in her statement to the Inquirer that she received the letter from the complainant on that day, immediately assessed it was beyond her capacity to deal with, and passed it to Ms Wellbourne-Wood for further action. This is also consistent with the documentary evidence, being the fax sent by Ms Wellbourne-Wood to Driver Assessments, also referred to in the agreed facts. Whilst on the face of the document it is dated 29 January 2010, the transmission report clearly shows that the fax was transmitted the day before on 28 January 2010. This is consistent with the statements of Ms Grantham and Ms Wellbourne-Wood. This is also consistent with the evidence of Mr Thompson and Ms Portelli in these proceedings.

21 Secondly, Ms Grantham challenges the finding of the Inquirer to the effect that computers in the Licensing Centre cannot be accessed by other users, because of locking devices. This is inconsistent with the true position as reflected in the agreed statement of facts set out above. Furthermore, this is also inconsistent with the evidence of Ms Mahony in these proceedings.

22 Thirdly, the conclusions by the Inquirer that all staff were properly trained in the use of TRELIS, is challenged. Ms Grantham's evidence, also reflected above as common ground, was that she never received any formal training as to either the use of the system or the conditions of its use. Further, despite the acceptance of statements by Ms Vijit Chelliah to the Inquiry, that there is no communication between Driver Assessments and other areas of the Department, this is at odds with the evidence on this appeal. That evidence is to the effect that there is quite regular communication between the Licensing Centre and Driver Assessments. There is also contact between complainants and Driver Assessments about the status of complaints that have been made. This includes in this case, contact by Mr H to Driver Assessments on a number of occasions in early 2010, as evidenced by Mr H's telephone records.

23 In short, Ms Grantham contended that the subsequent evidence reveals that the conclusions reached in the Inquiry, in particular those relating to the inferred credibility of Ms Grantham, were erroneous and caused the Department's decision making to be flawed.

24 On the other hand, the Department submitted that there was a link between Mr H, Ms K and Ms Grantham. It was contended that Ms Grantham did access the TRELIS record in relation to Ms K without due cause. The submission was that Ms Grantham understood the background to the "relationship issues" between Mr and Mrs H and Mr H's former wife Ms K, and the access on 8 March 2010 was related to this relationship. As to any contact between Driver Assessments and the Licensing Centre, the Department contended that officers in Driver Assessments have full access to the TRELIS system and there would be no need for a request to be made of an employee in a Licensing Centre to access records on their behalf. Furthermore, it was submitted that given the alleged knowledge of the relationship between the persons concerned, Ms Grantham should have declared a conflict of interest and notified the relevant manager.

Consideration

25 Whilst the appeal is dealt with as a hearing de novo, there were a number of key findings made by the Inquirer which clearly significantly influenced the finding that the breach of discipline alleged against Ms Grantham occurred. In particular, the Inquirer made a substantial credibility finding against Ms Grantham and also for that matter, against Ms Wellbourne-Wood, in relation to their statements to the Inquiry that Ms Grantham handed the letter of complaint to Ms Wellbourne-Wood on the day she received it on 28 January 2010. This finding was based upon analysis of the rosters and attendance records at the Morley Licensing Centre on the dates in question.

26 However, as the agreed statement of facts now discloses, subsequent evidence as to those documents reveals that they are not accurate or reliable. Moreover, the fax sent by Ms Wellbourne-Wood containing Mr H's letter of complaint, although dated 29 January 2010 on the coversheet, was clearly sent the previous day on 28 January 2010 as disclosed by the fax transmission report. This was consistent with the evidence of Ms Grantham and Ms Wellbourne-Wood that they were on duty on the same

day that the letter of complaint was received. The evidence of the transmission of the fax on 28 January, was consistent with the evidence of Ms Grantham and Ms Wellbourne-Wood, that the letter was received by Ms Grantham on that day and was immediately passed to Ms Wellbourne-Wood for her attention.

27 This evidence is also consistent with the evidence of Mr Thompson, who was rostered to work on the telephone reception of Driver Assessments on 28 January 2010. This is also reflected in the common ground. He testified that he received a telephone call from Ms Wellbourne-Wood late in the afternoon on that day. Mr Thompson advised Ms Wellbourne-Wood to fax the letter to Driver Assessments to the attention of Ms Jenny Portelli, which she did that afternoon. After receiving the letter, as Ms Portelli was not then on duty, he put it on Ms Portelli's keyboard on her desk for the next morning. When she got into work the next morning on 29 January between 6.00am and 6.30am, Ms Portelli testified that she found the letter and confirmed with Mr Thompson that he had left it for her attention. She then passed it onto Mr Dowding in the office to action.

28 From an examination of the Inquiry Report as a whole, the conclusion that Ms Grantham and Ms Wellbourne-Wood, contrary to their statements, were not at work on the same day because of the attendance records and rosters, was flawed. This was a significant finding as to the credibility of Ms Grantham, which permeated the Inquirer's report, and which contributed to her version of the events not being believed.

29 On the evidence it is also the case that Ms Grantham had no relationship with Mrs H apart from knowing her as a work colleague. She had only met Mr H once. She also did not know Ms K, other than that she was Mr H's former wife. The context of the matter is important. A member of the public made a written complaint about the fitness of another person to hold a motor vehicle driver's licence. The complaint made a number of serious allegations. Ms Grantham acted upon that complaint promptly by passing it to her supervisor Ms Wellbourne-Wood who was at work on 28 January 2010.

30 Whilst Ms Grantham initially made a statement to the Inquirer that she accessed the TRELIS system on the same day that she received the letter, Ms Grantham now accepts that this statement was made in error. It was Ms Wellbourne-Wood who made a TRELIS record on that day. No complaint has been established in relation to that access. Ms Grantham did access the record very briefly on 8 March 2010 but she cannot recollect at whose request this was done. Ms Grantham speculated that it may have been someone else in the office or from Driver Assessments although she suspected it was more likely it was Ms Wellbourne-Wood.

31 It was Ms Grantham's evidence that this access, which was for around 30 seconds, brought up the customer's address and licence status. The TRELIS records in evidence show that Ms Grantham made around 20 searches, between 10:15am and 11:18am on the morning in question. This is in the context of Ms Grantham's evidence that on any working day, she may access between 60 to 100 files. There was also undisputed evidence before the Appeal Board that the Licensing Centre is very busy and on that week in particular, being the week of a public holiday, it was short staffed.

32 Furthermore, with respect, contrary to the conclusions reached by the Inquirer, the evidence before the Appeal Board is that there is communication between the Licensing Centre and Driver Assessments on a fairly regular basis. Ms Portelli, who is employed in Driver Assessments, testified that on many occasions she contacted the Licensing Centre and other centres to follow up on actions regarding a driver's licence issue. She also said that she received many calls from the centres which she has dealt with. This was consistent with the evidence of other witnesses including Mr Thompson. This was contrary to the evidence of Ms Vijit Chelliah, the Co-Ordinator – Driver Assessment in the Driver and Vehicle Services section of the Department. Ms Vijit Chelliah's statement to the Inquirer was heavily relied upon by the Inquirer to conclude that there was no communication between the Licensing Centre and Driver Assessments. Thus, Ms Grantham's assertion that somebody from the other section may have requested access to the record was not inherently improbable.

33 It was also the uncontradicted evidence before the Appeal Board, that Ms Wellbourne-Wood, given she only worked one day a week on a part-time basis, often followed up on inquiries she was dealing with. This is consistent with Ms Grantham's evidence that it may well have been Ms Wellbourne-Wood who made the request of her to access the TRELIS record on 8 March. When it was put to her, Ms Hills-Wright, the Branch Manager of the Licensing Centre, also accepted that given her knowledge of how Ms Wellbourne-Wood works, it was quite possible this could have occurred.

34 In my view on all of the evidence, it is most unlikely that it was Mrs H who would have requested Ms Grantham access the TRELIS record on 8 March. This is because Ms Hills-Wright had, by late 2009, some knowledge of potential issues involving Mrs H's husband's former wife, Ms K. Later, around 18 or 19 March 2010, Mrs H went to see Ms Hills-Wright to discuss the complaint issue with her. It was Ms Hills-Wright's testimony that she suggested that because it involved the former wife of her husband, she should "put something in writing". Subsequently, a conflict of interest declaration was made by Mrs H. Ms Hills-Wright's evidence also was to the effect that she was aware in late 2009, that there had been a letter of complaint from Ms K suggesting that Mrs H had in some way acted inappropriately in relation to Ms K's driving record. Mrs H had been previously advised by another employee, Ms Mahony, in November 2009, to not get involved in any way with these matters. Ms Mahony specifically advised Mrs H to not access Ms K's TRELIS record nor to request anyone access it on her behalf.

35 Having regard to this testimony, and the surrounding context, it is highly unlikely, given the various warnings and concerns that Mrs H had about being involved in the matter, that she would have requested Ms Grantham to access the TRELIS record for Ms K on 8 March 2010.

36 In relation to training, as in the agreed facts, Ms Grantham testified that she had no formal training in relation to the use of the TRELIS system or the conditions attaching to its use. She accepted, however, that it is general knowledge that the system is not to be accessed for any non-business purposes. The absence of formal training was supported in the testimony of other witnesses, in particular Ms Hills-Wright. She became the Manager of the Licensing Centre in 2009 and according to her testimony it was only following involvement by the Corruption and Crime Commission concerning an unrelated incident, that a greater focus was placed on raising awareness about the use of the TRELIS system. This has only been in the last couple of years or so. Ms Hills-Wright also confirmed that despite the heightened focus on these issues, there are staff members who have still not been trained in the new protocols in relation to the use of TRELIS.

37 Allied to this, Ms Hills-Wright also confirmed, as did other witnesses called by Ms Grantham, that despite various formal policies and procedures being in place, due to the workloads of customer service staff, detailed records are often not made in TRELIS when a record is accessed. There would thus appear to be a significant departure from the Department's formal policies and procedures in this respect with what is in practice occurring on a day to day basis. Ms Grantham testified that given the volume of work she is required to undertake, when accessing records as a part of her daily duties, she simply does not have time to make a detailed access record each and every time.

38 On all of the evidence it is open to find and I do find that there was a legitimate and serious complaint made by a member of the public in relation to the medical fitness of a person to hold a driver's licence. Ms Grantham acted upon that complaint diligently and passed it to her supervisor Ms Wellbourne-Wood to action it. Whilst Ms Grantham could not recollect who requested her to access the TRELIS record of Ms K on 8 March 2010, there is no evidence to suggest that it was accessed for any ulterior purpose. I am not persuaded there was any personal relationship between Ms Grantham and Mrs H, Mr H or Mr H's former wife, Ms K. The conclusion that Ms Grantham accessed the record on the date in question without good reason was an inference drawn by the Inquirer which was not reasonably open to be drawn on all of the evidence, in the context of the history of the written complaint by Mr H.

39 Furthermore, the absence of a record entry notation on the TRELIS record of Ms Grantham's entry on 8 March 2010 is consistent with the evidence that licencing staff often do not make records of all such entries. Merely because Ms Grantham could not recollect who requested the access, in the context of all of the other evidence, does not lead to the obvious inference that there was no valid business reason for it. The credibility findings against both Ms Grantham and Ms Wellbourne-Wood, made by the Inquirer, in light of the evidence as to the accuracy of the rosters and attendance records at the Licensing Centre, were not reasonably open.

Conclusion

40 For all of the foregoing reasons the appeal should be upheld. The finding of the Inquirer and the penalty imposed by the Department should be quashed.

2012 WAIRC 00290

APPEAL AGAINST THE DISCIPLINARY DECISION BY EMPLOYER AGAINST A UNION MEMBER ON 13 SEPTEMBER 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS MICHELLE GRANTHAM
	APPLICANT
	-v-
	THE DIRECTOR-GENERAL, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR D SOLOSY - BOARD MEMBER
	MR M COE - BOARD MEMBER
DATE	THURSDAY, 10 MAY 2012
FILE NO/S	PSAB 16 OF 2011
CITATION NO.	2012 WAIRC 00290

Result	Appeal upheld
Representation	
Applicant	Mr M Shipman as agent
Respondent	Mr S Barrett

Order

HAVING HEARD Mr M Shipman as agent of the applicant and Mr S Barrett on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the appeal be and is hereby upheld;

(2) THAT the finding of the Inquirer and the penalty imposed by the respondent be and are hereby quashed.

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

2012 WAIRC 00205

APPEAL AGAINST THE EMPLOYER FAILING TO PROVIDE INFORMATION RE EMPLOYMENT UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN JAMES ROSS
	APPELLANT
	-v-
	DEPARTMENT OF THE PREMIER AND CABINET
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G BROWN - BOARD MEMBER
	MR E ISAILOVIC - BOARD MEMBER
DATE	TUESDAY, 10 APRIL 2012
FILE NO	PSAB 2 OF 2012
CITATION NO.	2012 WAIRC 00205

Result	Direction issued
Representation	
Appellant	Mr G Ross
Respondent	Mr R Andretich of counsel

Order

HAVING heard Mr G Ross on his own behalf and Mr R Andretich of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

THAT the parties file written submissions as to the Appeal Board's jurisdiction to determine the herein appeal by 17 April 2012.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 00238

APPEAL AGAINST THE EMPLOYER FAILING TO PROVIDE INFORMATION RE EMPLOYMENT UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN JAMES ROSS
	APPELLANT
	-v-
	DEPARTMENT OF THE PREMIER AND CABINET
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G BROWN - BOARD MEMBER
	MR E ISAILOVIC - BOARD MEMBER
DATE	WEDNESDAY, 18 APRIL 2012
FILE NO	PSAB 2 OF 2012
CITATION NO.	2012 WAIRC 00238

Result	Application discontinued by leave
Representation	
Appellant	In person
Respondent	Mr R Andretich of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Public Service Appeal Board, 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,
Commissioner.
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2012 WAIRC 00294

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00294
CORAM	**:**	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	TUESDAY, 10 APRIL 2012 2010
DELIVERED	**:**	TUESDAY, 15 MAY 2012
FILE NO.	**:**	PSA 21 OF 2009, PSA 22 OF 2009, PSA 23 OF 2009, PSA 24 OF 2009, PSA 25 OF 2009, PSA 26 OF 2009, PSA 31 OF 2009
BETWEEN	**:**	VALERIE GRACE FLASHMAN BETHANY FAYE JOHN H. HODGES JANINE HAWKER GREGORY JOHN PALMER STEVEN SHAW PETER WATTS Applicants AND ATTORNEY GENERAL, DEPARTMENT OF THE ATTORNEY GENERAL Respondent

CatchWords	**:**	Public Service Arbitrator – Reclassification – Temporary Special Allowance – increased work value – level of complexity – operative date
Legislation	**:**	*Industrial Relations Act 1979* s 39
Result	**:**	Temporary Special Allowance Granted
Representation:		
Applicants	**:**	Ms L Kennewell
Respondent	**:**	Mr D Newman and Mr O Wood

Reasons for Decision

1 The applicants occupy positions as Guardians Level 5 in the Office of the Public Advocate. They seek reclassification of those positions to Level 6. The basis of the claims is that the work value of the positions has increased significantly, and the main argument raised by the applicants is that a significant number of the cases they deal with are complex and require higher level skills than is required for Level 5. The respondent says that the level of complexity of the cases allocated to Level 5 positions is appropriate and that it is reasonable that these positions undertake some complex cases.

2 In 2008 a review of the classifications in the Guardianship, Advocacy and Investigator Work Teams was undertaken by Gent Consulting Group, which reported on 25 November 2008. This review found that there had been a significant increase in the number of more complex cases referred to the Public Advocate. The greatest impact of this was on the Guardian Level 5 positions. This constitutes a significant net addition to work value. The report recommended that the structure of the Guardianship Team be changed to include Guardians at Levels 5, 6 and 7, and the more complex cases be allocated to the higher level positions. The outcomes of the Gent review were considered by the respondent and the applicants subsequently made submissions to the respondent seeking reclassification of their positions. Their submissions were considered and rejected by the respondent's Classification Review Committee.

3 There is dispute between the parties as to the level of complexity of the work engaged in by the Level 5 positions, any operative date for any reclassifications as a consequence and the measurement of complexity of cases being dealt with by the Guardians.

4 In respect of the question of whether a significant net addition to the position of Guardian at Level 5 has been demonstrated, I am satisfied, as recognised by the Gent report, that for some time prior to 25 November 2008, there was an increase in the level of the complexity of the cases handled by the positions occupied by the applicants. However, I find that when the respondent created positions of Senior Guardian, which were occupied from March 2010, these higher level positions undertook the bulk of the complex cases and took the role of supervising small teams of Level 5 Guardians.

5 Since early 2010 there has been a system of allocation and re-allocation of cases to ensure work of the appropriate level of complexity is allocated appropriately. A mechanism was put in place for cases referred to the Public Advocate to be assessed (the Complexity Model) so that their level of complexity could be determined and those cases were allocated accordingly. I accept that the Level 5 positions still retain some complex work, however, this is not inappropriate for such positions. The Senior Guardians do only complex cases.

6 Accordingly, from the time the Senior Guardian positions were occupied, the level of complexity of the Level 5 Guardian positions was reduced to what I believe to be an appropriate level for such positions.

7 As to the respondent's claim that consideration of any work value increase should not be earlier than 23 March 2010 because until then the applicants had not provided their full claim, I reject this proposition. There are generally two circumstances which apply to the issue of operative date. The first is where an employer initiates a review of classifications and this is what occurred in this instance. The second is where the employee initiates the review of the classification by making a claim to the employer. In this latter circumstance the employee cannot rely upon the earliest time on which he or she raises the request with the employer, unless the employee has at that time provided a detailed and substantive case to the employer rather than simply a claim unsupported by adequate material, and puts their detailed and substantive case later. In this circumstance the operative date for any increase in classification level would be the date of the complete case being submitted for consideration. While the case put by the employee should be as complete as possible, this does not mean that such a case is incomplete merely because the employer might seek some clarification, elaboration or further information.

8 However in this case, the employees made their claim when their employer had already received a recommendation from Gent Consulting Group which recognised the increase in work value of the positions in November 2008. Merely because consideration of the consequences of that report and the employees subsequently having an opportunity to put their case for consideration took time, does not mean that the earlier recognition of the increase in work value should not apply.

9 Therefore, in this case, the increased work value ought to be recognised as occurring no later than November 2008. However, I note that the Public Service Arbitrator has no power to award retrospectively beyond the date upon which the application was lodged with the Commission (s 39 *Industrial Relations Act 1979* (the Act)). In this case, the applicants filed their applications on 24 September 2009. In those circumstances, I am of the view that the best way to recognise the increase in work value, which applied to these positions from at least November 2008 until the Senior Guardian positions were occupied, is via a Temporary Special Allowance (TSA).

10 A further point which arises is that the applicants say that the Complexity Model, which measures the complexity of cases for the purpose of allocation of those cases, is flawed and does not adequately reflect the true complexity of the case load of a Level 5 position. However, there is no evidence before me beyond mere assertion to enable me to come to that conclusion.

11 In conclusion, I am satisfied that the Level 5 Guardian positions have demonstrated that there was a significant net addition to work value in those positions. However, since the Level 6 Senior Guardian positions were occupied, the level of work required of the Level 5 positions is not beyond that which would be normally expected of Level 5 positions, which is performed with the support and assistance of Senior Guardians, the Guardianship Manager and the Public Advocate.

12 I would order that:

1. a TSA apply to these positions to Level 6 from the date on which the applications were filed in the Commission, being 24 September 2009, to March 2010.

2. While s 39 of the Act does not give the Arbitrator power to order that the commencement of the TSA be earlier than the date of filing, I recommend that the respondent recognise the higher level of work from at least 24 November 2008.

13 Minutes of Proposed Order will issue.

2012 WAIRC 00322

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VALERIE GRACE FLASHMAN BETHANY FAYE JOHN H. HODGES JANINE HAWKER GREGORY JOHN PALMER STEVEN SHAW PETER WATTS **APPLICANTS** **-v-** ATTORNEY GENERAL, DEPARTMENT OF THE ATTORNEY GENERAL **RESPONDENT**
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 25 MAY 2012
FILE NO	PSA 21 OF 2009, PSA 22 OF 2009, PSA 23 OF 2009, PSA 24 OF 2009, PSA 25 OF 2009, PSA 26 OF 2009, PSA 31 OF 2009
CITATION NO.	2012 WAIRC 00322
Result	Temporary Special Allowance granted

Order

HAVING heard Ms L Kennewell on behalf of the applicants and Mr D Newman and Mr O Wood on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

1. ORDERS that the respondent pay to the applicants a Temporary Special Allowance to Level 6 from 24 September 2009 to 3 March 2010; and
2. RECOMMENDS that the Temporary Special Allowance set out in this Order apply from no later than 24 November 2008.
3. ORDERS that the applications be, and are otherwise hereby dismissed.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 24/2010	Kathryn Devereux	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	Scott A/SC	Dismissed	14/09/2011

NOTICES—Union Matters—

2012 WAIRC 00351

NOTICE

FBM 4 of 2012

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;

Except to the extent provided by subrule 28, 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 "15" 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 "15" 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 "15" 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 "17" to "21" 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.

(28) The Union shall also consist of workers engaged in the manufacture of bricks at the enterprise trading as Narrogin Brick.

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 "15" hereof), Builders' Labourers employed to assist building tradesmen on construction of buildings.

No Person, who is eligible under subclauses (26) and (27) 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.

(29) 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.

(30) 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.

(31) 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.

(32) Glass Bevellers, Cutters, Polishers and Silverers, Lead-Light Glaziers and Cutters, Brilliant Cutters, Sandblasters of Glass, Draughtsmen and Painters.

(33) 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".

(34) 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).

(35) 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.

(36) Timber Stackers, Yardmen and Labourers employed in furniture factories, Cementers of Leadlights, Rag Pickers and Fumigators for furniture and upholstery.

(37) 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.

(38) 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.

(39) 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.

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.

PROVIDED that no person shall be eligible to be a member of the Union unless they were eligible to be a member of:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers; or

The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA

As at the date of the amalgamation of the two Unions on *[date]* 2012."

The matter has been listed before the Full Bench at 10:30 am on Monday 27 August 2012 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 11 June 2012

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2011 WAIRC 01082

REFERRAL OF DISPUTE RE PAYMENT UNDER OWNER-DRIVER CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	BRAKER TRANSPORT PTY LTD
	APPLICANT
	-v-
	BJ MAY PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 30 NOVEMBER 2011
FILE NO/S	RFT 26 OF 2011
CITATION NO.	2011 WAIRC 01082

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Not applicable

Order

WHEREAS on 29 November 2011 the applicant made application to the Tribunal under s 40(a) and/or (d) of the Owner-Drivers (Contracts and Disputes) Act 2007 alleging that the respondent has failed to pay the applicant outstanding monies owed to the applicant under an owner-driver contract;

AND WHEREAS also on 29 November 2011 the applicant filed an application under reg 99D(4) of the Industrial Relations Commission Regulations 2005 seeking an order that the time for the respondent to file a notice of answer in the application be shortened to seven days from the date of service of the notice of referral;

AND WHEREAS having considered the grounds in support of the application for shortened time for filing answers the Tribunal is satisfied that an order should be made;

NOW THEREFORE, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the time for the filing of a notice of answer by the respondent be and is hereby shortened to seven days from the date of service of the notice of referral on the respondent.

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

2012 WAIRC 00301

REFERRAL OF DISPUTE RE PAYMENT UNDER OWNER-DRIVER CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2012 WAIRC 00301
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 5 APRIL 2012
DELIVERED	**:**	THURSDAY, 5 APRIL 2012
FILE NO.	**:**	RFT 26 OF 2011
BETWEEN	**:**	BRAKAR TRANSPORT PTY LTD
		Applicant
		AND
		BJ MAY PTY LTD
		Respondent

Catchwords	**:**	Owner-driver contract - referral of dispute regarding payment of claim - failure of respondent to appear - claim for interest on outstanding sum - Owner-Drivers (Contracts and Disputes) Act 2007 ss 4, 5, 40
Result	**:**	*Order issued*
Representation:		
Applicant	**:**	Mr A Dzieciol of counsel
Respondent	**:**	No appearance

Case(s) referred to in reasons:

Case(s) also cited:

Reasons for Decision

Ex temporé

1 The Tribunal has before it a claim in this matter by Brakar Transport Pty Ltd against BJ May Pty Ltd for a debt under section 40(a) and/or (b) of the Owner-Drivers (Contracts and Disputes) Act 2007. Brakar Transport claims the sum of $15,481.77 plus interest. BJ May Pty Ltd failed to appear at the hearing. Being satisfied that the Company had been duly notified of the proceedings, and no good reason being shown as to why the Tribunal should not proceed, the Tribunal heard and determined the matter in its absence.

2 The facts in the matter before me are relatively straightforward and are as follows.

3 Mr Frost, who is the principal of Brakar Transport, testified that he works as the sole director of the company and provides a prime hauler for towage services for other entities. On his evidence, the prime mover is some 130 tonnes in weight.

4 Mr Frost testified that in or about February 2011, he entered into discussions with Mr Brad May, who the Tribunal understands is the principal of the respondent, BJ May Pty Ltd. Those discussions led to an oral agreement whereby Brakar Transport would agree to supply a prime mover for the transportation of B-Double trailers between Perth and Brisbane carrying loads of various kinds on behalf of other transport companies. According to Mr Frost's evidence, the oral agreement involved a term that the Perth-Brisbane return run for the B-Doubles would be at the rate of $1.55 per kilometre.

5 In accordance with that oral agreement, Mr Frost told the Tribunal that he commenced to provide services to BJ May Pty Ltd and, according to his evidence, all seemed well at least in the initial stages. According to Mr Frost, for the first six to eight weeks there were no difficulties experienced in particular in relation payments. However, Mr Frost testified that sometime after payments from BJ May Pty Ltd started to slow and the timeframe for the payment of invoices provided by him to BJ May blew out to in excess of 21 days in arrears.

6 As a result of this, and understandably given the effect upon his business, Mr Frost approached BJ May Pty Ltd to discuss the matter. He was informed there were difficulties with the respondent company's bank. However, it appears from the evidence things did not get better, in fact they got worse, and accordingly Mr Frost informed the Tribunal that because of the arrears and payments owing to him and the costs incurred by his business in continuing to trade, he gave notice of termination of the oral contract between he and BJ May of seven days somewhere, it seems on the evidence, about the end of May 2011.

7 In accordance with the oral agreement, tendered before me in the evidence of Mr Frost, are two invoices dated 6 June and 13 June 2011. Those two invoices refer to the transport of B-Doubles between Perth and Brisbane return in accordance with the agreement reached earlier with Mr May on behalf of the respondent company. The total sums of those two invoices are, firstly, the amount of $8,252.95, which is the gross value of $15,438.50 including GST, less the sum of $7,185.55 for fuel which was agreed by Mr Frost as a valid deduction from the invoice. Secondly, the invoice amount of $9,228.82 representing a total gross, including GST, of $15,438.50 less $6,209.68 in fuel deductions. That leads to a total sum claimed of $17,481.77. According to Mr Frost those amounts remained unpaid from the time the invoices were tendered to BJ May.

8 Accordingly, Mr Frost informed the Tribunal he approached BJ May to discuss the matter of the outstanding invoices. It seems that, following those discussions, Mr Frost was provided a cheque by BJ May dated 29 August 2011 in the sum of $16,273.17. Subsequently, regrettably, by notice of 31 August 2011 from Mr Frost's bank, Bankwest, he was informed that cheque was dishonoured. Accordingly, I am satisfied that the cheque for the amount just mentioned has not been paid by BJ May's bank.

9 The evidence also was that subsequently in September it seems, on about 20 September 2011 BJ May provided a payment of $2,000 to Brakar Transport in relation to the outstanding debt. I should also add that Mr Frost's evidence was that based upon his experience in the industry that where an agreement is reached, as in this case, for example, for the cartage services at a certain agreed rate for a certain load, in this case B-Double transport loads, that unless there is adequate notice given of any change to the loading to be transported pursuant to the contract then the agreed rate is paid in full.

10 On the basis of the evidence I am satisfied and I find as follows.

11 That Brakar Transport is an owner-driver for the purposes of s 4 of the OD Act in that it is a body corporate carrying on the business of the transport of goods to heavy vehicles of a gross vehicle mass greater than 4.5 tonnes. Secondly, I am satisfied and I find that the heavy vehicle used by Brakar Transport is supplied by it and operated by Mr Frost as an officer of Brakar Transport and whose principal occupation is to drive the said heavy vehicle. I am also satisfied and I find on the evidence that in or about February 2011 an oral owner-driver contract for the purpose of s 5 of the OD Act came into existence by which Brakar Transport was to supply a prime mover for the transport of B-Double trailers for trips to Brisbane and return at the agreed rate of $1.55 per kilometre. I am satisfied and I find also that Brakar Transport, in accordance with the owner-driver contract it had entered into, provided the services to BJ May in respect of which invoices issued to BJ May on 6 June and 13 June 2011 for the amounts I have referred respectively less the agreed fuel deduction in the total amount of $17,481.77.

12 I am satisfied also that on the basis of the evidence the present claim is a payment claim for the purposes of s 3 of the OD Act. Also, in relation to the evidence I am satisfied that the cheque provided by BJ May to Mr Frost of Brakar Transport was dishonoured and therefore the amount claimed remains as a debt due and owing by BJ May to Brakar Transport. I am also satisfied on the evidence that in September 2011, a payment of $2,000 was made by BJ May to Brakar Transport in part satisfaction of that debt.

13 The Tribunal is therefore satisfied on the basis of all of that evidence that there is a debt due and owing to Brakar Transport from BJ May in the sum of $15,481.77. By s 4 of the Act, clause 2, Schedule 1, interest is payable on that debt at the rate of 6% per annum, which in this case is approximately from the end of June 2011, to the date of judgment. I am also satisfied that in accordance with contractual principles generally that Brakar Transport, is entitled to the full amount in accordance with the contractual relationship between it and BJ May for the two respective loads claimed.

14 Accordingly, on the basis of those findings and the evidence, the Tribunal proposes the following orders.

15 Firstly, a declaration that the respondent, BJ May is indebted to the applicant, Brakar Transport in the sum of $15,481.77. Secondly, an order that the respondent pay to the applicant the debt due plus interest in the total sum of $16,142.59 within 14 days. That interest amount is the total sum of $660.82 which is $17.86 per week over 37 weeks from the end of June to the date of judgment.

2012 WAIRC 00304

REFERRAL OF DISPUTE RE PAYMENT UNDER OWNER-DRIVER CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	BRAKAR TRANSPORT PTY LTD
	APPLICANT
	-v-
	BJ MAY PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 22 MAY 2012
FILE NO/S	RFT 26 OF 2011
CITATION NO.	2012 WAIRC 00304

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	No appearance

Order

HAVING heard Mr A Dzieciol of counsel and there being no appearance on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby –

(1) DECLARES that the respondent, BJ May Pty Ltd, is indebted to the applicant, Brakar Transport Pty Ltd, in the sum of $15,481.77.

(2) ORDERS that the respondent pay to the applicant the debt due plus interest in a total sum of $16,142.59 within 14 days.

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

2012 WAIRC 00323

REFERRAL OF DISPUTE RE PAYMENT UNDER OWNER-DRIVER 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-
	JEREMY RICHARD TAYLOR
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 25 MAY 2012
FILE NO/S	RFT 28 OF 2011
CITATION NO.	2012 WAIRC 00323

Result	Application discontinued
Representation	
Applicant	Ms M Papa, Mr G Exelby
Respondent	Mr J Taylor

Order

WHEREAS the applicant filed a notice of discontinuance, the Tribunal, 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.

2012 WAIRC 00235

REFERRAL OF DISPUTE RE BREACH OF CONTRACT BY EMPLOYER

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2012 WAIRC 00235
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 12 DECEMBER 2011, FRIDAY, 17 FEBRUARY 2012
DELIVERED	**:**	WEDNESDAY, 18 APRIL 2012
FILE NO.	**:**	RFT 23 OF 2011
BETWEEN	**:**	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH Applicant AND SIMS METAL MANAGEMENT LTD Respondent

Catchwords	**:**	Owner-driver contract - Whether owner-driver contract existed - Whether contract contained an express term as to use of a substitute driver - Whether contract contained an implied term as to termination on notice - Princples applied - Assessment of damages - Order issued.
Legislation	**:**	Owner-Drivers (Contracts and Disputes) Act 2007 ss 4, 5, 47.
Result	**:**	Application upheld in part. Order issued
Representation:		
Applicant	**:**	Mr A Dzieciol of counsel and with him Ms J Philips
Respondent	**:**	Mr S Mayne

Case(s) referred to in reasons:

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266;

Crawford Fitting Co v Sydney Valve and Fittings Pty Ltd (1988) 14 NSWLR 438;

Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523;

Gibson v Manchester City Council [1978] 1 WLR 520; [1979] 1 WLR 294;

Integrated Computer Services Pty Ltd v Digital Equipment Corp (Australia) Pty Ltd (1988) 5 BPR 11110;

Vroon BV v Fosters Brewing Group Ltd [1994] 2 VR 32.

Reasons for Decision

1 Mr Hajje operates a business as an owner-driver under the name AMJ Metal Recyclers. In about July 2007 AMJ started performing work for Sims Metal Management Ltd. The work involved the collection of scrap metal, mainly in the form of car bodies, for recycling at Sims premises. This work continued for about four years, when, in August 2011 following a period of illness, Mr Hajje says Sims wrongfully and unlawfully terminated the arrangement he had with Sims.

2 Mr Hajje contends that the arrangement his business had with Sims was an owner-driver contract for the purposes of the Owner-Drivers (Contracts and Disputes) Act 2007. In the absence of any agreement as to notice to terminate the contract, Mr Hajje says that the law should imply a period of three months' notice. He also says because of certain representations made to him by Sims, he lost the opportunity to have his business continue to perform services while he was ill. Mr Hajje claims damages for breach of contract on both grounds.

3 On the other hand, Sims says it is not liable to Mr Hajje. This is for the reason that it says there was no ongoing contract between Sims and AMJ. The work performed was sporadic and on an "as required" basis. Whilst Sims was sympathetic and helpful to Mr Hajje when he was ill, there was no commitment to provide ongoing work once Mr Hajje was well enough to resume performing services.

4 A number of issues need to be considered in this case. They are:

(a) Was there an owner-driver contract in existence between Mr Hajje and Sims?;

(b) If there was an owner-driver contract:

(i) Was reasonable notice required to terminate the contract and what, in the circumstances of the present case, would be a reasonable period of notice?;

(ii) Was Sims liable for losses incurred by Mr Hajje for the period of his illness when he could not provide services to Sims?; and

(iii) How should any damages be assessed if Mr Hajje makes out any of his claims?

Was there an owner-driver contract?

5 An owner-driver contract for the purposes of s 5 of the OD Act is a contract, whether written or oral or partly written or partly oral, by which an owner-driver, in the course of business, agrees with another person to transport goods in a heavy vehicle.

6 Sims says that there was no owner-driver contract in this case with Mr Hajje. It contended that there was just an ad hoc arrangement whereby Mr Hajje provided contracting services as may be required. Sims contended that this arrangement reflects the cyclical nature of the scrap metal industry. Further, it is only the "regular" owner-drivers engaged by Sims that have written terms and conditions of appointment and in particular in this case, there was no obligation on Mr Hajje to provide a relief driver when he was ill. These were submissions made by Sims from the bar table, as it did not call any evidence. This was so despite the Tribunal warning Sims of the possible consequences of adopting this course.

7 Mr Hajje testified that he relocated from Sydney to Perth in about April 2005. In Sydney he had his own scrap metal business and he owned three trucks. His intention was to establish a similar business in Perth but he found this more difficult than he anticipated. Mr Hajje testified that in early 2007 he was approached by a person from Sims who told him that Sims were in need of a driver. As a result of this contact, Mr Hajje started driving for a contractor to Sims on a sub-contract basis. Later, in about June 2007, Mr Hajje purchased the truck he had been driving and from 1 July 2007 he commenced performing services as an owner-driver for Sims. Mr Hajje testified that at the time he started, he discussed with Ms Mutch, the Transport Manager for Sims, whether he could continue to do some of his own work when time permitted. This was agreed.

8 The arrangement with Sims, according to Mr Hajje, was that Sims would provide him with work on the basis that he provide a suitable vehicle and make himself available in relation to scrap metal work. The truck that Mr Hajje purchased at the time was painted in the Sims blue colours and he was also required to wear a Sims uniform.

9 In terms of the arrangement, Mr Hajje testified that he spent 99% of his time working for Sims which involved generally five days per week at least 10 hours per day: 6, 25T. He acknowledged that there was some reduction in the workload at the time of the global financial crisis, where the drivers agreed to work on a reduced four day basis. Mr Hajje described the method of work operation. At the end of each day, he said he would hand in his run-sheet for that particular day and he would then receive a run-sheet for the following day which specified the jobs that he was required to do. This entailed him picking up scrap metal, mostly motor vehicle bodies, in accordance with the run-sheet, and returning the load to the Sims yard. Once delivered, the scrap metal would be unloaded onto the pre-sort pile, and it would then be sorted and be shredded.

10 According to Mr Hajje, he would normally do three to four jobs a day. Sims paid Mr Hajje on an hourly rate basis, and at the end of each week he would tender an invoice to Sims which Sims then paid. For the period of his engagement, to the year ending 30 June 2008, Mr Hajje earned $150,000 gross. For the year ending 30 June 2009, the sum was $130,000 gross. For the year ending 30 June 2010, the amount earned was $125,000 gross. Between 1 July 2010 and April 2011, Mr Hajje's earnings were $115,000 gross.

11 In late 2009, Mr Hajje purchased a new truck so he could more effectively undertake the work he was doing for Sims. To assist him in the purchase, Sims gave Mr Hajje a letter confirming that he was working for them which he provided to the finance company. The letter, as annexure AH1 to Mr Hajje's witness statement, said, in part "Allan Hajje is a subcontractor for Simsmetal and has been since 2007, supplying a flat top/hiab crane truck." Mr Hajje's earnings to 17 December 2009 were set out. The letter also said that "we do anticipate that the work for this vehicle is expected to continue in the near future". Mr Hajje purchased a new Isuzu FVR 1000 Long truck which had an eight tonne carrying capacity. Mr Hajje said that he reinforced the tray of the truck to avoid damage when car bodies were unloaded by machinery at the Sims yard. Mr Hajje took delivery of the truck, with the modified tray and crane installed in April 2010. The total capital cost of the truck was some $200,000 inclusive of on-road charges.

12 In contractual parlance, not all commercial transactions fit neatly within the traditional rules of offer and acceptance. To ascertain whether an enforceable agreement has been reached in a particular case, courts and tribunals often need to consider whether the conduct of the parties, with or without the spoken word, considered objectively, evinces an intention that the parties intended to be contractually bound: *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Australia) Pty Ltd* (1988) 5 BPR 11110; *Gibson v Manchester City Council* [1978] 1 WLR 520; [1979] 1 WLR 294. Also, an agreement may be inferred from the conduct of the parties where an offer and acceptance cannot be immediately identified: *Empirnall*

Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523; *Vroon BV v Fosters Brewing Group Ltd* [1994] 2 VR 32.

13 In this case the only evidence in relation to the question of formation of an owner-driver contract is from Mr Hajje. In my view, it is open to find on balance that from in or about July 2007 Mr Hajje and Sims entered into an agreement for the provision by Mr Hajje of services to Sims to transport scrap metal in his vehicle. Mr Hajje spent most of his time engaged in this activity and by agreement with Sims, was able to perform some limited work on his own account. It is clear from the evidence that Sims expected Mr Hajje to be available to perform the services. Mr Hajje not only purchased an appropriate truck to perform the services, and upgraded it in 2009, but he was also required to ensure it conformed to the specifications required by Sims. Mr Hajje also wore a Sims uniform. He was paid the rates per tonne in accordance with the Sims payment scheme and complied with Sims requirements as to terms and conditions generally for services performed for Sims clients. Mr Hajje received his allocation of daily work in the same way as all other drivers of Sims and he performed services for Sims over a period of approximately four years.

14 I am also satisfied on the evidence that there existed mutual obligations under the agreement. On the one hand Mr Hajje was expected to render satisfactory services to Sims and to be available to work when required on the basis that Sims would provide available work to Mr Hajje. The fact that at various times the levels of available work may have fluctuated, for example during the global financial crisis, does not materially alter the finding of the existence of an ongoing agreement. In any event, on the evidence, the work performed by Mr Hajje was largely continuous, except for Mr Hajje's absence because of illness, which issue I will come to shortly. The work was certainly not sporadic or intermittent, as may be the case with casual employment for example.

15 Accordingly, I am satisfied on the evidence that Mr Hajje was an owner-driver for the purposes of s 4(2) of the OD Act. I am also satisfied that he and Sims operated under an owner-driver contract in accordance with s 5 of the OD Act until it came to an end in August 2011.

Liability for losses during Mr Hajje's illness

16 In March 2011 Mr Hajje became ill. He discussed this with the then Acting General Manager of Sims Mr Skinner in early April 2011. Mr Hajje informed Mr Skinner of his illness and his need to be absent for some time in the Eastern States to undertake tests. Mr Hajje testified that he was told by Mr Skinner "not to worry and to take time off as was needed". Mr Hajje suggested, as was the usual practice, that he get someone else to drive his truck. However, Mr Hajje was informed that this was not necessary at that time.

17 Mr Hajje was back at work for a short time in May 2011 but required a further absence as he was still not well. Mr Hajje testified that he spoke to Ms Manigodich the Transport Supervisor for Sims. As Mr Hajje was required to be absent for some time, he proposed to put another driver in the truck and he said that Ms Manigodich agreed. Accordingly, Mr Hajje testified that he arranged for a substitute driver and obtained the necessary insurances. However, a few days later, Mr Hajje said that Ms Manigodich informed him that Sims no longer saw a need for a driver for Mr Hajje's truck as she could not guarantee any more than eight hours a week. According to Mr Hajje, he then asked about "his job", and Ms Manigodich told him to the effect that "he should get better and that his job would still be there and that Sims would not replace him". Over the course of Mr Hajje's absence, until early August 2011, Mr Hajje testified that he kept in regular contact with Ms Manigodich about his medical condition and prognosis for a return to work.

18 Mr Hajje said that it was the usual practice at Sims that where an owner-driver was going to be absent for any period of time, that a replacement driver would be arranged so that the truck could continue to operate.

19 The question of any compensation to cover the period during Mr Hajje's absence from work due to his illness depends upon the existence of a term in the owner-driver contract to that effect. Whilst Mr Hajje made reference to what was described as a "custom and practice" in relation to this issue, the evidence as to it is somewhat scant. However, that is not the end of the matter. In most contracts, there may be terms implied on a number of bases. Obligations may be implied on the basis of the "business efficacy test". That is, a term may be implied into a contract if it is necessary for its effective operation. The major statement of principle in this regard, is found in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 where at 283 it was said:

> "For a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

In my view, the implication of a term into the owner-driver contract to the effect that during any reasonably lengthy absence, a substitute driver would be used to drive the truck and ensure the continued provision of services where required, would satisfy such a test. It enables the agreement to effectively operate. It would be, in my view, obvious to a reasonable bystander and in all the circumstances satisfies the requirements of the business efficacy test.

20 Mr Hajje said in his evidence that he lost income as a result of Sims not allowing him to put a driver in his truck from June 2011. He said that if they had done so, then he would have earned approximately $2,000 per month. This is calculated on the basis of net earnings of approximately $6,000 per month less costs of a substitute driver of approximately $4,000 per month. This leaves a loss over a period of approximately two and a half months of $5,000 in nett earnings.

21 However, Mr Hajje's belief as to the amount of work and profit and projected earnings in his evidence was inconsistent with other evidence he gave as to what the Sims Transport Manager said to him in relation to a shortage of work over this period. That evidence was to the effect that she could "not guarantee more than eight hours per week" at that time. Therefore on the basis of all of the evidence, the Tribunal cannot confidently find on balance any compensable loss for this period.

Reasonable notice to terminate the contract

22 In early August 2011 when Mr Hajje had recovered from his illness he advised Sims that he was fit to return to work. He had email exchanges with Ms Manigodich. She informed Mr Hajje that the company no longer had work for him. Mr Hajje also

spoke to Mr Mayne the General Manager who confirmed that this was the position. On the basis of the previous representations to him, and the performance of the services to that time, Mr Hajje testified that he had an expectation of ongoing work with Sims. He said he regarded the responses of Sims as a termination of the arrangement he had with the company.

23 There being no evidence as to how the parties may have contemplated the termination of the owner-driver contract between Mr Hajje and Sims, the law is that commercial agreements of this kind contain an implied term that the agreement may be terminated on notice: *Crawford Fitting Co v Sydney Valve and Fittings Pty Ltd* (1988) 14 NSWLR 438. What is reasonable notice will be a question of fact in each case, depending upon each particular circumstance. Cases from employment law as to the implication of a term of reasonable notice in a contract of employment may be of some assistance.

24 In the case of commercial agreements of the present kind, McHugh JA (Priestly JA agreeing) in *Crawford Fitting*, in referring to the purposes of reasonable notice, observed that it would be of "sufficiently long to enable the recipient to deploy his labour and equipment in alternative employment, to carry out his commitments, to bring current negotiations to fruition and to wind up the association in a businesslike manner": at 444.

25 The facts relevant to the determination of reasonable notice in this case are that Mr Hajje has undertaken the work for Sims for some four and a half years. In 2007 purchased a truck and in late 2009 Mr Hajje expended some $200,000 in capital expenditure on the purchase and configuration of another truck. Mr Hajje had it configured in accordance with Sims' requirements. The configuration included a minimum tray length, it being able to carry at least four cars and be fitted with a hiab crane with a six tonne lifting capacity. Also Sims, on the evidence, is the dominant operator in the scrap metal industry therefore there may be limited opportunities for other work of this kind to be undertaken by Mr Hajje. The limited alternative work Mt Hajje has found since he left Sims is some evidence of this. In this case there was no evidence of any other contracting arrangements that Mr Hajje was required to wind up.

26 Having regard to these factors and the acceptance by Mr Hajje that other contract drivers engaged by Sims are seemingly required to receive one months' notice of termination of contract, I consider that applying the principles in *Crawford Fittings*, a reasonable period of notice would be two months.

Assessment of damages

27 The powers of the Tribunal under s 47(4) of the OD Act to grant a remedy are very broad. In terms of damages, the Tribunal may order the payment of damages, including exemplary damages and damages in the nature of interest. Given that owner-driver contracts are in the nature of commercial contracts, the general principles in assessing contractual damages are of assistance. The essence of that approach is to restore the innocent party, as far as money may do, to the position they would have been in, had the contract been performed.

28 Mr Hajje says that in the nine months that he undertook work for Sims until he became ill in the 2011 calendar year, he earned on average $12,500 per month. His overheads, including truck repayments, registration, insurance, fuel and truck maintenance and repairs, amounted to approximately $6,500 per month. On that basis, Mr Hajje's nett earnings were approximately $6,000 per month. After the agreement was terminated, between 19 August 2011 and 30 November 2011 Mr Hajje, consistent with his obligation to mitigate his loss, obtained work from other sources. He was not able to earn any income between 19 August 2011 and 30 September 2011. Between 1 October and 30 November 2011, Mr Hajje earned gross income of $13,312.88. From the gross income figure, must be deducted Mr Hajje's operating costs which were some $11,700. These costs included $6,630 for truck repayments; $1,432 for insurance; $338 for truck registration; $1,300 for fuel; and approximately $2,000 for truck maintenance. Therefore over the period from August to the end of November 2011, Mr Hajje's nett earnings amounted to approximately $1,600.

Conclusion

29 On the basis of my earlier finding that in all of the circumstances a period of two months' notice would be reasonable, Mr Hajje's nett earnings over such a period would be $12,000. From this figure, is to be deducted Mr Hajje's nett income from other work of $1,600. Therefore there will be an award of damages in the sum of $10,400 plus interest.

30 The Tribunal orders accordingly.

2012 WAIRC 00236

REFERRAL OF DISPUTE RE BREACH OF CONTRACT BY EMPLOYER

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-
	SIMS METAL MANAGEMENT LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 18 APRIL 2012
FILE NO/S	RFT 23 OF 2011
CITATION NO.	2012 WAIRC 00236

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel and with him Ms J Philips
Respondent	Mr S Mayne

Order

HAVING heard Mr A Dzieciol of counsel and with him Ms J Philips on behalf of the applicant and Mr S Mayne on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby orders –

THAT the respondent pay to the applicant damages in the sum of $10,400 plus interest of $416 within 21 days of the date of this order.

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

2012 WAIRC 00329

DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	WENLOCK TRANSPORT
	APPLICANT
	-v-
	CONTRACT HEAVY HAULAGE/MINES EXPRESS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 29 MAY 2012
FILE NO/S	RFT 16 OF 2010
CITATION NO.	2012 WAIRC 00329

Result	Application discontinued
Representation	
Applicant	Mr D Rohrlach
Respondent	Mr M Quadrio

Order

WHEREAS the applicant filed a notice of discontinuance, 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.