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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2012 WAIRC 00988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TREVOR DAVID HOFFMAN
	APPELLANT
	-and-
	PERTH MOBILE GP SERVICES LTD ACN 129 336 803
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 7 NOVEMBER 2012
FILE NO/S	FBA 6 OF 2012
CITATION NO.	2012 WAIRC 00988
Result	Discontinued by leave

Order

WHEREAS on 27 September 2012, the appellant filed a notice of appeal to the Full Bench; and

WHEREAS on 31 October 2012, the appellant by email advised that he wished to discontinue the appeal; and

WHEREAS on 2 November 2012, the respondent's agent informed the Full Bench by email that the respondent consented to the appeal being discontinued;

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

THAT the appeal be and is hereby discontinued by leave.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2012 WAIRC 00966

APPEAL AGAINST A DECISION OF THE COMMISION GIVEN ON 30 MARCH 2012 IN MATTER NO B 195 OF 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2012 WAIRC 00966
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	**:**	WEDNESDAY, 29 AUGUST 2012
DELIVERED	**:**	THURSDAY, 1 NOVEMBER 2012
FILE NO.	**:**	FBA 2 OF 2012
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Appellant AND KEN DAVIS Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S J Kenner**
Citation	**:**	**[2012] WAIRC 00189; (2012) 92 WAIG 462**
File No	**:**	**B 195 of 2010**

CatchWords	**:**	Industrial Law (WA) - contractual benefits claim - fixed term contract - implication of terms - 'business efficacy test' - custom and practice - principles to be applied when interpreting contracts considered - contract to vary found - appellant demonstrated error but no error found in the construction of the effect of terms of the varied contract of employment of the respondent
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii).
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	Mr R Hooker and Mr S Millman
Respondent	**:**	Mr M Cox and Mr J Hulmes
Solicitors:		
Appellant	**:**	Slater & Gordon
Respondent	**:**	MDC Legal

Case(s) referred to in reasons:

Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99

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

Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1981-1982) 149 CLR 337

Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd [2000] HCA 35; (2000) 201 CLR 520

Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd (1981) 36 ALR 567

Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1985-1986) 160 CLR 226

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2011] FCA 1294

Currie v Misa (1875) LR 10 Ex 153

Heimann v The Commonwealth (1938) 38 SR (NSW) 691

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

Hughes v St Barbara Ltd [2011] WASCA 234

Kucks v CSR Ltd (1996) 66 IR 182

Lee v GEC Plessey Telecommunications [1993] IRLR 383

Meek v Port of London Authority [1918] 2 Ch 96

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451

Ryan v Textile Clothing & Footwear Union Australia (1996) 130 FLR 313

Stirnemann v Kaza Investments Pty Ltd [2011] SASCFC 77

The Metropolitan Gas Co v The Federated Gas Employees' Industrial Union (1925) 35 CLR 449

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

Western Export Services Inc v Jireh International Pty Ltd [2011] HCA 45; (2011) 282 ALR 604

Case(s) also cited:

Casella v Hewitt [2008] WASCA 13 (12 February 2008)

CFMEU v John Holland Pty Ltd [2010] FCAFC 90

Finance Facilities Pty Ltd v Federal Commissioner of Taxation [1971] HCA 12; (1971) 127 CLR 106

Gallotti v Argyle Diamond Mines Pty Ltd [2003] WASCA 166

Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (2006) 156 FCR 1

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114

McCourt v Cranston [2012] WASCA 60

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

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

Reasons for Decision

SMITH AP:

Background

1 Until October 2005, Mr Davis, the respondent to the appeal, was a permanent teacher employed by the Department of Education of Western Australia. In October 2005, he took leave to take up a short-term position with the appellant, The State School Teachers' Union of WA (Incorporated) (SSTU). In January 2007, Mr Davis was appointed by the SSTU as a field officer for a four year fixed term. The central issue in this appeal is whether at the expiration of the fixed term the SSTU was obliged, at law, to offer Mr Davis a further contract for a four year fixed term.

2 When Mr Davis was appointed as a field officer, the terms of his contract of employment were set out in a short letter dated 25 January 2007, signed on behalf of the SSTU by Mr David Kelly, who was at that time the general secretary of the SSTU. Mr Davis also signed the letter. The express terms of contract set out in the letter were:

(a) The period of the contract was to commence on 15 January 2007 to 15 January 2011.

(b) The salary was $73,862 Year 2, of the current Conditions of Employment Agreement – for Officers of the SSTU dated 16 September 2005 (the Conditions of Employment Agreement).

(c) The normal hours of employment were 37½ hours per week.

(d) All other conditions of employment were in the Conditions of Employment Agreement.

3 The Conditions of Employment Agreement was enclosed with the letter dated 25 January 2007. The Conditions of Employment Agreement was executed on 16 September 2005 on behalf of the officers of the SSTU by Mr Kelly and on behalf of the representatives of the officers of the SSTU by Mr C C Sharpe. It is a comprehensive document containing 40 clauses and three appendices. The document follows the form and contains the types of conditions which are usually found in industrial agreements registered by the Commission that apply to employees in the public sector. The terms of the Conditions of Employment Agreement are expressed to 'apply and be binding upon the SSTU and the officers employed by it'. 'Officers' are defined in cl 5.3 to include a number of categories of officers employed by the SSTU, including field officers who are industrial officers. However, the Conditions of Employment Agreement is not a registered agreement, so it has no statutory force. Consequently, it only had force and effect in the law of contract as it was incorporated as an express term into Mr Davis' contract of employment.

4 It is common ground that the terms of the Conditions of Employment Agreement were express terms of the contract of employment of Mr Davis and that his position as a field officer was an industrial staff position. Although Mr Davis' contract of employment was for a maximum term of four years, the Conditions of Employment Agreement contained a provision which contemplated one offer of a further four year term could be made. This provision was contained in appendix 2 of the Conditions of Employment Agreement which provided as follows:

> Contract appointments to the Union for Industrial Staff are on a four (4) year basis which Executive may renew for one (1) further 4 years contract without the requirement of declaring the position vacant and going to advertisement.

5 Prior to the appointment of Mr Davis in 2007, a dispute arose towards the end of 2006 between the SSTU and industrial officers employed by the SSTU about the renewal of fixed term contracts. At that time, the contracts of three industrial

officers were about to expire. As a result of the dispute, negotiations took place between representatives of the industrial staff and the SSTU. After some months an agreed process for the renewal of contracts under appendix 2 was reached.

6 Mr Davis' contract as a field officer was to expire in January 2011. In early October 2010, Mr Davis was informed that his appointment would not be renewed and his contract came to an end in January 2011.

7 Mr Davis brought an application before the Commission under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (the Act) claiming that he had been denied a contractual entitlement. His claim is that he should have been re-appointed for a further four year term pursuant to the terms of the agreed process and by not doing so, the SSTU breached the terms of his employment contract. The effect of the terms of agreed process and whether it applied to Mr Davis' contract of employment was a critical issue in the proceedings at first instance before the Commission.

8 After hearing the matter, the learned Commissioner found that by proceeding to advertise Mr Davis' position without compliance with the agreed process, the SSTU was in breach of Mr Davis' contract of employment and an order was made on 30 March 2012 to award Mr Davis compensation for denied contractual benefits in the sum of $136,622.

9 There is no appeal against the quantum of the sum awarded. This appeal is against the decision of the Commission that Mr Davis had been denied a contractual benefit. The SSTU says that there was no breach of any term of Mr Davis' contract of employment so that no award of compensation should have been made.

Relevant findings made by the Commission at first instance

10 The issues the learned Commissioner found required his consideration were as follows [4]:

> Firstly, what were the terms of the agreed process for the renewal of Mr Davis' contract? Secondly, did any such agreed process became [sic] a term of Mr Davis' contract? Thirdly, if the agreed process was a term of Mr Davis' contract, on its proper interpretation, did it mean that the Union had to offer Mr Davis a renewal of his contract?

11 At the hearing at first instance, a dispute arose as to what was the document that had been agreed to by the executive of the SSTU in 2007 which set out the terms of the agreed process. After considering all of the evidence, the learned Commissioner found that the document agreed to was set out in a document titled 'Agreed Process for the Implementation of Appendix 2 – Appointment' (2007 Agreed Process). This document states as follows (exhibit A4):

> Appendix 2 states:
>
> *'Contract appointments to the Union for Industrial Staff are on a four (4) year basis which Executive may renew for one (1) further 4 years contract without the requirement of declaring the position vacant and going to advertisement.'*
>
> Agreed Renewal Process:
>
> 1. Executive is advised that the first 4 year term of the contract appointment of the incumbent Industrial Officer is due to end. (Note: a minimum of 12 weeks is required prior to end of the appointment for Executive to receive this advice).
> 2. Executive determines that either:
>
> 2.1 The position proceeds through the 'offer of renewal process,' or
>
> 2.2 The position is not renewed. This determination would be on the basis that:
>
> 2.2.1 The position has been made redundant, or
>
> 2.2.2 The Officer's contract has been extended as he/she is currently subject to a substandard performance process which has not yet been completed; or
>
> 2.2.3 The position is to be advertised and filled through normal appointment procedures as the Officer has been found to be performing in a substandard manner and has unsuccessfully completed a substandard performance process.
>
> 3. Where Executive determines that the Industrial Officer be offered a renewal for one (1) further 4 year contract (as per Appendix 2 Officers of the SSTUWA Conditions of Employment Agreement and point 2 above), the following process will occur.
> 4. The President of SSTUWA writes to incumbent Industrial Officer inviting him/her to renew contract appointment for one further 4 year term.
> 5. The Industrial Officer responds in writing indicating whether he/she wishes to have appointment renewed or not.
> 6. If the Industrial Officer accepts the renewal offer the Industrial Officer meets with the relevant Senior Officer for a Formal Appreciation and Formal Acceptance process which reviews the positive contributions and highlights from the Industrial Officer over the last four years and considers possible directions in the next four years and the support the organization can provide to the Industrial Officer to enhance his/her role within the organization and in the context of the SSTUWA Strategic Plan and their job satisfaction.
> 7. A Renewal Document process is formally completed, comprising the following steps:
>
> Step 1
>
> The Industrial Officer is provided with the documentation listed below and develops the Pro Forma Renewal Document with his/her work team, individually or as the Officer determines. Where the Officer develops the Pro Forma Renewal Document in collaboration with the team including the relevant Senior Officer, the process moves directly to step 3.

Documentation provided to the Industrial Officer:

A. Renewal Document Process (Steps 1-5)

B. Pro Forma Renewal Document, based on the SSTUWA Strategic Plan

C. Samples of completed Pro Forma Renewal Documents

D. Relevant JDF for the Industrial Officer's position.

Step 2

Where the relevant Senior Officer has not been party to the development of the Pro Forma Renewal Document the Industrial Officer presents the Document to the relevant Senior Officer for discussion.

Step 3

The relevant Senior Officer signs off the final Document

Step 4

The General Secretary and Industrial Officer sign off the final Document.

Step 5

The signed formal Document is forwarded to the President for consideration by the Appointments Committee.

8. The Appointments Committee recommends to Executive that the incumbent Industrial officer's contract appointment be renewed for one further 4 year term.

9. Executive endorses the Appointments Committee's recommendation re renewal of incumbent Industrial Officer's contract appointment. The SSTUWA President advises the Industrial Officer in writing of Executive's decision to renew contract appointment for one further four year term.

10. In the event that the incumbent Industrial Officer declines the offer to renew a contract appointment for one further four year term or if the Executive determines not to renew a contract under the provisions of 2.2 above, the Officer is entitled to the conditions set out in Clause 35 Retraining.

12 Whilst the SSTU denies the correctness of the finding that the 2007 Agreed Process sets out the terms of the agreed process, it elected not to pursue this point on appeal.

13 The second issue considered by the learned Commissioner was whether the 2007 Agreed Process had contractual effect, either by express or implied incorporation into the contract of employment of Mr Davis.

14 The learned Commissioner found that there were two terms that formed part of Mr Davis' contract. The first was that it was an implied term that the contract of employment could be varied from time to time by a process of collective negotiation between representatives of the officers (the employees) and representatives of the SSTU. The learned Commissioner then went on to find that the approach of negotiating collectively through representatives had been followed in 2007 when the executive met on 22 February 2007 and 30 March 2007 and agreed to vary the Conditions of Employment Agreement. These acts, the learned Commissioner found, had the effect of incorporating the agreed process as an express term of Mr Davis' contract of employment by variation to the Conditions of Employment Agreement.

15 During the submissions in this appeal, the SSTU's counsel spent a considerable amount of time analysing the reasoning of the learned Commissioner in the following passages [36] – [39]:

[36] Of particular relevance to this issue is the evidence of Mr Kelly. His uncontradicted evidence was that changes to employment conditions for officers of the Union were negotiated collectively by representatives of the officers and the Union. This was consistent with the principles that the Union supported. This is reflected in the 2005 Agreement itself. The process, as outlined by Mr Kelly, is that representatives of the officers and of the Union, which generally included himself, would negotiate changes. They would then be endorsed by the Executive of the Union. All affected staff would then be notified of the changes, usually by a memorandum or such. This was confirmed in the evidence of Ms Mitussis. This was a method employed over many years. It was not the practice for individual officers to receive letters advising of the agreed changes.

[37] On the strength of that evidence, I have no hesitation in concluding that it was an implied term of Mr Davis' contract that it could be varied from time to time in this manner. To imply such a term is consistent with the evidence as to how the Union and its officers dealt with employment matters over a long period of time. The implication of such a term also satisfies the 'business efficacy' test, as set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 cited in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

[38] This approach was confirmed in exhibit A8, which is a record of a Special Executive Committee meeting on 22 February 2007. At this meeting it was resolved, as minuted at resolution 6 'that the current Agreement be amended to include the new clause for renewal process and performance management'. The reference to 'the current Agreement' can only sensibly be read as the 2005 Agreement. This evidence is very important. It reflects the decision of the Executive which, between meetings of the State Council, is the ultimate decision making organ of the Union under its Constitution, to amend the 2005 Agreement that was contractually binding on the Union and Mr Davis, to incorporate the 'agreed process' then in contemplation. This was a clear and unambiguous expression of intention by the Union to be bound by the outcome of the ensuing process. This is also to be read with resolution 4 of the same meeting where the Executive directed the senior officers, who were Messrs Kelly

and Keely, 'as a matter of urgency to finalise a renewal process and that Senior Officers present the agreed process to the Executive for endorsement'. That is precisely what Messrs Kelly and Keely then did.

[39] The resolution adopted by the Executive on 30 March 2007 to 'endorse' the 21 March 2007 agreed process; the prior resolution of the Executive on 22 February 2007 to vary the contractually binding 2005 Agreement to incorporate it; and the evidence of Mr Kelly as to how the terms and conditions for officers of the Union were negotiated and varied, which evidence was consistent the evidence of Ms Mitussis and Mr Davis, leads to the conclusion that the 2007 agreed process was incorporated as an express term of Mr Davis' contract of employment by a variation to the 2005 Agreement. This is entirely consistent with Mr Kelly's evidence as to how all prior changes to officers' conditions were made. It is also consistent with the evidence as to the subsequent conduct of the Union and industrial officers who participated in the agreed process after it came into effect. If, as contended by the Union, the process did not bind it, then it is difficult to see why, at least until the end of 2010, the Union complied with it. This is evidence confirmatory of contractual effect: *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68; *Port Sudan Cotton Co* v *Govindasamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5.

16 Having concluded that the Conditions of Employment Agreement was varied to include the 2007 Agreed Process, the learned Commissioner went on to consider what did such a term mean.

17 The learned Commissioner found that when a generous approach to the interpretation of industrial instruments applied in ***Kucks v CSR Ltd*** (1996) 66 IR 182 (and more recently in ***Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*** [2011] FCA 1294) was applied to the construction of the 2007 Agreed Process, that the discretion conferred by the use of the word 'may' in appendix 2 had been modified by this agreed document. Also, when regard was had to the terms of the comprehensive nature of the 2007 Agreed Process which required the officer and relevant senior officer to complete a number of steps, including commitments as to future performance, that once the steps had been completed, recommendations were to be made to the appointments committee and to the executive of the SSTU for renewal of an industrial officer's contract for one further four year term. After having regard to these findings, the learned Commissioner found that in his view the 2007 Agreed Process was not of itself an offer of a four year fixed term contract, it was an invitation to enter a process the outcome of which, if satisfactorily completed, would in all likelihood be an offer of a further four year contract. The effect of cl 2.2 was to qualify the broad discretion provided for in appendix 2 of the agreement. Further, he found the terms of cl 10 confirmed the grounds upon which the executive may decline to renew a contract. Finally, the learned Commissioner found that the SSTU did not comply with cl 2 of the 2007 Agreed Process and, as a consequence, Mr Davis was denied the contractual benefit of participation in the process.

Grounds of appeal

18 In ground 1, the appellant says the learned Commissioner erred in law in concluding that Mr Davis had an enforceable legal right under his contract of employment with the SSTU when Mr Davis' contract:

(a) by its express terms conferred an unqualified discretion on the SSTU to offer, or decline to offer, any further employment to Mr Davis; and

(b) had not been breached by the SSTU.

19 In ground 2, the SSTU says that the learned Commissioner erred in law in concluding that it was an implied term of Mr Davis' contract that it could be varied from time to time so as to change its fundamental character, namely as a fixed term contract of employment, to one which conferred a qualified entitlement to re-employment for a further term.

20 In ground 3, it is contended that the learned Commissioner, having wrongly concluded that a written process for the implementation of the express contractual term conferring the SSTU's discretion had itself become a term of Mr Davis' contract, the learned Commissioner further erred in law and fact in construing Mr Davis' contract as qualifying the SSTU's discretion in that the learned Commissioner:

(a) despite purporting to construe the meaning of the words conferring the discretion in their ordinary and natural sense, paid no, alternatively insufficient, account to the literal meaning of the word 'may';

(b) disregarded the unambiguous language of the words conferring the discretion; and

(c) applied a 'generous approach' to the construction of Mr Davis' contract, incorrectly derived from principles applicable to the construction of industrial instruments.

Issues raised in the grounds of appeal

21 The SSTU says the following issues of error are raised in the grounds:

(a) The summary of facts relied upon by the learned Commissioner in [36] of the reasons for decision was not balanced, nor accurate. In particular, the SSTU says that the finding that the process, identified by Mr Kelly, that representatives of the officers and the SSTU would negotiate changes to employment conditions was a truncated version of one aspect of the evidence given by Mr Kelly. The SSTU argues that the negotiations which led to the adoption by the executive of the 2007 Agreed Process was in settlement of a dispute about the renewal of four year contracts of employment of three industrial officers of the SSTU. One of those industrial officers resigned prior to the issue being resolved. Whilst the dispute was being discussed, a one year extension of the contracts was provided to each of the two other employees. The SSTU says that when regard is had to the evidence of Mr Kelly, Mr Keely and the minutes of the resolutions passed by the executive on 22 February 2007 and 30 March 2007, together with a letter sent from Mr Keely to the representatives of the industrial officers dated 6 March 2007, it is clear that the 2007 Agreed Process only applied to the two remaining employees whose four year contracts had expired.

(b) The SSTU contends that once the learned Commissioner had proper regard to all of the evidence, he should have applied the whole of the test for implication of a term considered in ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** (1981-1982) 149 CLR 337, 347. Instead, the learned Commissioner only had regard to one part of the test in ***Codelfa***. He simply concluded that the evidence of Mr Kelly and Ms Mitussis established that it was an implied term of Mr Davis' contract that his contract could be varied from time to time through the process of negotiation of changes to employment conditions by representatives of the officers and the SSTU. This evidence, the learned Commissioner said, satisfied the 'business efficacy test'.

(c) In any event, the SSTU says that the summary of the evidence relied upon (which is otherwise contested) was evidence of custom and practice. However, the evidence was not sufficiently unequivocal of a longstanding practice so as to satisfy the test for implication of a term on grounds of custom and practice as set out by the High Court in ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*** (1985-1986) 160 CLR 226 and ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410.

(d) Whilst the learned Commissioner at [39] found that the 2007 Agreed Process was incorporated into Mr Davis' contract of employment as an express term by a variation to the Conditions of Employment Agreement, such a finding could only be made if a finding could have been properly made that it was implied in Mr Davis' contract of employment that his contract could be varied. The SSTU says that such a term would have to be implied. However, the facts relied upon by the learned Commissioner did not and could not sustain such a finding, even if the tests for implication of a term had been properly applied. This is because:

(i) The contract of employment was complete on its face. It was not supplemented by any statutory conditions, such as an award, as the work carried out by Mr Davis was award-free.

(ii) The contract was for a fixed term in the sense of it being for a maximum term as there was a capacity to terminate the contract of employment on notice.

(iii) There was an unfettered or unconfined discretion contained in appendix 2 of the Conditions of Employment Agreement that was incorporated into the terms of the contract to offer further employment.

(e) A term that the 2007 Agreed Process applied to Mr Davis' contract could only form part of his contract of employment through the implication of a term that his contract could be varied by variations to the Conditions of Employment Agreement through collective negotiation as there was no express variation to his contract of employment. In particular, there was no document executed by the parties which evidenced a variation to the terms of Mr Davis' contract of employment and there was nothing in the executive minutes upon which it could be found the variation to the Conditions of Employment Agreement applied to Mr Davis' contract of employment.

(f) In any event, the 2007 Agreed Process document adopted by the executive when properly construed were simply guidelines for the application of the discretion in appendix 2.

22 The SSTU also argues that the finding made at [39] that the subsequent conduct of the SSTU, following the adoption of the 2007 Agreed Process, was evidence confirmatory of contractual effect, is contrary to the principles enunciated by the High Court in ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165.

23 In the third ground of appeal, the SSTU puts forward an argument that having wrongly determined that the 2007 Agreed Process had become a term of Mr Davis' contract of employment, the learned Commissioner erred in law and fact in construing the term. In particular, the SSTU argues the express language and fundamental character of the individual contract of employment which was for a fixed or maximum term could not be qualified or modified by the content of the agreed procedure. The SSTU says that the 2007 Agreed Process is simply guidelines for the SSTU to follow when determining whether it should exercise its discretion or not to offer a further term of employment. In essence, what the SSTU argues is that the express term of Mr Davis' contract that his employment was for a maximum term of four years could not be converted to something other than a contract for a fixed period by the implementation of mere guidelines.

24 In making the finding that the nature of Mr Davis' contract had been modified by the 2007 Agreed Process, the SSTU says that the learned Commissioner erred in paying no, or alternatively insufficient, consideration to the literal meaning of the word 'may' in appendix 2. Also, the learned Commissioner erred in law in applying the principles of construction of statutory collective instruments which require such instruments to be interpreted generously, whereas the principles that apply to construction of contracts of employment require the application of a stricter approach. The SSTU says that the 2007 Agreed Process contemplates a number of steps that are to be carried out prior to a decision being made as to whether a further contract should be offered to an industrial officer. It is said that when the process set out in the steps is properly examined the executive retains its absolute discretion throughout the process to offer a further contract.

Did the learned Commissioner err in finding an implied term that Mr Davis' contract could be varied by collective negotiation between the SSTU and representatives of its officers?

(a) Business efficacy test

25 The legal principles that apply to the implication of contractual terms are well settled. A term can be implied in order to give business efficacy to a contract. However, there are five conditions that must be satisfied for a term to be implied on this basis. For a term to be implied in a contract where parties have attempted to spell out the full terms of their contract, the 'business efficacy test' requires a term must: ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1977) 180 CLR 266, 283; ***Codelfa*** (347):

(a) be reasonable and equitable;

(b) be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(c) be so obvious that 'it goes without saying';

(d) be capable of clear expression; and

(e) not be contradictory of any express term of the contract.

26 In ***Codelfa***, Mason J observed (346):

(a) The implication of a term is to be compared, and at the same time contrasted, with rectification of a contract. The difference is that with rectification the term sought to be applied has been actually agreed but omitted. With implication there is no agreement and implying a term is designed to give effect to the parties' presumed intention.

(b) A court is slow to imply a term. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question in issue.

(c) There is difficulty in identifying, with any degree of certainty a term which the parties would have settled upon had they considered the question.

27 In respect of each of the five conditions for implying a term, there is some overlap in the criteria.

(i) The term must be reasonable and equitable

28 Fairness is a condition of implication. In all the circumstances, when regard is had to the context of the contract as a whole, it must be reasonable to imply the term: ***Hospital Products Ltd v United States Surgical Corporation*** (1984) 156 CLR 41, 139. Whether a term is fair is a question to be assessed.

29 When the reasons for decision at first instance are considered, it is apparent that no analysis was undertaken by the learned Commissioner as to whether this condition could have been said to have been satisfied, by implying a term that Mr Davis' contract could be varied from time to time by collective negotiation.

(ii) The term must have business efficacy

30 It is not enough that it is reasonable to imply a term, it must be necessary to do so to give business efficacy to the contract: ***Codelfa*** (346). That is, it must be necessary to make the agreement work or, conversely, to avoid an unworkable condition: ***Codelfa*** (404).

31 Other than to observe that over a long period of time the SSTU and its officers dealt with employment matters by collective negotiation, the learned Commissioner made no finding as to why the term would be necessary to enable Mr Davis' contract to be workable and effective in a business sense as the parties must have intended. Nor did he address the question whether the contract was capable of sensible operation in the absence of the implied term.

(iii) The term must be so obvious that it goes without saying

32 The learned Commissioner had no regard to whether it could be found that the term was so obvious that it went without saying that both parties would have agreed if they had turned their minds to it. The perspective from which this is to be judged is an 'officious bystander' who if asked to consider the particulars of the case would say 'of course the term in question would have been adopted': ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (283 - 286).

(iv) The term must be capable of clear expression

33 Whilst the learned Commissioner made no finding of fact in respect of this condition, it is clear that the term found to be implied into Mr Davis' contract was capable of clear expression.

(v) No contradiction of express terms

34 The learned Commissioner did not make a finding whether any conflict arose between the terms sought to be implied and the express terms of the contract. However, it appears clear that no conflict would arise.

35 As no analysis was made by the learned Commissioner in respect of each of the conditions in the statement of principles applied in ***Codelfa*** that must be satisfied to imply a term, it is clear that the learned Commissioner erred in law in finding that Mr Davis' contract could be varied from time to time by collective negotiation.

(b) Implication by custom and practice

36 A term can also be implied into a contract on the basis of custom and usage. The circumstances where a term can be implied from custom and usage is also well established. These principles were set out in ***Con-Stan Industries of Australia Pty Ltd*** as follows (236 - 237):

(a) The existence of a custom or usage that will justify the implication of a term into a contract is a question of fact.

(b) There must be evidence that the custom relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract.

(c) A term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement.

(d) A person may be bound by a custom, notwithstanding the fact that he had no knowledge of it

37 Whilst these requirements are not entirely different to the five conditions of the business efficacy test, there is no requirement that the term is necessary to make the agreement work. However, it must be shown that the custom relied on is so well known and acquiesced in that everyone making a contract in the circumstances in question can reasonably be presumed to have imported that term into the contract: ***Con-Stan Industries of Australia Pty Ltd*** (241); ***Byrne*** (440) (McHugh and Gummow JJ).

38 When the learned Commissioner found that a term should be implied because of evidence of a 'longstanding custom' of negotiation of changes to employment conditions of officers through collective negotiation of the terms that were to be provided for the Conditions of Employment Agreement, he appeared to be making a finding that custom or usage of a process of negotiation in the past justified the implication of the term. However, whilst implication of a term on this basis is to be founded in fact, whether such a finding should be made is a question of law: ***Heimann v The Commonwealth*** (1938) 38 SR (NSW) 691, 695 (Jordan CJ). In order to imply a term on this basis, findings should be made that address each of the requirements discussed in ***Con-Stan Industries of Australia Pty Ltd***. This did not, however, occur.

39 The SSTU also contends that the facts relied upon by the learned Commissioner to find an implied term were not accurate or balanced. Nor could the evidence be said to be uncontradicted. I do not, however, find it necessary to resolve this issue, as I am of the opinion that insufficient regard was had to the principles at law upon which a finding in fact implying a term can be made. I am also of the opinion, for the reasons that follow, that it was not necessary to imply a term that Mr Davis' contract could be varied from time to time by collective negotiation between representatives of the industrial officers and the SSTU.

Was Mr Davis' contract of employment capable of variation?

40 The SSTU says the answer to this question is 'no', on two grounds. Firstly, the SSTU argues that to make a finding that the 2007 Agreed Process became an express term of Mr Davis' contract, it was first necessary to find that it was an implied term that Mr Davis' contract could be varied from time to time. They say:

(a) this finding was an essential step in the reasoning upon which the finding that the 2007 Agreed Process became an express term of Mr Davis' contract of employment; and

(b) when the finding of an implied term falls away, the finding of the express term must also fall.

41 I am not persuaded by the appellant's first argument. All contracts are by their very nature agreements and, as such, all contracts can be varied. Where the terms of an existing contract contemplate or accommodate change, such as increase in rates of pay, the contract continues according to its existing terms: ***Meek v Port of London Authority*** [1918] 2 Ch 96, 100. Where a change in conditions of employment is to be applied that is not contemplated by the terms of the existing contract, then change can only be implemented by consent which in law can constitute a contract to vary the first contract. In ***Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd*** [2000] HCA 35; (2000) 201 CLR 520 (Gleeson CJ, Gaudron, McHugh and Hayne JJ) observed [23] - [24]:

[23] In *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vict) Pty Ltd* (1957) 98 CLR 93 at 144 Taylor J said:

> 'It is firmly established by a long line of cases ... that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement.'

[24] That passage was cited with approval by Wilson and Dawson JJ in *Dan v Barclays Australia Ltd* (1983) 57 ALJR 442 at 448-449; 46 ALR 437 at 448. It accords with principle and with authority (eg, *Morris v Baron and Co* [1918] AC 1; *British and Beningtons Ltd v NW Cachar Tea Co* [1923] AC 48; *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340).

42 In this matter, no issue of rescission of the earlier contract arises. However, a variation to the terms of a contract of employment cannot be lawful unless a variation is by consent. Thus, there must be agreement. A valid contract of employment, including a variation of the terms of an existing contract which in itself is a contract to vary, must satisfy four elements:

(a) The parties must have the capacity to make a contract. This is usually not an issue where parties are not minors. Parties can contract on their own behalf or through an agent who has actual or ostensible authority.

(b) The parties must intend their agreement to be legally binding. Whether the parties can be said to have intended that legal consequences are to attach to their agreement requires a consideration of the objective effect of what the parties said, and did, and the surrounding circumstances, rather than the parties' subjective beliefs: ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22]; ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [40]. In the case of a variation to a contract, except where the contract is required by law to be evidenced in writing, an agreement to vary may be express or implied from conduct: ***Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd*** (1981) 36 ALR 567, 576 - 577 (Ellicott J) and cases cited therein.

(c) The dealings between the parties must objectively show a concluded bargain (whether in person or though their agents). Again, this element requires an examination of words, conduct and surrounding circumstances. Post-contractual conduct is not admissible on the question of what a contract means. However, evidence of events after a contract was entered into is admissible for determining the question about whether a binding contract was formed: ***Hughes v St Barbara Ltd*** [2011] WASCA 234 [106] (Pullin JA) and cases cited therein; ***Stirnemann v Kaza Investments Pty Ltd*** [2011] SASCFC 77 [16] - [18].

(d) There must be consideration. In particular, for the matter promised there must be some right, interest, profit or benefit accruing to one party or forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party: ***Currie v Misa*** (1875) LR 10 Ex 153 (162) approved by Hayne JA in ***Ryan v Textile Clothing & Footwear Union Australia*** (1996) 130 FLR 313, 348 - 349.

43 In this matter, the parties clearly had capacity to make a contract and there was evidence before the Commission that, if accepted, established that both parties appointed representatives to negotiate a process for renewal of fixed term contracts. Ms Mitussis was one of the representatives authorised by the industrial officers to act on their behalf in discussions with representatives of the SSTU. Both Ms Mitussis and Mr Davis gave evidence that the industrial officers employed by the

SSTU regularly met between late 2006 through to April 2007 for two purposes. One was to negotiate an agreement with the executive of the SSTU to renew the contracts of two of the field officers who had been informed by the SSTU that there would be no extension to their contracts of employment. The second purpose was to obtain agreement with the executive to a formal renewal process for the implementation of appendix 2 of the Conditions of Employment Agreement: AB Part A, 151 (witness statement Ms Mitussis); AB Part A, 157 (witness statement Mr Davis); AB Part B, 93-94 (ts Ms Mitussis); AB Part B, 35-36 (ts Mr Davis). This evidence is admissible only in respect of the issue of capacity, in that it evidences that Ms Mitussis, Mr Sharpe and Mr Frank Herzog were appointed as representatives of the industrial officers, including Mr Davis, to negotiate an agreed process for the implementation of appendix 2. This evidence is also consistent with resolution 3 passed by the executive on 2 March 2007: AB Part A, 199 that the:

> Executive, through the Senior Officers, enter into further negotiation with industrial staff representatives to develop a renewal process.

44 As to whether it could be found the parties intended to enter into a legally binding agreement, regard can be had to the circumstances of the exchange that passed between them. In particular, it must be ascertained what were the objective manifestations of the intentions of the parties. To do so, requires an examination of the acts of the representatives and the principals. However, the element of intention is presumed in commercial contracts. When regard is had to the evidence, it is apparent that the SSTU and Mr Davis (the parties) could be said to have intended to enter into a binding agreement. This evidence is that:

(a) The terms of the Conditions of Employment Agreement were expressly incorporated into Mr Davis' contract of employment. In particular, appendix 2 became an express term of the contract of employment by incorporation.

(b) The parties were in a commercial relationship of employer and employee who engaged in negotiations to settle a specific dispute about the employment contracts of two employees whose four year terms had expired or were about to expire and a dispute about the exercise of the discretion of the employer conferred by appendix 2. I do not accept the argument put on behalf of the SSTU that the dispute and its settlement by the 2007 Agreed Process only related to the employment contracts of the two employees whose fixed term contracts had expired or were expiring. Mr Kelly made this plain in paragraphs 7-9 of his witness statement wherein he stated (AB Part A, 55):

> 7. In late 2006 and early 2007, the industrial officers raised with the Executive their concerns about the permanency of their employment. In particular the industrial officers wished to change the word 'may' in Appendix 2 of the 2005 Agreement ('**Appendix 2**') to 'shall'.
>
> 8. Ramona Mitussis was one of the representatives of the industrial officers in negotiations with the Executive concerning this issue. The Executive was represented by myself, Mike Keely (then President of the Union) and Pat Burke, who I believe at the time was Senior Vice President of the Union.
>
> 9. There were numerous negotiation meetings. In those meetings, I always expressed my view that the Executive must maintain its discretion to advertise contracts on expiry if it wished, and therefore that the word 'may' in Appendix 2 should not be changed to 'shall'.

(c) Mr Gary Hedger who was a member of the executive from 2005 to 2009 also made this plain. In his written statement he said in paragraphs 3-5 (AB Part A, 153):

> 3. Whilst I was an elected member of the SSTUWA executive, I became aware that an industrial dispute arisen between the Industrial Staff and the Executive of the Union in or around the end of 2006 as a result of discussions I had with Industrial Staff and other members of the Executive.
>
> 4. This dispute was in regard to the renewal of contracts for appointed staff and the process for the renewal of the contracts for Field Officers Chris Sharpe and Paul Kaplan.
>
> 5. From my discussions on the Executive and with Industrial Staff of the SSTUWA, I understood that a key component of the dispute was a claim by the Industrial Staff for a form of security of tenure that allowed the organisers some form of permanency.

Although this evidence is not admissible as to the intentions of the parties, it is admissible to show what the parties were in dispute about.

45 It is also apparent from the resolutions passed by the executive and the terms of the 2007 Agreed Process itself, that the terms of the process were to extend to all industrial officers employed by the SSTU. It is immaterial that there was no document executed by Mr Davis and the SSTU evidencing a variation to Mr Davis' contract of employment, as an agreement for a variation of a contract can be implied from conduct: ***Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd*** (576 - 577) (Ellicott J) and authorities cited therein.

46 Even if there is an intention to create legal relations, a binding agreement can only be achieved if there is a concluded bargain. When regard is had to the dealings between the parties, it can be seen the SSTU and Mr Davis reached a consensus that the 2007 Agreed Process constituted a variation to the Conditions of Employment Agreement. When that proposition is accepted, it follows that it was open for the learned Commissioner to find, as he did, that the contract of Mr Davis was varied, by the incorporation of the 2007 Agreed Process into appendix 2. It is my opinion that it was open to make this finding when regard is had to the following evidence of facts and circumstances that were before the Commission:

(a) In late 2006 and early 2007, the industrial officers employed by the SSTU were in dispute with the SSTU about whether there should be an automatic rollover of fixed term contracts (the automatic rollover dispute).

(b) Mr Davis was one of the employees who authorised Ms Mitussis, Mr Sharpe and Mr Herzog to act as agents of the industrial officers in negotiations to resolve the automatic rollover dispute.

(c) The minutes of a special meeting of a committee of the executive of the SSTU held on 22 February 2007 record (AB Part A, 332 – 333):

> 3. Executive will offer a renewal of one further 4 year contract to Paul Kaplan and Chris Sharpe at the end of the extension to their current contracts subject to them successfully participating in and completing a renewal process and undertaking performance management through the agreed performance management process from the commencement of their new contract.
>
> Kelly/Bell
>
> **CARRIED**
>
> 4. That Senior Officers meet with Industrial Staff representatives as a matter of urgency to finalise a renewal process and that Senior Officers present the agreed process to Executive for endorsement.
>
> Bell/Croghan
>
> **CARRIED**
>
> 5. That Senior Officers meet with appropriate Industrial Staff representatives as a matter of urgency to negotiate a performance management process (for appointed Industrial Staff) for immediate implementation subject to the agreed process being endorsed by Executive.
>
> Kelly/Chedid
>
> **CARRIED**
>
> 6. That the current Agreement be amended to include the new clause·for renewal process and performance management.
>
> Edmondson/Burns
>
> **CARRIED**
>
> …
>
> 8. That Executive notes that it maintains its rights as per Appendix 2 as to how it will appoint industrial staff.
>
> Burns/Chedid
>
> **CARRIED**

Whilst the executive of the SSTU passed a motion noting 'that it maintains its rights as per Appendix 2 as to how it will appoint industrial staff', this statement can only be construed as a statement of subjective intention and thus not admissible in respect of the issue whether a concluded bargain had been reached. The same can be said of the resolution to amend the Conditions of Employment Agreement to include a new clause for renewal process and performance management. At the time this resolution was passed, the conditions of an agreed process had not been approved by either the executive or the industrial officers. Consequently, this resolution can also only be construed as a statement of subjective intention and not admissible.

(d) In accordance with the resolutions made by the executive on 22 February 2007, representatives of the industrial officers met on several occasions with representatives of the SSTU and during those negotiations various drafts of an agreed process for renewal of contracts were discussed: see paragraphs 14 and 15, affidavit Mr Kelly, AB Part A, 56.

(e) The executive met on 2 March 2007 and made the following resolutions which were recorded in a letter dated 6 March 2007 to the representatives of the industrial officers from Mr Keely, the president of the SSTU: AB Part A, 199 - 200 that the:

> 3. Executive, through the Senior Officers, enter into further negotiation with industrial staff representatives to develop a renewal process.
>
> 4. The agreed process be placed on the March 30 Executive agenda for consideration.
>
> 5. Subject to Executive·endorsement of the renewal process and the officers successfully participating in and completing the renewal process, Paul Kaplan and Chris Sharpe will be offered a further four year contract as per Appendix 2 of The Conditions of Employment Agreement 2005.

(f) On 21 March 2007, the industrial officers held a meeting at which Mr Davis moved a motion that was carried by the industrial officers that the 2007 Agreed Process be endorsed: paragraph 15, statement of Mr Davis, AB Part A, 158, 201-204.

(g) On 31 March 2007, the executive of the SSTU met and resolved to endorse the 2007 Agreed Process: AB Part A, 212.

47 I do, however, agree that the learned Commissioner erred in finding that the agreement reached in 2007 to vary the Conditions of Employment Agreement was consistent with Mr Kelly's evidence as to how all prior changes to officers' conditions were made. How variations were made in the past to the officers' conditions of employment was not relevant or material. It would have been open to the SSTU and each of its employees at any time to adopt a different course of action to negotiate variations to each and every contract of employment. The only relevant conduct in this matter was the negotiations and surrounding circumstances that occurred in early 2007.

48 The learned Commissioner also found that the 2007 Agreed Process was incorporated as an express term of Mr Davis' contract was consistent with the evidence that the SSTU complied with the process until at least the end of 2010. In making this

finding, the learned Commissioner did not err as post-contractual conduct is relevant and admissible for determining whether a binding contract has been formed.

49 There was, as the learned Commissioner properly found, sufficient consideration offered by both parties to support the agreement. The SSTU modified its absolute discretion in appendix 2 and Mr Davis agreed by adopting the 2007 Agreed Process to participate in the renewal process. Consideration can also be found in the removal of the actual dispute: ***Lee v GEC Plessey Telecommunications*** [1993] IRLR 383 [117] - [121].

50 The second reason why the SSTU says it was not open to find Mr Davis' contract could be varied to apply the 2007 Agreed Process as an express term, as to do so would fundamentally change the nature of the employment from employment for a fixed term to something else. The SSTU also puts this point forward in support of its argument that the 2007 Agreed Process when properly construed can only be interpreted as guidelines for the exercise of the SSTU's otherwise unconstrained discretion in appendix 2 of the Conditions of Employment Agreement.

51 This argument can easily be disposed of. Contracts are agreements made by consent. Employment contracts are capable of variation irrespective of whether a contract is for a fixed or indefinite term. There is no principle at law that prohibits parties to an employment contract for a fixed term from entering into an agreement to vary the term, such as to extend the term, or to convert the term into a contract of ongoing duration. In any event, the 2007 Agreed Process did not have that effect. For the reasons set out below, the variation effected by the 2007 Agreed Process was to provide a right to Mr Davis to a second four year fixed term, provided he was able to satisfy the requirements of the renewal process.

52 When Mr Davis entered into the contract as a field officer for a four year term, pursuant to appendix 2, it was a term of his contract that the executive of the SSTU would consider whether he was to be offered a further four year term without declaring the position vacant and going to advertisement. When the 2007 Agreed Process was expressly incorporated into the terms of Mr Davis' contract of employment in April 2007, the manner of the exercise of the discretion to offer a further four year term became prescribed by the terms set out in the 2007 Agreed Process.

53 For these reasons, ground 2 of the grounds of appeal is not made out.

Did the 2007 Agreed Process modify the absolute discretion conferred in appendix 2 of the Conditions of Employment Agreement?

54 One central proposition that stands within the matters raised in grounds 1 and 3 of the SSTU's grounds of appeal is a contention that, notwithstanding the adoption of the 2007 Agreed Process, the SSTU retained an unfettered discretion as to whether or not to renew an individual officer's contract of employment for one further four year term.

55 When regard is had to principles of interpretation of the terms of a contract, such an interpretation is not tenable. I do, however, agree with the submission made on behalf of the SSTU that the learned Commissioner erred in applying the principles of interpretation of statutory industrial instruments. This error of law did not, however, result in an erroneous interpretation of the provisions of the 2007 Agreed Process. When the proper principles of interpretation are applied, the meaning of the words ascribed to the process and their legal effect by the learned Commissioner cannot be faulted.

(a) Relevant principles for the interpretation of contracts

56 The rules of construction require that the words of a contract must be understood in their context. This requires that the text must be read as a whole: ***The Metropolitan Gas Co v The Federated Gas Employees' Industrial Union*** (1925) 35 CLR 449, 455 (Isaacs and Rich JJ). However, evidence of surrounding circumstances is only admissible if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has plain meaning: ***Codelfa*** (352) (Mason J); ***Western Export Services Inc v Jireh International Pty Ltd*** [2011] HCA 45; (2011) 282 ALR 604.

57 The meaning of the terms of a contract is to be determined on the basis of what a reasonable person would have understood the parties to an instrument to mean. In ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said [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.

58 Their Honours in ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** also emphasised that information about the subjective understanding of individual participants in the dealings between the parties was irrelevant and such evidence should be strongly discouraged [35]. Their Honours then at [36] referred to the following observation made by Mason J in ***Codelfa*** (352):

> We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.

59 The text of a contract is to be given its natural and ordinary meaning. In ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** [1973] HCA 36; (1973) 129 CLR 99, 109 - 110, Gibbs J said:

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of anyone part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous

the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke* v. *Dunlop* ((1888) 39 Ch D 387, at p 393.), which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's Case* ((1880) 16 Ch D 681, at p 686.). Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in *Hillas* & *Co. Ltd.* v. *Arcos Ltd.* ((1932) 147 LT 503, at p 514.), that the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects', should not, in my opinion, be understood as limited to documents e drawn by businessmen for themselves and without legal assistance (cf *Upper Hunter County District Council* v. *Australian Chilling and Freezing Co. Ltd*. ((1968) 118 CLR. 429, at p 437.)).

(b) Did the learned Commissioner err in construing the 2007 Agreed Process as fettering the discretion in appendix 2 of the Conditions of Employment Agreement?

60 In the particulars to ground 3 of the grounds of appeal, the SSTU contends the learned Commissioner purported to construe the words conferring the discretion (in appendix 2) in their ordinary and natural sense, but paid no, or alternatively insufficient, account to the literal meaning of the word 'may'. They also say in the particulars that the learned Commissioner disregarded the unambiguous words conferring the discretion.

61 The fundamental difficulty with the argument raised in these particulars is that the construction the SSTU says ought to be applied ignores the context of the words creating the discretion which must take into account the conditions provided for in the 2007 Agreed Process. Once the 2007 Agreed Process was adopted and became an express term of the contract of Mr Davis, the discretion in appendix 2 became qualified by the conditions provided for in the process. To construe the words in appendix 2 as unqualified, following the adoption of the 2007 Agreed Process by the parties, is to ignore the effect of the variation of the contract of employment. The learned Commissioner, in my view, correctly found that when the Conditions of Employment Agreement and the 2007 Agreed Process were read together as a whole, the effect of the 2007 Agreed Process was to modify the discretion conferred on the executive by appendix 2. As the learned Commissioner correctly found, the effect of cl 2.2 was to create the conditions by which the executive was to determine whether or not to offer a renewal of a one four year fixed term.

62 Prior to the adoption of the 2007 Agreed Process, by the use of the word 'may' in appendix 2, without prescription of the circumstances by which the discretion to renew would be offered, this word gave the executive an unfettered discretion to offer or not to offer a renewal of a contract of employment. However, once the 2007 Agreed Process became part of appendix 2 by agreement through a course of conduct and negotiations between the SSTU and Mr Davis and his representatives, the word 'may' in appendix 2 became subject to the conditions specified in the process. The process for consideration by the executive whether or not to offer a renewal is plain. There were two alternatives. The executive was to determine either:

(a) under cl 2.1 to proceed through the offer of renewal process; or

(b) under cl 2.2 not to proceed through the offer of renewal process 'on the basis that':

(i) the position had been made redundant; or

(ii) an issue of substandard performance by the officer concerned had arisen.

63 The words 'either' and 'on the basis that' in cl 2.2 must be given their ordinary meaning. They are not ambiguous. The word 'may' either creates a choice between two alternative courses of action but no other; and the words 'on the basis that' creates the conditions which must be satisfied if the executive determines not to renew for one further four year contract. Clause 3 to cl 9 provide for the process to be followed when an offer of renewal process determination is made by the executive. These steps are only to be followed once a determination is made to proceed through the renewal process. No discretion rests with the executive, not to complete the offer process, once the process starts. If the officer accepts the offer then a number of formal documentation steps, including a review of the officer's work, is to be undertaken. Clause 1 simply provides for notice to be given of when the first four year term is to end and cl 10 provides for retraining if in the event renewal for a one four year term does not occur.

64 I am satisfied that no other reasonable construction of appendix 2 as varied by the 2007 Agreed Process is open.

65 Whilst I am satisfied that particular (c) of ground 3 properly identifies an error of law, I am not satisfied that the error led to an error in the construction of the effect of appendix 2, as amended by the 2007 Agreed Process. For these reasons, I am not satisfied that ground 3 has been made out. I am also not satisfied that ground 1 of the grounds of appeal has been made out.

66 For these reasons, I am of the opinion that an order should be made to dismiss the appeal.

SCOTT ASC

67 I have read a draft of the reasons for decision of the Acting President. I agree with those reasons and have nothing to add.

MAYMAN C

68 I have read a draft of the reasons for decision of the Acting President. I agree with those reasons and have nothing to add.

2012 WAIRC 00967

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPELLANT
	-and-
	KEN DAVIS
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 1 NOVEMBER 2012
FILE NO/S	FBA 2 OF 2012
CITATION NO.	2012 WAIRC 00967

Result	Appeal dismissed
Appearances	
Appellant	Mr R Hooker (of counsel) and Mr S Millman (of counsel)
Respondent	Mr M Cox (of counsel) and Mr J Hulmes (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 29 August 2012, and having heard Mr R Hooker (of counsel) and Mr S Millman (of counsel) on behalf of the appellant, and Mr M Cox (of counsel) and Mr J Hulmes (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 1 November 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—Declarations made under Section 71—

2012 WAIRC 01004

APPLICATION FOR DECLARATION PURSUANT TO SECTION 71(2)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2012 WAIRC 01004
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 30 OCTOBER 2012
DELIVERED	**:**	WEDNESDAY, 14 NOVEMBER 2012
FILE NO.	**:**	FBM 8 OF 2012
BETWEEN	**:**	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	:	Industrial Law (WA) - application pursuant to s 71 for a declaration relating to qualifications of persons for membership of a state branch of a federal organisation and offices which exist within the branch - application granted
Legislation	:	*Industrial Relations Act 1979* (WA) s 7(1), s 71, s 71(1), s 71(2), s 71(3), s 71(4); *Fair Work (Registered Organisations) Act 2009* (Cth).
Result	:	Decarlation issued
Representation:		
Applicant	:	Mr M Zoetbrood and Mr S Price

Case(s) referred to in reasons:

Jones v Civil Service Association Inc [2003] WASCA 321; (2003) 84 WAIG 4

Re an application by the Civil Service Association (1993) 73 WAIG 2931

Re Bonny [1986] 2 Qd R 80

Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers [2012] WAIRC 00032; (2012) 92 WAIG 102

Case(s) also cited:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (1981) 61 WAIG 631

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA [2012] WAIRC 00850; (2012) 92 WAIG 1721

Western Australian Municipal, Administrative, Clerical and Services Union of Employees [2011] WAIRC 00111; (2011) 91 WAIG 331

Reasons for Decision

THE FULL BENCH:

1 Introduction

1 This is an application made under s 71(2) and s 71(4) of the *Industrial Relations Act 1979* (WA) (the Act) for a declaration that the rules of a counterpart federal body:

(a) relating to the qualifications of persons for membership are deemed to be the same; and

(b) prescribing the offices which exist in a branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) are deemed to be the same as the rules prescribing the offices which exist in the state organisation.

2 Pursuant to s 71(1) of the Act, the counterpart federal body, in relation to a state organisation, means the Western Australian branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act*, the rules of which:

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

(b) prescribe the offices which shall exist within the branch,

are, or, in accordance with s 71, are deemed to be, the same as the rules of the state organisation relating to the corresponding subject matter.

3 The applicant was registered as a state organisation by a Full Bench on 19 September 2012, following the amalgamation of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA: [2012] WAIRC 00850; (2012) 92 WAIG 1721.

4 The counterpart federal body of the applicant is The Australian Workers' Union, West Australian Branch. The applicant makes the application to enable the orderly and efficient administration and co-ordination of its functions and duties and its counterpart federal body. Obtaining a declaration is a step towards the applicant being able to obtain a s 71 certificate to enable the offices that exist in its rules, to be held by persons holding corresponding offices in its counterpart federal body. A certificate will exempt the applicant from holding elections for its offices as defined in s 7(1) of the Act. A certificate will also enable it to make an agreement relating to the management and control of funds with The Australian Workers' Union (AWU) of which the counterpart federal body is a branch.

2 Are the qualifications of persons for membership substantially the same?

5 Pursuant to s 71(2) of the Act, the rules of the state organisation and its counterpart federal body relating to the qualification of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same.

6 Under s 71(3) of the Act, the Full Bench may form the opinion that the rules of the state organisation and the counterpart federal body are substantially the same notwithstanding that a person who is:

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

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

7 Substantial means what is 'real or of substance as distinct from ephemeral or nominal' or 'considerable or in the main or essentially': ***Re an application by the Civil Service Association*** (1993) 73 WAIG 2931; ***Re Bonny*** [1986] 2 Qd R 80, 82.

8 The eligibility rules for membership of the applicant and its counterpart federal body are lengthy and somewhat tortuous. Whilst the applicant was recently registered as a new state organisation following the amalgamation, its eligibility rules are merely the eligibility rules of the amalgamating organisations. The applicant's rules are from a longstanding organisation which has been registered since 18 July 1941 (see the discussion in ***Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** [2012] WAIRC 00032; (2012) 92 WAIG 102 [144]).

9 The eligibility rules of the applicant and its counterpart federal body show that the organisations have historically covered an extremely broad range of industries and occupations. This is perhaps reflected in the names of the applicant and its counterpart federal body which do not tie themselves to any particular branch of industry or occupation.

10 The applicant filed an outline of submissions on 22 October 2012. Attached to those submissions is a document which contains a broad comparison of the eligibility clauses of the applicant and its counterpart federal body. It is apparent from that document and the submissions made on behalf of the applicant that there are a number of occupations for which there is no equivalent eligibility rule in the rules of the counterpart federal body which are largely occupations which are out-dated. They refer to work which is no longer carried out in Western Australia such as the manufacture of sealing devices for bottles or jars and the manufacture of badges and emblems. The fact that these industries and occupations are out-dated is reflected in the absence of members in the membership records of the applicant and the counterpart federal body.

11 The applicant provided evidence in a statement made by the secretary, Stephen Price, on 14 August 2012 in which he states that as at 10 August 2012 there were 6795 members of the applicant and 6679 members of its counterpart federal body. Of these members 116 members of the applicant are not eligible to be members of the counterpart federal body. These include 112 furniture workers and four service station employees. Further, there are 58 members of the counterpart federal body who are eligible for membership of the counterpart federal body but who are not eligible to be members of the applicant. Of these 58, 38 members are engaged in the manufacture of fertilisers and chemicals and 20 members are engaged by a company known as Energy Developments Ltd.

12 It is apparent that in the main those who are not eligible to be members of the counterpart federal body are engaged in occupations which were formerly covered by the Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA. However, workers engaged in those occupations comprise a very small number.

13 Consequently, when regard is had to the actual numbers of members of the applicant and the counterpart federal body and their occupations, together with the fact that the eligibility rules of the applicant contain a number of out-dated occupations, we find that the eligibility rules of the applicant and the counterpart federal body are substantially the same as, in essence, there is a significant similarity of coverage between both organisations.

3 Are the offices that exist in the counterpart federal body the same as the offices of the applicant?

14 When determining whether the offices that exist in the counterpart federal body are the same as the offices of the applicant, it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules: ***Jones v Civil Service Association Inc*** [2003] WASCA 321; (2003) 84 WAIG 4 [35] (Pullin J).

15 Pursuant to s 71(4) of the Act, the rules of a counterpart federal body prescribing the offices which shall exist are deemed to be the same as the rules of the state organisation prescribing the offices which shall exist in the state organisation if, for each office in the state organisation there is a corresponding office in the counterpart federal body.

16 Rule 24 of the rules of the applicant establishes the following offices of the state organisation. These are as follows:

(a) president;

(b) two vice-presidents;

(c) secretary;

(d) assistant secretary;

(e) seven executive committee members.

17 Although these offices are referred to in r 14, r 34 and r 35 as branch president, branch vice-presidents, branch secretary, branch assistant secretary and branch executive committee members, pursuant to the order made by the Full Bench on 19 September 2012, the registration of the new amalgamated organisation was authorised subject to the applicant taking steps forthwith to alter its rules to remove a number of errors, including the inconsistencies in references to these titles. In these reasons, as r 24 creates the executive and each office of the applicant without a preceding title of branch, each of those offices will be referred to without the reference to branch, even when the provisions in r 14, r 34 and r 35 are being considered.

18 Pursuant to r 33(7) of the rules of the AWU, the offices of the counterpart federal body are as follows:

(a) branch secretary;

(b) branch president;

(c) branch assistant secretary;

(d) two branch vice-presidents;

(e) seven branch executive committee members.

(f) Alcoa Pinjarra sub-branch president;

(g) Alcoa Pinjarra sub-branch secretary.

19 As s 71(4) of the Act only requires that the offices which exist in the counterpart federal body correspond to each office in the state organisation, it is immaterial that the counterpart federal body establishes two additional offices.

20 To determine whether the offices that exist in the counterpart federal body are the same as the offices of the state organisation, the Full Bench is required not only to have regard to the titles of the offices that exist in each organisation, but it is also necessary for the Full Bench to consider the functions and powers of each of those offices which necessarily includes an analysis of the functions and powers of each office as a member of the executive of each organisation.

3A Functions and powers of offices that comprise the executive and branch executive

21 It is clear that the express duties and functions of the president and vice-presidents of the applicant and the branch president and the branch vice-presidents of the counterpart federal body are identical. However, regard should also be had to the functions and powers that the president, branch president, vice-presidents and branch vice-presidents have as members of the executives.

22 In the applicant's table of comparison of the powers and duties of the executive committee members of the applicant and the executive committee members of the counterpart federal body, the applicant only refers to r 27 of the rules of the applicant and r 35(5) and r 35(6) of the rules of the AWU. However, as members of each executive, the executive committee members exercise the powers of each of the executives, together with the other members of the executives, the presidents, the vice-presidents, the secretaries and assistant secretaries. In r 27 there is only one provision that deals expressly with the powers of an executive committee member. In r 27(4) of the rules of the applicant, executive committee members shall exercise all the rights and privileges of members of the executive, except where they pertain to a particular office. Whilst there is no equivalent provision in the rules of the counterpart federal body, it is inherent in the nature of a position of an office of an executive that each member is empowered, together with other members of the executive, to exercise those powers of the executive. To analyse the positions of executive committee members and also all of the other members of the executive to ascertain whether the offices can be said to correspond, it is necessary to examine the powers and functions of the executive of the applicant and the branch executive of the counterpart federal body. These powers and functions are set out in the following provisions:

(a) Admission to membership

23 Pursuant to r 6(1) of the rules of the applicant, where a person applies and is admitted to membership the executive of the applicant can determine within one month to terminate the membership. A similar power resides with the branch executive of the counterpart federal body under r 7(5) of the rules of the counterpart federal body. Under r 6 of the rules of the applicant, the state executive is empowered to determine the form of the application for membership. However, there is no equivalent provision in the rules that apply to the counterpart federal body, but both the state executive and the branch executive of the counterpart federal body comprise the management committee of each organisation and as such would have the power to determine the form of such an application.

(b) Expulsion

24 Under r 9 of the rules of the applicant, the executive is empowered to expel members of the state union. A similar provision is contained in the rules of the AWU in r 19.

(c) Investment of funds

25 Under r 15 of the rules of the applicant, all property and funds of the union vests in and is under the control of the executive. Under the rules that apply to the counterpart federal body all property and funds is vested in the national executive under r 51. However, given that the counterpart federal body is simply a branch of a national body one would expect that a branch would not have absolute control over the funds of the branch.

(d) Annual general meetings, general meetings and extraordinary meetings

26 The time and place of the annual general meeting is to be determined by the state executive under r 20 of the rules of the applicant. They are also empowered under r 20(2) to call a general meeting at any time and to decide under r 20(4) the time of an extraordinary general meeting as being called by requisition of not less than 100 financial members. The branch executive of the counterpart federal body also has similar powers to call these meetings under r 46(1) and r 47(1). However, the time and place of an extraordinary general meeting is to be fixed by the branch secretary under r 48(1) of the rules of the AWU.

(e) Management

27 Under r 24 of the rules of the applicant, subject to the rules of the applicant or decision by plebiscite of the whole of the financial members of the union, the applicant is to be managed by the executive. The branch executive is also the management committee of the counterpart federal body. Under r 35(1) of the rules of the AWU, it has general control and conduct of the business of the branch and acts on its own behalf subject to the rules and decisions of national conference and national executive. Given that a branch is part of a larger national body, it follows that the branch would have to be subject to the decisions made by its national executive. Consequently, the management powers of the respective executives could not be regarded as material.

(f) Constitution of divisions

28 Under r 25 and r 26 of the rules of the applicant, an executive can create or eliminate divisions from time to time. Under r 33 of the rules that apply to the counterpart federal body, two or more branches of the federal body can form a division with the approval of the national conference or national executive.

(g) Powers of the executive

29 Under r 27 of the rules of the applicant, all powers of the executive are set out. In particular, the executive has power to decide any question affecting the union which may arise under the rules and to make, alter or rescind any by-laws for the guidance of and generally to have absolute control of the affairs of the union, subject to the constitution and rules of the union or plebiscite of the whole of the members of the union. There are also specific powers to appoint returning officers and to dismiss officers of the union. Importantly, it is expressly provided in r 27(3) that subject as provided in the rules, the highest authority of the union shall be the executive. Similar powers are given to the branch executive of the counterpart federal body under r 35 of the AWU rules.

(h) Elections

30 Under r 29(5)(b) of the rules of the applicant, a person is prohibited from nominating or holding any office in the union or being employed by the union if they are an officer, agent, delegate or employee of another union, unless they have the authority of the executive. A similar power is contained in the rules of the AWU. However, the power of approval in such a case resides with the national executive under r 60(7)(b) of the rules of the AWU. Where a candidate for an election dies after close of nomination and before a ballot is declared, the executive may appoint a member who qualifies for office to act in the respective office until the ballot is declared.

31 Under r 31(11) of the rules of the applicant, a similar power is vested by r 60(14) in the national executive under the rules of the AWU.

32 Under r 31A(12) of the rules of the applicant, the executive sets the opening and closing dates for election. There is no equivalent provision in the rules of the AWU as the dates for elections are set in r 63(9).

33 Under r 32 of the rules of the applicant, a vacancy in an elected office can be filled by the executive. The branch executive of the counterpart federal body is also empowered to fill a vacancy in its branch executive under r 65 of the rules of the AWU.

(i) Representation in court and settlement of disputes

34 Under r 38 of the rules of the applicant, the executive can appoint persons to represent the union. The branch secretary of the counterpart federal body also has the power to make similar appointments under r 68 of the rules of the AWU, but this power does not reside generally in the branch executive.

(j) Auditors

35 Under r 46 of the rules of the applicant, auditors are appointed by the executive. Under r 56(3) of the rules of the AWU, branch auditors are required to be appointed each year by the branch executive.

(k) Amalgamation and dissolution of the union

36 Under r 45 of the rules of the applicant, the executive may submit the question of dissolution of the union to a plebiscite of the membership. Under r 50(3), any proposed amalgamation requires approval by a majority vote of the executive. Under r 73 of the rules of the AWU, the union cannot be dissolved while any two branches are in favour of its continuance. Subject to that provision, the national conference or the national executive council may submit the question of dissolution of the union to a plebiscite of financial members. However, there is no provision which deals with the circumstances under which amalgamations are to take place under the rules of the AWU. However, such amalgamations are contemplated by r 78 of the rules of the AWU as that rule deals with holding offices in an amalgamated organisation.

3B Functions of secretary, assistant secretary, branch secretary and branch assistant secretary

37 In respect of the duties and functions of the secretary of the applicant and branch secretary of the counterpart federal body, the applicant's schedule of comparison of its rules and its counterpart federal body simply analyses the functions, powers and duties of the secretary under r 35(1) of the rules of the applicant and of the branch secretary in r 39(1) of the rules of the AWU. Rule 35(1) of the rules of the applicant is almost in identical terms to r 39(1) of the rules of the AWU. The only exception is that there are additional duties attached to the rules of the branch secretary of the counterpart federal body in that the branch secretary is also charged with the duty of endeavouring to increase the membership of the branch and to promote and/or organise the education of officers, employees, members and delegates of the union. These rules, however, do not contain all of the powers, functions and duties of the secretary and the branch secretary of the relevant organisations. Apart from the functions and powers of the secretary and branch secretary as members of the executive, there are other relevant provisions which are scattered throughout the rules of the applicant and the AWU. These are as follows:

(a) Admission to membership

38 Under r 6(2) of the rules of the applicant, a person applying for membership is required to pay a prescribed contribution to the secretary or other named officers and authorised persons. A similar provision is found in r 7(2) and r 7(4) of the rules of the AWU.

(b) Resignation

39 Under r 7(1) of the rules of the applicant, resignation of members of the union is effected by the giving of written notice of intention to resign to the secretary. Under r 14(1) of the rules of the AWU a member may resign membership by notice in writing addressed to an officer of the relevant branch. An officer is defined in r 81 of the rules of the AWU to mean a member holding any elected position in or on behalf of the union.

(c) Free membership

40 Under r 8 of the rules of the applicant, the secretary of the applicant can issue a free membership to any member who has been financial for the preceding five years and who is over the age of 65 years or is permanently incapacitated, where such persons are not earning the minimum wage. A similar entitlement to a ticket is available to members of the counterpart federal body.

However, the contribution is to be $10 per quarter and there is nothing in the rules of the AWU that states to whom the application is to be made, or who can grant it (see r 9(3) of the rules of the AWU).

(d) Expulsion

41 Officers of the union who believe a member has been guilty of any breach of the rules, or misconduct, is required to report the breach to the executive or to the secretary pursuant to the requirements of r 9 of the rules of the applicant. Under r 19(2) of the rules of the AWU, any member may charge another member with breaches of the rules, or other categories of misbehaviour, some of which could be characterised as misconduct. Pursuant to r 19(3) of the rules of the AWU, charges must be made to the national secretary or the branch secretary.

(e) Roles of officers and members

42 Under r 10 of the rules of the applicant, the secretary is required to keep a correct register of the names, postal addresses and occupations of all officers and members and is required to provide a copy of the same to the national secretary. There does not appear to be an obligation on the counterpart federal body to keep a register of officers, but under r 59(2) of the rules of the AWU, the branch secretary is required to keep a register of the members.

(f) Contributions

43 Annual contributions are payable under r 14(2) of the rules of the applicant. These are to be paid by way of a lump sum or over such period and in such part payments as may be determined by the secretary. The same right to determine the periods and part payments is conferred on the branch secretary pursuant to r 10(2) of the rules of the AWU. Also under r 14 of the rules of the applicant, duties are created for the secretary to carry out in relation to payroll deductions and direct debits. These are set out in r 14(5) and r 14(6) of the rules of the applicant and the same obligations are found in r 10(6) and r 10(7) of the rules of the AWU.

(g) Accounts, balance sheet and audit

44 Under r 16 of the rules of the applicant, the secretary is to submit to each annual general meeting the auditor's report, balance sheet, the annual report of the secretary and a statement of the financial position of the applicant. A similar obligation arises under r 55 of the rules of the AWU. However, pursuant to r 55(2) of the rules of the AWU, the branch secretary is required to provide records to the branch auditor by 31 July each year and the branch auditor is required to provide by 30 September each year an audit and report of the accurate figure of membership contributions. The branch secretary is required to provide the audit and report to the national executive before 15 October each year. Also each branch is required to file with the audited balance sheet and the auditor's report, an operating report as prescribed by the *Fair Work (Registered Organisations) Act*. There does not, however, appear to be an obligation to provide or issue an annual report.

(h) Withdrawal of funds

45 Under r 17(3) of the rules of the applicant, no funds can be withdrawn from the bank except by cheque signed by the secretary and countersigned by the president, vice-president or assistant secretary. Under r 17(4), the secretary can also withdraw funds by electronic transfer. It appears from the rules of the AWU that there is no equivalent obligation placed upon the functions and duties of the branch secretary.

(i) Postponement of general and annual meetings

46 Under r 20(3) of the rules of the applicant, general or executive meetings may be postponed by the order of two officers, of whom the secretary shall be one. Under r 20(4), the secretary is empowered to call an extraordinary general meeting upon receipt of a requisition signed by not less than 100 financial members. The equivalent powers are conferred upon the branch secretary under r 46(3) and r 48(1) of the rules of the AWU.

(j) Trustees

47 Under r 28(2) of the rules of the applicant, the secretary of the union can act as an attorney for a trustee in certain circumstances. However, no office of trustee is created under the rules of the applicant so it appears this rule has no operation.

(k) Elections

48 There are a number of duties conferred upon the secretary of the applicant by r 30(5), r 31(10) and r 31A(1) and r 31A(5) of the rules of the applicant. Equivalent obligations are also conferred on the branch secretary by r 61(6), r 62(10), r 63(1) and r 63(5) of the rules of the AWU.

(l) Representation in court, industrial agreements and industrial disputes

49 Duties are conferred upon the secretary in respect of these matters by r 38, r 39 and r 41 of the rules of the applicant. Similar duties are conferred upon the branch secretary by r 67, r 68 and r 69(2) of the rules of the AWU.

(m) Returns

50 Under r 40 of the rules of the applicant, the secretary is to file with or deliver to the Registrar of the Commission records and other documents which are required to be filed or delivered under the Act. There is no equivalent provision conferring such a duty on the branch secretary under the rules of the AWU.

(n) Seal

51 Under r 43 of the rules of the applicant, a seal is to be kept in the custody of the secretary. Under the rules of the AWU there is no seal of the branch and pursuant to r 69 the common seal of the AWU is kept in the custody of the national secretary.

(o) Control of organisers

52 Under r 48 of the rules of the applicant, all organisers are required to conform to the directions of the secretary. It is inherent in this rule that the secretary is able to direct the duties of the organisers. The same duty is conferred upon the branch secretary

by operation of r 41 of the rules of the AWU. However, organisers in the state branch are also to conform to the direction of the national secretary.

3C Conclusion

53 When all of these provisions are analysed, together with the obligations on the secretary in r 35(1) and on the branch secretary in r 39(1), it is apparent there is a substantial similarity between the duties, functions and powers of each of the offices of secretary and branch secretary so as to enable a finding to be made that these offices correspond. The functions of assistant secretary of the applicant and the branch assistant secretary are the same. The assistant secretary under r 35(2) is to carry out such functions as are determined by the executive or the secretary and is to have the powers and perform the duties of the secretary when the position of secretary is vacant. The same functions and powers are conferred on the branch assistant secretary pursuant to r 39(2) of the rules of the counterpart federal body.

54 It is also apparent when regard is had to all of these provisions that apply to the other members of each executive that there is a substantial similarity between the functions, powers and duties of the executive and in turn each of the offices of the applicant and the branch executive and the offices of the counterpart federal body. Clearly not all powers, functions and duties are the same. However, such a finding is not required and, in any event, would be difficult to find in most applications that come before a Full Bench under s 71 of the Act, as counterpart federal bodies are bodies that are part of much larger organisations whose principal affairs and concerns are determined by a national body that extends beyond the limits of one state.

55 For these reasons, we are of the opinion that a declaration can be made that for each office in the state organisation there is a corresponding office in the counterpart federal body.

2012 WAIRC 01028

APPLICATION FOR DECLARATION PURSUANT TO SECTION 71(2)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 16 NOVEMBER 2012
FILE NO.	FBM 8 OF 2012
CITATION NO.	2012 WAIRC 01028

Result	Declaration issued
Representation	
Applicant	Mr M Zoetbrood and Mr S Price

Declaration

This matter having come on for hearing before the Full Bench on 30 October 2012, and having heard Mr M Zoetbrood and Mr S Price on behalf of the applicant, the Full Bench being of the opinion upon the evidence that the rules of the applicant and The Australian Workers' Union, West Australian Branch, its counterpart federal body, relating to the qualifications of persons for membership of each such body are substantially the same, and the Full Bench also being of the opinion that the rules of the counterpart federal body prescribing the offices which exist in the branch are the same in this respect as the rules of the applicant, it is this day, 15 November 2012 declared as follows:

(1) The rules of the applicant and its counterpart federal body relating to the qualifications of persons for membership are deemed to be the same, in accordance with s 71(2) of the *Industrial Relations Act 1979* (the Act).

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

By the Full Bench

(Sgd.) THE HONOURABLE J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2012 WAIRC 00935

ALLEGED NON-OBSERVANCE OF UNION RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2012 WAIRC 00935
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	WEDNESDAY, 13 JUNE 2012, THURSDAY, 14 JUNE 2012
DELIVERED	**:**	MONDAY, 15 OCTOBER 2012
FILE NO.	**:**	PRES 3 OF 2011
BETWEEN	**:**	ROBERT MCJANNETT
		Applicant
		AND
		CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS
		Respondent

Catchwords	**:**	Industrial Law (WA) – application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) for orders regarding alleged breaches of union rules – application made by respondent to strike out the application on grounds that include, abuse of process, allegations set out in charges not capable of proof of breach of a rule, no standing, lack of particularity and allegations out of time – construction of object clause considered – scope of the power of the President under s 66 of the Act considered – standing under s 66 of the Act considered – charges struck out – principles for the making of a costs order considered
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 26, s 27(1)(a), s 27(1)(a)(iii), s 27(1)(c), s 27(1)(o), s 49J(2), s 64B(1), s 64B(1)(a), s 66, s 66(1), s 66(2), s 66(2)(e), s 66(2)(f), s 71, s 72(5)(d), s 73(3)(b);
		Industrial Relations Commission Regulations 2005 (WA) reg 59;
		Associations Incorporation Act 1987 (WA) s 5(2)(b)
		Conciliation and Arbitration Act 1904 (Cth) s 141, s 141(1G);
		Criminal Code (WA);
		Crimes Act 1914 (Cth);
		Fair Trading Act 2010 (WA);
		Workplace Relations Act 1996 (Cth).
Result	**:**	Application dismissed, costs order made
Representation:		
Applicant	**:**	Mr R Mcjannett, in person
Respondent	**:**	Mr T Dixon (of counsel)
Solicitors:		
Respondent	**:**	Slater & Gordon

Case(s) referred to in reasons:

Aon Risk Services Australia Ltd v Australian National University [2009] HCA 27; (2009) 239 CLR 175

Australian Education Union v Australian Principals Federation (2006) 158 IR 360

Banque Commerciale SA En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279

Brailey v Mendex Pty Ltd (1993) 73 WAIG 26

Cameron v Hogan (1934) 51 CLR 358

Civil Service Association of WA Inc v Director General of Department for Community Development [2002] WASCA 241; (2002) 82 WAIG 2845

D A Christie Pty Ltd v Baker [1996] 2 VR 582

Darroch v Tanner (1987) 16 FCR 368

Delron Cleaning Pty Ltd v The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch [2004] WAIRC 12163; (2004) 84 WAIG 2527

Hospital Salaried Officers Association of Western Australia (Union of Workers) v The Hon Minister for Health (1981) 61 WAIG 616

Kangatheran v Boans Ltd (1987) 67 WAIG 1112

Mcjannett v Construction Forestry Mining and Energy Union of Workers [2012] WAIRC 00291; (2012) 92 WAIG 507

Mcjannett v Reynolds [2009] WAIRC 00211; (2009) 89 WAIG 633

Mcjannett v Reynolds [2009] WAIRC 01282; (2009) 89 WAIG 2395

Mcjannett, in the matter of an application for an inquiry in relation to an election for offices in the Construction, Forestry, Mining and Energy Union, Western Australian Branch [2009] FCA 996

Mcjannett, in the matter of an application for an inquiry in relation to an election for offices in the Construction, Forestry, Mining and Energy Union, Western Australian Branch (No 2) [2009] FCA 1015 (10 September 2009)

McParland v The Construction, Forestry, Mining and Energy Union of Workers [2002] WAIRC 06935; (2002) 82 WAIG 2894

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

R v The Associated Northern Collieries (1910) 11 CLR 738

Re Reynolds [2011] WAIRC 00989; (2011) 91 WAIG 2212

Re The Construction, Forestry, Mining and Energy Union of Workers [2011] WAIRC 01175; (2011) 92 WAIG 6

Scott v Jess (1984) 3 FCR 263; (1984) 56 ALR 379

Singh v The Federated Miscellaneous Workers Union of Australia, WA Branch (1993) 73 WAIG 2674

Spalla v St George Motor Finance Ltd (No 6) [2004] FCA 1699

Stacey v Civil Service Association of Western Australia (Inc) [2007] WAIRC 00568; (2007) 87 WAIG 1229

The Construction Forestry Mining and Energy Union of Workers v (Not applicable) [2011] WAIRC 01174 (21 December 2011)

The West Australian Locomotive Engine Drivers' Firemen's and Cleaners' Union of Workers v Schmid (No 1) (1996) 76 WAIG 639

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

United Group Resources Pty Ltd v Calabro [2011] FCA 1408

United Voice WA v Minister for Health [2012] WAIRC 319; (2012) 92 WAIG 585 (Fiona Stanley Hospital (No 2))

Walton v Gardiner (1993) 177 CLR 378

Wauhop v Civil Service Association of Western Australia Inc [2003] WAIRC 08021; (2003) 83 WAIG 951

Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union [2011] FCA 949

Wyatt v The Civil Service Association of Western Australia (Inc) (1997) 77 WAIG 3206

Reasons for Decision

Background

1 This is an application made by The Construction, Forestry, Mining and Energy Union of Workers (CFMEUW) to summarily dismiss the substantive application in this matter. The substantive application is for orders to be made under s 66(2) of the *Industrial Relations Act 1979* (WA) (the Act) by the applicant who is a member of the CFMEUW. The applicant claims that the CFMEUW has not observed its rules. In the applicant's application filed on 16 December 2011, the applicant states that the grounds on which the application is made are:

> Non observance of the rules of the union in particular but not confined to rule 3. Threats, violence, bribery, misappropriation of members [sic] funds and Tax evasion by officers of the CFMEUW.

2 After a directions hearing of the substantive application held on 20 January 2012, an order was made on 23 January 2012, that the applicant file and serve a statement of particulars that complies with reg 59 of the *Industrial Relations Commission Regulations 2005* (WA): [2012] WAIRC 00028; (2012) 92 WAIG 404. The applicant filed a statement of particulars on 2 February 2012. The applicant later filed an amended statement of particulars on 10 February 2012 and a further amended statement of particulars on 16 February 2012. In these proceedings, it is common ground that the particulars the applicant relies upon are those filed on 16 February 2012.

3 Further orders were made on 17 February 2012 ([2012] WAIRC 00085; (2012) 92 WAIG 405), which required:

(a) the CFMEUW to file and serve by close of business on 1 March 2012 a request for further and better particulars of the applicant's amended statement of particulars filed on 16 February 2012;

(b) the applicant to file and serve his answer to the request for further and better particulars by close of business on 21 March 2012; and

(c) the applicant to file and serve written submissions by close of business on 21 March 2012 supporting the precise manner in which he contends that the rules of the CFMEUW have been breached in respect of each allegation he wishes to press in the amended statement of particulars filed on 16 February 2012.

4 The applicant filed his answers to the further and better particulars and what he says are written submissions on 21 March 2012. The applicant's written submissions are contained in the same document as the answers and are set out in a heading 'Relationship' which follows each one of the 47 'charges' which the applicant alleges are separate breaches of the rules of the respondent.

5 On 2 April 2012, the CFMEUW made an application for orders pursuant to s 27(1)(a) of the Act that the application be dismissed. The grounds of the application for summary dismissal are as follows:

> 1. The Application amounts to an abuse of process. Many of the issues raised in the Application and in the particulars to the Application have been the subject of findings and Orders made by Commission, including in proceedings in which the Applicant was involved.
>
> 2. The Application variously fails to identify conduct capable of giving rise to a breach of the CFMEUW Rules; or alternatively a CFMEUW Rule which is amenable to contravention.
>
> 3. There is no jurisdiction under s 66 to make the orders sought in the Application; and alternatively, the Applicant has no standing to seek such orders.
>
> 4. There is no public interest in proceeding to hear and determine an Application under s 66 of the Act which relies on conduct which is variously alleged to have occurred:
>
> a. over a decade ago; and/or
>
> b. at a time before the Applicant became a member of the CFMEUW (in April 2005)
>
> 5. The allegations in the Application and in the particulars to the Application are variously frivolous, vexatious, devoid of particularity (notwithstanding that there has been numerous attempts to particularise) and scandalous.
>
> 6. In the absence of an application with clearly defined grounds, it is not in the public interest to entertain an Application in the nature of the current matter in circumstances where the Applicant in this and previous matters before the Commission has been vexatious and has serially made serious allegations totally lacking in veracity.
>
> 7. Further grounds to be identified in the Applicant's submissions.

The alleged particulars of breaches of rules, request for further and better particulars and answers

6 In respect of each charge, the CFMEUW requested particulars which were as follows:

> (a) Specify:
>
> (i) all material dates, places and names;
>
> (ii) each act, fact, matter, thing, circumstance, event, happening, occurrence, omission, error, neglect or default relied upon;
>
> (b) Say whether the matter or thing was wholly or partly in writing, oral or to be implied, and:
>
> (i) insofar as it was in writing, identify each document or paper constituting any part of it and say where and in whose possession that document or paper now is, when and where it may be inspected, and, if it has been lost or destroyed, say where a copy of it may be inspected and if there be no copy, give the material substance of it to the best of your recollection;
>
> (ii) insofar as it was oral say when, where and between what actual persons, and whether face to face or by way of telephone, each conversation constituting any part of it took place and give the material substance of each conversation;
>
> (iii) insofar as it was to be implied, state the acts, facts, matters, circumstances and things, and when and where they occurred or arose, from which the implication is to be drawn;
>
> (iv) if the matter or thing (as the case may be) was made, entered into, carried out or done by a person acting, or purporting to act on behalf of or with the authority of another, give the like particulars as are sought above of the authority (express, implied or ostensible) of that person to act on behalf of that other;
>
> (c) Set out precisely:
>
> (i) the particular Rule of the CFMEUW which is said to have been breached for each Charge;
>
> (ii) how the allegations in the Charge amount to a breach of the specific Rule of the CFMEUW identified in (c)(i) above; and
>
> (iii) the order or relief under s 66 of the *Industrial Relations Act 1979 (WA)* (**IR Act**) sought in respect of the particular Charge.

7 The applicant describes each alleged breach of the rules of the respondent as a charge. In the first paragraphs of his statement of particulars of the charges filed on 16 February 2012 he states:

> **1.** This further amended statement of particulars is filed by the applicant in support of the form 1 application in this matter.
>
> **2.** The applicant and subsequent witnesses possess physical and testimonial evidence to corroborate all the claims made in this action.
>
> **3.** Terms used:- In all instances in this document the term 'President' means Mr. Cam McCulloch and the term 'Secretary' means Mr. Kevin Noel Reynolds and the term 'Assistant Secretary' means Mr. Joseph Macdonald [sic] and the term 'executive' means the entire executive of the union at the time of the alleged offence or rule breach.

4. The applicant brings the following charges against the union being for misconduct, impropriety, tax evasion, maladministration, acts of violence against members and the public, and abuse of office amounting to multiple breaches of the rules of the union.

8 The particulars of each charge, the applicant's submissions of the manner of breach, request for further and better particulars and answers given are as follows:

(1) **Charge 1 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The secretary, assistant secretary, and union organiser, Mark Hudston, conspired with Wayne Carey, site manager of Downer Energy Systems Pty Ltd, in or around October 2006 to have the applicant dismissed from his employment at the Alcoa Pinjarra co-generation project stage 2 where he was employed as an open crane operator and replaced by an inexperienced rigger and then entered onto the ERMS blacklist data base.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the following:

(a) the alleged conspiracy;

(b) the ERMS blacklist data base;

(c) the inexperienced rigger;

(d) the applicant's employment contract; and

(e) whether the applicant was dismissed from his employment, and if so, the grounds or reasons given at the time.

Answer – All the requested particulars are held on file at the union office in relation to the wrongful dismissal case litigated at the time of the dismissal. The respondent should look to its own filing system before making such requests. This is not discovery.

Relationship (applicant's submission) – The act of arranging the dismissal in collusion with Wayne Carey is a clear and obvious contradiction and breach of the objects of the union r 3.

(2) **Charge 2 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The abovementioned union officials in or around October 2006 also conspired with Wayne Carey to blacklist the stepson of the applicant, namely Joshua Daley, in a forthright attack upon the applicant.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the alleged conspiracy;

(b) the employment history of Joshua Daley in the relevant period;

(c) the alleged blacklist; and

(d) how it is alleged the alleged blacklisting was a 'forthright attack upon the applicant'.

Answer

(a) The union conspired to list Joshua Daley on the ERMS blacklist.

(b) Joshua Daley was employed in the construction industry and was eventually removed from the ERMS blacklist by way of complaints to and investigations carried out by the ABCC.

(c) The blacklist is well known to the union as documented by the union in written correspondence to the members and government agencies and articles published in the union magazines.

(d) Joshua Daley was not a member of the CFMEUW at the time of the dismissal and blacklisting. He was, however, well known to Wayne Carey as the applicant had been attempting to secure employment for him at the same project. There can be no other reason for the blacklisting other than a forthright attack upon the applicant.

Relationship (applicant's submission) – The act of arranging the blacklisting in collusion with Wayne Carey is a clear and obvious contradiction and breach of the objects of the union r 3.

(3) **Charge 3 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The union refused point blank to mount a proper defence of the wrongful dismissal carried out against the applicant by Downer Energy Systems Pty Ltd and refused to ask his replacement not to take his position operating a 250 tonne crawler crane as described above.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) wrongful dismissal;

(b) applicant's employment contract with Downer Energy Systems Pty Ltd;

(c) request for the mounting of a proper defence made by the applicant; and

(d) action the applicant asserts should have been taken.

Answer – Details of (a), (b) and (c) are held at the union office case file as stated at 1 above. This is not discovery.

(d) The action the union should have taken was not to delay proceedings by way of deliberate procrastination and to in the first instance request the replacement rigger not to replace the applicant as an open crane operator because the replacement rigger was hired and contracted as a rigger not as a crane operator and the applicant in fact assisted in the training of the replacement rigger to obtain his crane operators licence adding more ambiguity to the situation. Mark Hudston was clearly aware of these facts at the time and flatly refused to respond to it appropriately.

Relationship (applicant's submission) – The refusal to mount a proper defence to the dismissal in the prescribed time and refusal to prevent the inexperienced rigger from replacing an experienced crane operator was a clear contravention to the objects of the union r 3 and carries with it safety implications for other persons working in the vicinity of the 250 tonne crawler crane as well.

(4) **Charge 4 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The union misled the applicant during his request for a wrongful dismissal claim by stating they could not do anything about the termination because of Work Choices. The union deliberately failed to compel Downer Energy Systems Pty Ltd to prove their operational requirement leading to the termination despite requests from the applicant to do so. The union did this because the secretaries and Mark Hudston were colluding with Downer Energy Systems Pty Ltd and the Chamber of Commerce and Industry of Western Australia (CCIWA) to cause the applicant's dismissal.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the way in which the union misled the applicant;

(b) who on behalf of the union misled the applicant;

(c) to the extent that the union failed to compel Downer Energy Systems Pty Ltd as alleged, how it is asserted that such action was 'deliberate';

(d) what power did the union have to compel Downer Energy Systems Pty Ltd to prove their operational requirement; and

(e) the alleged collusion between 'the secretaries and Mark Hudston' and 'Downer Energy Systems and the CCIWA'.

Answer

(a) This is explained clearly in the charge apart from the fact it was verbally to some extent.

(b) Timothy Kucera and Mr Hudston.

(c) The union had the legal expertise and knowledge to know that they should have compelled Downer Energy Systems Pty Ltd to prove the operational requirement. The union was aware that the applicant had never been dismissed from employment in his history. The union did not do this because they were colluding with Downer Energy Systems Pty Ltd to dismiss and blacklist the applicant. Therefore, the action or moreover the failure of fiduciary duty was deliberate.

(d) The union had the power under the unfair dismissal provisions of the Act and the *Fair Work Act 2009* (Cth) to force Downer Energy Systems Pty Ltd to prove their operational requirement. This has recently been stated to the applicant by FWA lawyer in Sydney who viewed the unfair dismissal case.

(e) The applicant was warned by union members on site just prior to the dismissal that union officials were conspiring against him. Following the dismissal a union official witness D1 has given a statement to the applicant that he heard Joe McDonald and others planning the event from the union office. The witness will be called to testify in the trial of this matter.

Relationship (applicant's submission) – Clearly this event is in contravention to the objects of the union r 3 and could also constitute and attempt to pervert the course of justice - contravention of s 143 of the *Criminal Code* (WA).

(5) **Charge 5 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The assistant secretary was expelled from the Australian Labor Party (ALP) in 2007 after being video recorded acting in a grossly offensive manner that was publicised repeatedly on national television networks throughout the 2007 Federal elections bringing the union and all of its members into disrepute.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) in what way did the assistant secretary 'act in a grossly offensive manner'?;

(b) the expulsion from the ALP; and

(c) how the expulsion from the ALP amounts to a breach of the respondent's rules.

Answer

(a) The assistant secretary was videoed in an angry violent manner abusing a construction manager with the words 'this fellow is a fucking thieving parasite dog' and this video was broadcast repeatedly around the nation on several television networks in 2007.

(b) The expulsion from the ALP was equally publicised around the nation, particulars of which are well known to the respondent. The expulsion of Joe McDonald and subsequent resignations of Kevin Reynolds and Shelley Archer was canvassed on the ABC news again as recently as Friday, 16 March 2012.

(c) Refer to r 3(1), (12), (18) and (26) and the fact the union is or was at the time affiliated with the ALP and pays into the ALP funding with union members' funds as determined by the ALP caucus and management committee pro rata to the amount of members in the union. The expulsion clearly brought the union and its members into disrepute.

Relationship (applicant's submission) – The behaviour of the assistant secretary was in contravention to the objects of the union r 3 and could also constitute civil breaches of creating a public disturbance.

(6) **Charge 6** – Discontinued.

(7) **Charge 7 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15), (21) and r 26(3)** – At the general meeting on 12 March 2008, the applicant asked assistant secretary Joe McDonald to arrange for the union to assist in a court action against ERMS or its proprietor Declan Hoare. The assistant secretary became abusive and would not allow a motion from the floor for the union to mount a court action against ERMS leaving the applicant and numerous other construction workers at the mercy of Declan Hoare who was perjuring himself in the Perth VRO court to prevent the applicant from investigating the blacklist.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) applicant's question or request to the assistant secretary;

(b) alleged abuse;

(c) manner in which it is alleged the assistant secretary 'would not allow a motion from the floor for the union';

(d) notice of motion by the applicant under the r 27 to have the item discussed at the meeting; and

(e) steps taken by the applicant to remedy the alleged conduct of the assistant secretary.

Answer

(a) The request was for the union to commence litigation against ERMS solutions for conducting an illegal blacklisting operation.

(b) The assistant secretary became angry when the request was pressed by the applicant and the applicant pointed to money wasting on Che Guevara T-shirts. Mr McDonald began shouting, ranting and waving his arms about.

(c) The assistant secretary shouted from the dais 'the union is not going to waste money on taking ERMS to court'. The president then closed down debate on the subject.

(d) Notice of motion was not allowed once the president closed down debate. Witness R1 who was present at the time will be called to testify at the trial of this matter and possibly others.

(e) Attendance at the general meeting of 9 July 2008 in the company of another blacklist victim witness J3 where the subject was raised again. Debate on the matter was again closed down by the president. An open letter to the union executive dated 14 July 2008 and copied to the national executive sent by facsimile and ordinary post to both entities. A letter to the secretary dated 8 July 2010 copied to the national secretary and delivered by facsimile and post. All letters remain unanswered.

Relationship (applicant's submission) – The actions of the assistant secretary supported by the president who was chairing the meetings were clear contraventions to r 3 and r 26.

(8) **Charge 8 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15), (21) and r 26(3)** – At the general meeting held on 9 July 2008, the president stifled debate from the applicant and his stepson, Joshua Daley, about being put on the ERMS blacklist. The secretary claimed there were no issues with the ERMS blacklist to warrant any action. The secretary and president went on to release numerous election flyers in the following weeks with the ERMS blacklist clearly listed as an issue on the advertising. The ambiguity of these actions against the interest of the members is obvious and a serious departure from the rules and ethics of the union.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) how the 'debate from the applicant and his stepson, Joshua Daley', was in accordance with proper meeting procedures;

(b) the stifling of the debate;

(c) the election flyers;

(d) the 'ambiguity of these actions';

(e) notice of motion by the applicant under r 27 to have the item discussed at the meeting;

(f) in what way was it against the interest of the members; and

(g) in what way was it a serious departure from the rules and ethics of the union.

Answer

(a) It was in accordance with proper procedures because we were both financial members and the floor had been open for general business. The president allowed the debate in the first instance.

(b) When the president realised the questions were about the union failing its fiduciary duty to protect members from the ERMS blacklist he closed down the debate.

(c) Several various election flyers were distributed by the president soon after these general meetings during the 2008 election period with clear propaganda exposing the ERMS blacklist. The incumbent union officials obviously have those election flyers in its records and this is not discovery.

(d) The ambiguity of these actions by the union is clear and gross given that they were receiving an avalanche of complaints from members at the time regarding the ERMS blacklist.

(e) As pointed out a notice of motion was disallowed by the president at both general meetings.

(f) It was clearly against the interests of the members for the union to stand by and do nothing whilst numerous members were being victimised and blacklisted by ERMS solutions and barred from working in the resources sector boom. In fact, several members were, by the failings of the union, compelled to take their complaint along with the applicant to the ABCC. During the ABCC investigation the name Wayne Carey came up numerous times in relation to complaints from other members.

(g) The objects and ethics of the union is to defend members from unscrupulous employers and victimisations. In particular, victimisations of shop stewards as the applicant was when he was blacklisted. As stated above, numerous victimised members of the respondent were compelled to go to the ABCC for help because the union refused to help.

Relationship (applicant's submission) – The actions and inactions of the union officials were clear contraventions to r 3 and r 26.

(9) **Charge 9 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – On 11 July 2008, the secretary wrote an ambiguous letter to the applicant with evidence the union had been trying to look as if it had been dealing with the ERMS issue and enclosed a copy of a letter from Helen Creed, WA Fair Employment advocate, dated 15 May 2008. The letter from Helen Creed instructs the secretary to take his concerns about the ERMS blacklist to the Federal jurisdiction. The union did not follow these instructions leaving the applicant and numerous other construction workers in Western Australia at the mercy of the ERMS blacklist system. This is a serious departure from the rules and ethics of the union.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the ambiguity in the letter;

(b) the 'instruction' to the union by Helen Creed;

(c) in what way is this a serious departure from the rules and ethics of the union; and

(d) how this charge is reconciled with charges 1, 2 and 7 above.

Answer

(a) The ambiguity was in the fact the secretary had stood by and done nothing at the meeting on 9 July 2008 when the president stifled debate and was now writing me a letter pointing to a letter he already had in his possession on 9 July 2008 yet did not make any mention of it (the letter from Ms Creed) to the members at the general meeting.

(b) The instruction is clear in the charge and the letter from Ms Creed. Ms Creed directed the secretary to the Federal jurisdiction and he ignored the advice.

(c) The secretary did nothing about ERMS. He simply pretended to be doing something whilst actually using the blacklist himself to victimise members he does not like or feels were a risk of exposing the theft of funds from the members.

(d) There is no reconciliation. The charge is clearly about the no response to the letter from Ms Creed amounting to a failure in the fiduciary duty of the secretary.

Relationship (applicant's submission) – Clearly the secretary was aware of the blacklist and the concerns of his members. However, the failure of the secretary to act upon the instruction of the employment relations advocate and take a complaint about the blacklist to the Federal authorities is a departure from the objects of the union r 3.

(10) **Charge 10 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – On 14 July 2008, the applicant wrote to the state executive pointing out the issues with ERMS and breaches of the union rules. The letter was delivered by registered mail and facsimile and was ignored by the union. This is a serious departure from the ethics and rules of the union.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the 'issues with ERMS' raised in the letter;

(b) the 'breaches of the union rules' raised in the letter;

(c) in what way is this a serious departure from the rules and ethics of the union; and

(d) how this charge is reconciled with charges 1, 2, 7 and 9 above.

Answer

(a) The union has the letter in its records and this is not discovery.

(b) Breaches of the union rules were not particularised in the letter because the applicant was still attempting to obtain a copy of the union rules at that time. However, the letter clearly points to misconduct by officials that could only amount to breaches of the union rules. Furthermore, at the time of writing the letter, the applicant had not yet heard from the union official who confirmed the conspiracy being formulated against him at the union office which he had been previously warned about by other union members at Pinjarra refinery.

(c) Ignoring the letter is clearly a serious departure from the rules and ethics of the union and any other union for that matter who might treat their members in such an appalling fashion. Ignoring the letter was itself a breach of the rules, regardless if any rule breaches had been particularised in the letter or not.

(d) There is no reconciliation. The charge is clearly about the ignored letter written and delivered on 14 July 2008.

Relationship (applicant's submission) – Ignoring a letter of this substance and committing the act of slandering union members (who were not present at the time) to the general meeting was clearly in contravention to the objects of the union r 3.

(11) **Charge 11 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15), (21), r 12 and r 35(1)(a), (g), (h) and (i) and the *Electoral Act 1907* (WA)** – During the election ballots of 2008 and 2009 the secretary and president authorised the union to publish and deliver numerous repeated election flyers using members' funds siphoned off from levies and small private enterprises and did not seek authority to do this at a general meeting and did not submit an account of election costs to a subsequent general meeting.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) authorisations to publish and deliver numerous repeated election flyers using members' funds;

(b) funds that were used;

(c) alleged levies;

(d) alleged small private enterprises;

(e) alleged way in which the funds were 'siphoned off from levies and small private enterprises';

(f) rule that required 'an account of election costs' to be submitted to a subsequent general meeting; and

(g) how this charge can be reconciled with the outcomes in:

(i) ***Mcjannett, in the matter of an application for an inquiry in relation to an election for offices in the Construction, Forestry, Mining and Energy Union, Western Australian Branch (No 2)*** [2009] FCA 1015 (10 September 2009);

(ii) ***Mcjannett v Reynolds*** [2009] WAIRC 00211; (2009) 89 WAIG 633;

(iii) ***Mcjannett v Reynolds*** [2009] WAIRC 01282; (2009) 89 WAIG 2395.

Answer

(a) There were no authorisations other than from the president as published on the bottom of the election flyers.

(b) Cannot be particularised due to the refusal of the union to allow a book inspection in breach of r 33 of the respondent and r 33 of the BLPPU.

(c) Numerous levies were brought upon the members since 2001, including but not confined to, levies claimed to assist in legal funding claimed to be needed in relation to:

(i) The Cole Royal Commission.

(ii) Joe McDonald's never ending court problems.

(iii) The 107 members on the Perth to Mandurah rail project charged under the *Building and Construction Industry Improvement Act 2005* (Cth) (*BCII Act*) for an illegal strike. Further levies drawn from members in 2011. Further other material particulars are not available due to the refusals of the union to allow a book inspection, however, there are

numerous witnesses that will be called in the trial of this matter with evidence of missing levy funds and refusals by officials collecting levy money to offer up receipts.

(d) Small private enterprises such as on site merchandising and union sponsored canteens at numerous construction projects around Perth and the South West such as but not confined to:

(i) The Perth desalination plant.

(ii) Fiona Stanley Hospital.

(e) The union continually refused requests for accountability of levy funds collected from shop stewards. When the applicant demanded a receipt for funds collected at the Worsley debottlenecking project in 2005 it was refused. Later when the applicant demanded receipts for levy funds collected at the Pinjarra Cogeneration project stage 2 it was initially refused after which a receipt book was begrudgingly supplied by Mark Hudston. Two weeks later the applicant was dismissed and blacklisted. The receipt book will become an exhibit in the trial of this matter. Numerous other shop stewards have come forward with similar information about refusals of accountability and may be called to give evidence in the trial of this matter. A large portion of the money was clearly pocketed by corrupt union officials either immediately after collection or by way of under the counter cash payments at the union office.

(f) Rule 15 of the rules of the respondent, r 15 of the BLPPU and r 36 of the CMETSWU.

(g) It cannot be reconciled with those matters as the issue of siphoning members' funds to pay for election material was not included in those matters.

Relationship (applicant's submission) – The act of stealing members' funds is clearly in contravention of the rules nominated in the charge and also constitutes contraventions of the *Criminal Code*.

(12) **Charge 12 – Multiple breaches of r 27(1)(a) - (i) and r 35(1)(a), (g), (h) and (i)** – As proved in the matter of PRES 3-6 of 2008 the union failed its duty to keep records of general meetings of the union despite the respondent holding most of the assets amounting to a massive breach of trust and accountability and/or dereliction of duty by the executive.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) how this charge raises an issue not previously dealt with by the Commission;

(b) (other than what was before the Full Bench in PRES 3-6 of 2008) the way in which the union failed its duty to keep records of general meetings;

(c) (other than what was before the Full Bench in PRES 3-6 of 2008) the alleged breach of trust and accountability; and

(d) (other than what was before the Full Bench in PRES 3-6 of 2008) the alleged dereliction of duty by the executive.

Answer

(a) The Commission did not deal with this matter in its entirety. The matter of PRES 3-6 of 2008 was not a complaint about rule breaches, nor was it a complaint about failure to keep proper financial records. The matters in PRES 3-6 of 2008 did not go before the Full Bench.

(b) PRES 3-6 of 2008 was not before the Full Bench, and in addition to that the applicant cannot answer this whilst the union adopt a position of refusing to allow a proper book inspection and the charge only refers to an issue that was proved in PRES 3-6 of 2008.

(c) The Full Bench did not hear PRES 3-6 of 2008, and the charge only refers to what was proved in that matter.

(d) The Full Bench did not hear PRES 3-6 of 2008 and the dereliction of duty was plainly obvious and touched upon by Ritter AP in his reasons for decision. There is a further breach of trust toward the trustees of the union in the dereliction of duty or breach of the rules by the trustees.

Relationship (applicant's submission) – Failing to keep proper records of general meetings is clearly manifest breaches of r 27 and r 35. General meetings are also convened to obtain authority from the members to dispose of assets and use funds for various purposes. In failing to keep the records the union also contaminated the responsibilities of the trustees as defined in r 12.

(13) **Charge 13 – Breach of r 33** – During the general elections of 2008/2009 the union refused to allow the applicant to inspect the books causing the applicant to make application to the Commission to carry out the book inspection. When the applicant was finally granted a book inspection the union instructed their lawyer to obstruct the inspection which he did.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the application made by the applicant to the Commission;

(b) the union representative who is alleged to have refused a book inspection;

(c) the day in which the alleged refusal was said to have occurred;

(d) the lawyer who is alleged to have obstructed the inspection;

(e) the manner in which the lawyer is said to have obstructed the inspection;

(f) how this charge is to be reconciled with the facts relied upon in the applicant's affidavit sworn on 7 September 2009 and filed in PRES 5 of 2009 on 8 September 2009; and

(g) how this charge can be reconciled with the outcomes in:

(i) ***Mcjannett, in the matter of an application for an inquiry in relation to an election for offices in the Construction, Forestry, Mining and Energy Union, Western Australian Branch (No 2)*** [2009] FCA 1015 (10 September 2009);

(ii) ***Mcjannett v Reynolds*** [2009] WAIRC 00211; (2009) 89 WAIG 633;

(iii) ***Mcjannett v Reynolds*** [2009] WAIRC 01282; (2009) 89 WAIG 2395.

Answer

(a) The respondent in this application was the respondent in that application. This is not discovery.

(b) The secretary represented by lawyer Simon Millman and Peta Arnold.

(c) 26 August 2009 was the day, however, difficulties in gaining co-operation for the book inspection appeared in the weeks prior to 26 August 2009.

(d) Simon Millman of Slater & Gordon.

(e) Mr Millman refused to allow inspection of the joining applications for both unions, refused to allow inspection of the financial records for both unions and refused to allow a proper inspection of the membership roll for both unions.

(f) This charge is not to be reconciled with the facts relied upon in PRES 5 of 2009 other than the contributing evidence that a book inspection had been obstructed on 26 August 2009.

(g) This charge cannot be reconciled with those matters as they were not matters before the Full Bench and the issue of obstruction of the book inspection was not sent to trial.

Relationship (applicant's submission)

(14) **Charge 14 – Multiple breaches of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – During the election period in 2009 the president, Cam McCulloch, authorised the sending of multiple election material containing negative falsehoods about the applicant to all the members which amounted to slander and possible breaches of the *Defamation Act 2005* (WA). This is also a possible offence against the *Electoral Act 1907* (WA) and constitutes an abuse of office by the president.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the negative falsehoods;

(b) the 'slander' and possible 'breaches' of the *Defamation Act*;

(c) the possible offence against the *Electoral Act*;

(d) the alleged abuse of office by the president;

(e) the identity of the election material (or 14(e) can be satisfied by attaching a copy to the answer to this request);

(f) how it is said that this charge amounts to a breach of the respondent's rules, or otherwise arises for determination under s 66 of the Act; and

(g) how this charge can be reconciled with the outcomes in:

(i) ***Mcjannett, in the matter of an application/or an inquiry in relation to an election/or offices in the Construction, Forestry, Mining and Energy Union, Western Australian Branch (No 2)*** [2009] FCA 1015 (10 September 2009);

(ii) ***Mcjannett v Reynolds*** [2009] WAIRC 00211; (2009) 89 WAIG 633;

(iii) ***Mcjannett v Reynolds*** [2009] WAIRC 01282; (2009) 89 WAIG 2395.

Answer

(a) The negative falsehoods were that the applicant:

(i) Was a serial candidate for all types of elections. (The applicant has stood in government and union elections which is a far cry short of 'all types of elections'.)

(ii) Had stood in elections for the National Party in Queensland. (The applicant has never stood for an election or pre-selection for the National Party – this is a blatant lie.)

(iii) Another wise man from the east. (The applicant is from Perth and has never lived in an eastern suburb of Perth either.)

(b) The slander and possible breaches of the *Defamation Act* were:

(i) 'A serial candidate for all types of elections'.

(ii) 'He's just another wise man from the East who thinks he knows better than West Aussies'.

(iii) 'He is known for famously polling only 15 votes in a Queensland State government by-election'. (There is nothing famous about it – in fact the president would have had to search long and hard to find the monorail advertising stunt in a field of 15 candidates. My recollection is eight votes so in their haste to slander me they apparently could not even get the figure correct.) In another Queensland State election the applicant polled 19% of the primary vote against a senior cabinet minister.

(c) The possible offence is actually against the *Criminal Code*. Section 99(2) and (4) with a penalty of 12 months prison and $12,000 fine.

(d) The abuse of office is clear. The president used his power and position to slander the applicant on an election flyer for the respondent's election.

(e) The election material is an A3 size colour poster printed both sides and opposes the applicant and Mr Peter Bruce the only two non-incumbent candidates in the election. The flyer which was mailed to over 10,000 members would obviously be held in the union records. The applicant does not have an A3 printer and this is not discovery.

(f) It is clearly against the objects of the union to use an incumbent position of office to slander another union member. It is not in the realms of democracy for an incumbent official to use his position to publish lies about a non-incumbent union member. The flyer was paid for out of union members' funds in contravention to the Act.

(g) This charge cannot be reconciled by those matters as they did not proceed to trial.

Relationship (applicant's submission) – The actions of the president during the election period were in contravention to the objects of the union r 3.

(15) **Charge 15 – Multiple breaches of r 11(1) and r 35(1)(h)** – The secretary and assistant secretary ordered multiple levies upon the members during the period 2001 to 2011 and the union did not advertise the purpose or ratify the levies in accordance with r 11(1) and therefore did not have the power to do it. The cash collected was then siphoned off and largely used for purposes other than that which was stated at the time of imposition of the levies. This is an oppression against the members which also amounts to multiple breaches of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21) and possible offences against the *Criminal Code* and *Crimes Act 1914* (Cth).

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) levies ordered, including dates and amounts;

(b) manner in which the cash collected was 'siphoned off';

(c) 'purposes' for which the cash was used;

(d) purpose for which the cash was stated to be used for each levy;

(e) alleged offence committed against the *Criminal Code*; and

(f) alleged offence committed against the *Crimes Act*.

Answer

(a) The levies ordered were always $20 per week per member. Numerous levies on numerous dates since 2001, including, but not confined to, repeated levies to assist legal action associated with the Cole Royal Commission, repeated levies claimed to be to assist legal action being taken against the assistant secretary, and a nationwide levy claimed to be to assist in legal action being taken against the 107 members charged under the *BCII Act* for an illegal strike on the Perth to Mandurah railway project.

(b) Cash was simply pocketed by officials and in most cases accountability was refused or denied.

(c) To fund opulent lifestyles for union officials.

(d) As stated at (a) above and paragraph 11 above.

(e) No alleged offence has yet been made. The charge relates to possible offences. There needs to be a thorough audit of the union and officials financial dealings after which there would most likely be alleged offences, criminal charges and prosecutions.

(f) Refer to (e) above.

(16) **Charge 16 – Multiple breaches of r 35(1)(a), (g), (h), (i), r 12, r 14(2) and r 15** – Since 2001, the executive did not seek authorisation from general meetings to take the control of money derived from levies and donations away from the trustees. The union failed to keep proper accounts and submit same to the auditors in relation to levies, donations and bribes. The officers of the union failed to provide the auditor with all the books and documents relating to levies, donations, blackmail payments and bribes amounting to an enormous breach of trust to the members and possible criminal offences. This action also amounts to multiple breaches of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (24).

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) rule that requires the executive to seek authorisation from general meetings;

(b) authorisation that was required to be sought under the rule;

(c) identity of the accounts referred to;

(d) shortcomings in the existing accounts, and the nature of the accounts the union should have kept;

(e) officers of the union alleged to have committed the alleged breaches;

(f) books and documents relating to the levies;

(g) alleged:

(i) levies;

(ii) donations;

(iii) 'blackmail payments'; and

(iv) 'bribes';

(h) alleged breaches of trust; and

(i) alleged criminal offences committed.

Answer

(a) Rule 12.

(b) To take control of money derived from levies and donations away from the trustees as stated in the charge.

(c) 'Accounts' being receipts issued to shop stewards and other collectors, pay in books accounting for money paid into the union bank accounts or office depository, and proper tallies of the levies and donations sent to the auditors.

(d) The accounts described above to not exist for the majority of money collected.

(e) Mark Hudston and a list of junior officials that will be corroborated by witness testimony at trial.

(f) Refer to (c) above.

(g) (i) Refer to 11(c) above.

(ii) Some levy payments were described as donations and/or casual tickets.

(iii) There are known blackmail payments made to the union. The largest known alleged payment is for the amount of $150,000 paid to the union training centre by a major construction company after they were set up in a tape recording sting by the secretary.

(iv) There are a number of known bribe attempts carried out by officials of the union. These are documented in newspaper reports and corroborated by a number of high profile business persons and mentioned in the Cole Royal Commission.

(h) Obvious gross breaches of trust to the non-official members of the union who would expect accountability of their hard earned funds collected by officials.

(i) Stealing, fraud and misrepresentation to gain a benefit are all breaches of the *Criminal Code*.

Relationship (applicant's submission) – Collecting levies with the clear premeditated intention to misappropriate the funds and excluding the trustees from the accountability is an enormous breach of r 3, r 35, r 12, r 14 and r 15 of the respondent and BLPPU and r 2 and r 36 of the CMETSWU.

(17) **Charge 17 – Breach of r 3(20) and contraventions of the *Oaths, Affidavits and Statutory Declarations Act 2005*** – The secretary forged a record of a member of the respondent in order to gain transitional registration of the union with Fair Work Australia. This also amounts to a breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21) by bringing the union into disrepute.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) forgery;

(b) contraventions of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA);

(c) date the action allegedly occurred;

(d) member who allegedly had his signature forged;

(e) nature and identity of the forged record (or 17(e) can be satisfied by attaching a copy to the answer to this request); and

(f) way in which the union was brought into disrepute.

Answer

(a) The secretary substituted an enrolment record from the federal union for an enrolment record of the respondent knowing that there were no bona fide enrolled members in the respondent.

(b) The secretary swore a statutory declaration that the record belonged to a member of the respondent when he knew it did not. The breach is obvious.

(c) On 11 March 2008, just prior to the 2008 election period as stated numerous times in past actions in this Commission and not yet taken to trial.

(d) There is no allegation of a forged signature – the record used in the exhibit attached to the said statutory declaration called 'KNR 1' is clearly not a record of a member of the respondent, but a record of a member of the CFMEU Construction and General Division, Western Australian Divisional Branch which is a different union registered in a different jurisdiction.

(e) Refer to (d) above and the federal union's own records.

(f) Redacted – the union is in danger of being brought into disrepute when the public find out about the false declaration filed with Fair Work Australia.

Relationship (applicant's submission) – The above matter is clearly in breach of the objects of the unions r 3 in the respondent and BLPPU and r 2 in the CMETSWU.

(18) **Charge 18 – Multiple breaches of r 3(23) and r 10(1), (2), (3) and (6)** – The union executive instructed officials not to collect entrance fees from thousands of members since 2001. This is a requirement under both state and federal rules. Specifically, r 8 of the national rules exposing the union to maladministration and its members to be ineligible to nominate for elections and forego their rights to any privileges of bona fide members. This is a massive breach of trust by the executive in direct conflict with the interests of the members and also amounts to breaches of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21).

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) alleged instruction – including what it was, when it was given and to whom it was given;

(b) circumstances in which the alleged instruction was carried out, if at all;

(c) alleged maladministration;

(d) manner in which it is said 'r 8 of the national rules' applies to an application under s 66 of the Act;

(e) way in which members became 'ineligible to nominate for elections and forego their rights to any privileges of bona fide members';

(f) identity of any such members who became ineligible to nominate as a result of such an instruction; and

(g) manner in which this allegation is in breach of trust and in direct conflict with members' interests.

Answer

(a) The instruction was given by the secretary as a standing order to all or most officials in the field. The instruction was given sometime around 2004 but cannot be exactly determined whilst the union continue to refuse a book inspection.

(b) Whilst signing up new members, transferring members from interstate and bringing previous delinquent members' accounts up to date.

(c) The maladministration is clear. The rules stipulate joining fees must be paid before a member is determined to be a financial member.

(d) Due to the decision in PRES 3-6 of 2008 and the testimony of the secretary in that matter, what is done in the name of the state union is also done in the name of the national union and vice versa.

(e) Rule 10(1), (2) and (3) of the respondent, BLPPU and r 8 of the national union are clear on the question of joining fees. Until the joining fee is paid and the secretary signs off on it the person is not deemed to be a member.

(f) Every member for which the union cannot produce a record of a paid joining fee signed off by the secretary on their application in the approved form 'schedule' to the rules.

(g) It is obviously a breach of trust and direct conflict to members' interests to waive a joining fee to members which then places them in a compromised position if at any given time the union officials felt they wanted to remove their eligibility and benefits of membership or right to nominate in an election or moreover challenge the result of an election ballot after an incumbent is defeated by a rank and file member on the basis that he or she had not paid a joining fee.

Relationship (applicant's submission) – Not collecting entrance fees in conflict to members' interests is an obvious breach of the objects of the union r 3 and r 10.

(19) **Charge 19 – Multiple breaches of r 3(1), (2), (3), (24) and (26) and r 35(1)(c), (g) and (i)** – The assistant secretary knowingly and repeatedly committed criminal offences of assault and trespass since 2001 mostly whilst not being in possession of a right of entry and then sought payment of the ensuing legal costs and fines from

members' funds. The executive committed multiple breaches of the union rules by authorising the behaviour of the assistant secretary and repeatedly authorising the payment of the enormous costs incurred by the repeated unlawful behaviour from members' funds. This is a gross departure of trust and accountability to the members.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) how it is alleged that the assistant secretary was acting under the respondent's rules at the times alleged;

(b) the conduct which allegedly constitutes criminal assault since 2001;

(c) the conduct which allegedly constitutes criminal trespass since 2001;

(d) the manner in which the assistant secretary sought payment of the ensuing legal costs and fines from members' funds;

(e) the members' funds utilised;

(f) the manner in which the 'behaviour' was authorised by the executive;

(g) the 'gross departure of trust' referred to; and

(h) any rule which prevents the respondent from funding an official's criminal prosecution attracted while acting as an officer or employee of the respondent.

Answer

(a) The assistant secretary was acting in his capacity of assistant secretary of both unions. What is done in the name of the federal union is also done in the name of the state union and vice versa.

(b) The same conduct for which he has been charged and prosecuted numerous times: see criminal record as adduced in APPL 31 of 2011.

(c) See (b) above

(d) By pleading to the executive to authorise payment from the union funds and by arranging and participating in the collection of levies from the members.

(e) Payments to Slater & Gordon out of union funds.

(f) The executive failed to curtail the behaviour which itself is a failure of their fiduciary duty toward the union and its members.

(g) The members place their trust in the executive by electing them or moreover show their trust by not mounting election challenges against them. The failure of the executive to stop the behaviour is a gross departure of trust.

(h) Rule 3 and r 35. Also the penalties imposed against the assistant secretary and paid by the union were against the assistant secretary not against the union, therefore by adopting to pay the penalties and costs with members' funds was removing the deterrent placed upon the assistant secretary by the courts and can be said was encouraging recidivism by the assistant secretary.

Relationship (applicant's submission) – Criminal behaviour by an assistant secretary and in particular repeated criminal behaviour is clearly against the objects of the union r 3 and r 35.

(20) **Charge 20 – Breach of r 3(13)** – When the applicant was arrested in Bali on trumped up allegations of importing drugs the assistant secretary told the national news media the union would not assist him. The assistant secretary went on to slander the applicant and told the media he was a pest because he took the union to court and accused the union administration of being corrupt. The applicant mounted a defence without any assistance from the union executive and with privately arranged support from the union rank and file defeated the drug importation charges.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the applicant's arrest, including date, charge and any plea or conviction;

(b) details of any time spent in custody;

(c) the applicant's trip to Bali, including whether the travel was work related;

(d) how long the applicant remained in Bali;

(e) whether the applicant continued to make membership subscription payments in this time;

(f) the national news media that is referred to (or 20(e) can be satisfied by attaching a copy to the answer to this request);

(g) the alleged slander; and

(h) what is alleged to have been told to the media by the assistant secretary.

Answer

(a) 28 December 2009. Charged and convicted under article 127 of the *Indonesian Narcotics Code 2009*. Possession of 1.7 gram of a group 1 narcotic (cannabis) which was planted in the

applicant's luggage in a large metal container that set off bomb detectors in the airport x-ray equipment.

(b) Five months in custody as well known by the respondent.

(c) It was a holiday during the Christmas recess as well known by the respondent.

(d) Five months as well known by the respondent.

(e) Not possible from Bali jail as well known by the respondent, however the applicant was a paid up financial member as at 28 December 2009 until 30 March 2010 as well known by the respondent.

(f) WA Today website 6 January by Chris Thomson; on 5 January 2010, at http://www.shaman-australis.com/forum/index.php?showtopic=23366 by Chiral; The Australian newspaper 30 December 2009 by Debbie Guest.

(g) 'I'm glad he didn't get his hands on the union funds' and 'he was a nuisance'.

(h) 'The union is not going to help' and 'it's not a union matter'.

Relationship (applicant's submission) – The clear refusal of the assistant secretary to help a member in need of assistance is a forthright breach of r 3(13)

(21) **Charge 21 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – In or about September 2010, whilst the applicant was employed at the Collgar Wind Farm construction site, union official Mark Hudston acting either for the executive or by his own volition delivered a negative newspaper article about the applicant to Mr Tony Grieve, the site manager for Vestas Pty Ltd at Collgar Wind Farm, with intent by the union to have a negative effect upon the applicant in his workplace.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the negative newspaper article that is referred to (or 21(a) can be satisfied by attaching a copy to the answer to this request);

(b) the manner and circumstances of delivery of the article to Mr Grieve;

(c) the conduct of Mr Hudston which permits the applicant to allege Mr Hudston was acting for the executive or otherwise;

(d) the intended negative effect upon the applicant in his workplace; and

(e) whether any negative effect was suffered by the applicant.

Answer

(a) To be divulged during the testimony of witness K1 during testimony at the trial of this matter.

(b) In person with the intent to damage the reputation of the applicant.

(c) The applicant did not allege this.

(d) See (b) above.

(e) The actions by Mark Hudston led to an email exchange between Vestas Pty Ltd and CCIWA which in turn led to a defamation action against CCIWA by the applicant.

Relationship (applicant's submission) – The actions of Mark Hudston are a clear breach of the objects of the union which should be defending and protecting its members not victimising and slandering them. Rule 3.

(22) **Charge 22 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – During the period September 2010 to 6 December 2010 union official Mark Hudston repeatedly refused to accept payment of the applicant's due subscription citing he had been instructed by the executive not to accept it. When the applicant contacted the union by phone he was told he had to apply to the executive to retain his membership. When the applicant requested to know the grounds, his request was refused. The applicant then paid his dues directly into the union bank account and emailed the union with a demand for a receipt. This was an unlawful oppression and serious breach of the union rules and abuse of office.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the refusals by Mark Hudston, including dates and content of conversations;

(b) the contacts to the union by phone, including dates, identities of persons spoken to at the union and the content of conversations;

(c) the date of the payment of dues;

(d) the email of the demand for a receipt;

(e) way in which the allegation is 'an unlawful oppression';

(f) the detriment suffered by the alleged unlawful oppression;

(g) the way in which the allegation is a 'serious breach of the union rules'; and

(h) the way in which the allegation is an 'abuse of office'.

Answer

(a) On 24 November 2010, and another occasion before this, Mark Hudston visited the site at Collgar Wind Farm and refused to accept a cash payment of over $600 from the applicant. He claimed at first he did not have a receipt book. When pressed he then claimed the executive would not allow him to accept money from the applicant.

(b) On 24 November 2010, after the refusal by Mark Hudston, the applicant telephoned the union office and attempted to pay his dues by credit card. The duty consultant hesitated and placed the call on hold. After a few minutes the duty consultant returned and stated the applicant had to apply to the executive to retain his membership. The applicant asked for the grounds of this claim and the consultant terminated the call.

(c) The date of payment is in the applicant's banking archives not held at his premises. The union clearly has the record of the date of payment just prior to 6 December 2010.

(d) The email is stored on a backup hard drive not held at the applicant's premises. If the respondent cannot locate the email in its own records the applicant will produce the email at the trial of this matter.

(e) What allegation? The act of refusing the applicant's payment of dues without clear or proper grounds and without prior notification was an unlawful oppression.

(f) Undue stress, hurt to his feelings and embarrassment.

(g) The rules clearly state written notification must be given to a member if there are allegations of misconduct. The union did not do this during the period 30 March 2010 when his subscription fell due and 5 December 2010 after his subscription was accepted. Instead, the union chose to conduct an unlawful campaign of victimisation against the applicant during this period.

(h) The conduct of the executive or the secretary or assistant secretary alone or in unison is clearly an abuse of office.

Relationship (applicant's submission) – The act of victimising the applicant is a clear departure from the objects of the union r 3 and the procedure for dealing with alleged misconduct r 35.

(23) **Charge 23 – Breach of r 35(2)(d) and r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21) and abuse of office** – During the week following 6 December 2010, whilst still employed at the Collgar Wind Farm, the applicant received both a receipt for his payment of dues and two threatening letters from the president containing a series of vexatious allegations directed at the applicant that were general in nature and not particularised. The letters were advising the applicant that he was going to be expelled from the union for misconduct. The applicant wrote back to the president by way of facsimile and registered mail requesting particulars of his defamatory allegations in the letters dated 6 December 2010. The president ignored the request and ceased communication. As a result, the applicant has been seriously defamed to the union executive and other officials and experienced undue stress. This is a serious abuse of office and the third documented unlawful attack upon the applicant in his workplace by this union since 2006 and the fourth documented attack upon the applicant in his workplace by the broader national union since 2000.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the threatening letters that are referred to (or 23(a) can be satisfied by attaching a copy to the answer to this request);

(b) the vexatious allegations;

(c) the applicant's facsimile and letter that is referred to (or 23(c) can be satisfied by attaching a copy to the answer to this request);

(d) the 'defamatory allegations';

(e) how the allegations were published so as to amount to defamation;

(f) the way in which the president ignored the request;

(g) the undue stress experienced by the applicant;

(h) the alleged abuse of office; and

(i) how charge 23 is said to amount to a breach of the respondent's rules.

Answer

(a) Two identical letters written by the president each on a different letterhead from the federal union and state union respectively and both dated 6 December 2010 and both put before this Commission in previous matters without going to trial. The respondent clearly has the letters in their own records.

(b) The applicant was 'found guilty of drug importation' and 'at the time charges were laid the applicant also falsely knowingly and deliberately alleged that this union and or its officials was involved in or responsible for the importation' and 'the applicants ongoing gross misbehaviour'.

(c) A request for further and better particulars was sent by facsimile and registered post to the president on 20 December 2010. The president has never responded to the request.

(d) Refer to (b) above.

(e) The allegations were sent on two official letterheads from the union office requiring union staff to articulate the letters. It is clearly obvious the letters would have been perused by the union executive also before they were sent to the applicant.

(f) Refer to (c) above.

(g) The applicant experienced hurt to his feelings, stress in relation to the allegations and threats of expulsion from the union and stress due to the false nature of the allegations levelled at him by the president.

(h) It is an abuse of office for the president to take it upon himself to make such false allegations on official union letterheads when in fact the rules state it is the secretaries' responsibility to take such actions in which case the allegations would still need to be true not false as they were.

(i) Refer to (h) above.

Relationship (applicant's submission) – The act of sending out two separate letters from two different unions both containing the same false allegations and slander and both quoting a rule of the respondent that is going to be used to expel the applicant is a clear departure from the objects of the union r 3 and misconduct by the writer r 35 and an abuse of office.

(24) **Charge 24** – Discontinued.

(25) **Charge 25 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15), (21) and r 35(1)(a), (g) and (i)** – The secretary instructed his son, Rod Reynolds, the union claims officer, not to progress a wage claim for the stepson of the applicant, Joshua Daley, a union member. This action is clearly another attack upon the applicant and a huge abuse of office.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the employment of Joshua Daley;

(b) the wage claim;

(c) when did the secretary provide the alleged instructions to Rod Reynolds;

(d) the nature of the instruction;

(e) in what way was the alleged conduct an attack on the applicant;

(f) in what way was the alleged conduct a 'huge abuse of office'; and

(g) how charge 25 amounts to a breach of a specific rule.

Answer

(a) Employed by Catcon Pty Ltd as a rigger at the Collgar Wind Farm project as detailed in his wage claim held at the union office.

(b) Details are clearly on file at the union office. Mr Daley will adduce those to the court at the trial of this matter.

(c) As alleged by Mark Hudston to the applicant and Mr Daley details of which will be adduced to the court at the trial of this matter.

(d) As stated in the charge.

(e) Clearly the respondent knew Mr Daley was the applicant's stepson. As Mr Daley had not had any prior issue with the union before he was blacklisted it is clear the union was conducting a campaign of reverse nepotism against the applicant.

(f) Obviously the use of the union entity and/or its staff to victimise a member is an abuse of office.

(g) The instruction by the secretary and refusal of his son to progress a bona fide wage claim which was given in its correct form and copies retained by Mr Daley is a clear breach of the rules, specifically r 3 and r 35.

Relationship (applicant's submission) – Refer to (g) above.

(26) **Charge 26 – Multiple breaches of r 3(22) and r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The secretary siphoned levies, blackmail payments, bribes and other revenue from small private enterprises from the union cash stream to acquire a massive personal portfolio of property, real estate and assets. Rule 3(22) does not allow the secretary to become the owner of the 'personal property' mentioned in the rule.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) alleged:

(i) levies;

(ii) blackmail payments;

(iii) bribes; and

(iv) other revenue;

the union secretary is alleged to have siphoned (including dates, details of the amounts involved and the nature of the transactions and 'siphoning');

(b) small private enterprises;

(c) details of the 'massive personal portfolio'; and

(d) manner in which (it is said that) the secretary has become the owner of union property.

Answer

(a) (i) Refer to 11, 15 and 16 above.

(ii)(iii) The applicant has two recordings of a sting operation which amounted to an extortion bid against a large construction company for $150,000 which it then paid into the union training centre. The first tape is of the sting operation set up by the secretary and carried out by officials and a site delegate at his instruction.

The second tape is of a former union official blowing the whistle to the Australian Taxation Office on the $150,000 extortion payment and other cash payments made to union officials at the union office.

The tapes have been digitally enhanced in a laboratory to make the voices more clear and transferred onto computer format for use in court proceedings. The tapes are stored in a safe location outside of Perth. The originals are stored in a separate location and will be handed over to the court and/or police.

The Cole Royal Commission also identified similar behaviour by officials from this union.

(iv) Refer to 11, 15 and 16 above also 26(a)(ii) and (iii) above. A conservative estimate of missing levy and other funds since 1994 is at between $5 million and $15 million depending how the mathematical formula is applied. Until the union allow a proper book inspection this figure is not ascertainable.

The nature of the alleged siphoning is wide ranging from secretary and executive approved junkets to outright theft of cash and donations.

(b) Refer to 11(d) above.

(c) A wide ranging portfolio including a hotel, a penthouse apartment at Raffles, a property at Leeming, an alleged property at Broome including a large boat, other smaller properties around Perth, a business in Bali called Bamboo Bar & Grill, alleged enterprises in Ireland and Canada and an expensive luxury Range Rover and the union training centre.

(d) By using his power and position to obtain such property.

Relationship (applicant's submission) – The use of the union entity to advance a person's personal wealth and position is clearly in breach of the objects r 3.

(27) **Charge 27 – Multiple breaches of r 12, r 14(2), r 15, r 35(1)(a), (g), (h), (i) and r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The executive of the union approved and encouraged under the counter weekly cash payments to numerous officials of the union for an extended period colloquially known as the 'funny money' among officials. This unlawful action also constitutes federal offences under taxation law. This is a serious breach of trust and propriety against the members of the union.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) how under the counter weekly cash payments were encouraged and made;

(b) who encouraged and made the payments;

(c) the cash payments or 'funny money' paid to numerous officials;

(d) the 'numerous officials';

(e) the timeframe of the payments;

(f) the alleged offences under taxation law; and

(g) the alleged breach of trust.

Answer

(a) By allocating untaxed weekly cash payments to union officials given in an envelope attached to their normal pay slip the latter being transferred directly into their bank accounts as their normal pay.

(b) The secretary directing the office manager to prepare the payments.

(c) The funny money payments including the names of recipients are detailed in an Australian Taxation Office investigation tape which has been transferred to DVD format for use in court proceedings and stored in a safe location.

(d) Will be named at the trial of this matter.

(e) Beginning around 1995 and continuing to an unknown date possibly 2012.

(f) The action of making under the counter cash payments by a union to employees of the union is a clear breach of taxation law.

(g) The breach of trust to the members is clear and obvious.

Relationship (applicant's submission) – Clear and concise breaches of r 3, r 12, r 14, r 15 and r 35 of the CFMEUW and BLPPU and r 2 and r 36 of the CMETSWU.

(28) **Charge 28 – Multiple breaches of r 35(1)(a), (g), (h), (i) and r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The secretary of the union arranged a large cash payment to the union training centre of $150,000 through the use of covert surveillance, entrapment and subsequent blackmail. The secretary encouraged other members to engage in this activity also. This is a massive breach of the union rules and could also constitute offences under the *Criminal Code* and federal *Crimes Act*.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) whether it is alleged the secretary was acting alone or on behalf of the union (or otherwise) when making the alleged payment;

(b) the large cash payment arranged, including the date, transaction, parties involved and purpose of the transaction;

(c) the covert surveillance;

(d) the alleged entrapment;

(e) the alleged subsequent blackmail;

(f) the manner in which the secretary 'encouraged' the conduct of others;

(g) the identity of the 'other members' encouraged by the secretary and the nature of their involvement;

(h) the alleged breach of union rules;

(i) the alleged offences under the *Criminal Code*; and

(j) the alleged offences under the federal *Crimes Act*.

Answer

(a) It is not clear if the secretary was acting alone for his own benefit or for the financial gain of the union. In either case the behaviour is totally out of hand. Further investigations may reveal these facts.

(b) $150,000 in 1997 paid by cheque signed by a company accountant named in the Australian Taxation Office investigation and made out to the union training centre but reported as a $100,000 payment in the Cole Royal Commission.

(c) The covert surveillance was arranged by the secretary for the purpose of getting a company official into a compromised position which could then be used to extort money from the company.

(d) Occurred at the HBI project in Port Hedland in 1997.

(e) The secretary then blackmailed the company with threats of exposing the company official for his role in setting up a violent attack upon a construction worker by demanding a large cash payment.

(f) The secretary used enticements to encourage a site delegate to carry a tape recorder by falsely telling him it was for the purpose of protecting his own position on site which was under threat. The secretary instructed union official Bob Wade to deliver the tape recorder and instructions to the site delegate.

(g) The site delegate is witness K2 and the company official is witness J3. The nature of their involvement is already described above.

(h) Breaches of r 3 and r 35 of the CFMEUW and BLPPU and r 2 of the CMETSWU.

(i) Offences relating to extortion, blackmail and attempts to pervert the course of justice.

(j) refer to (i) above.

Relationship (applicant's submission) – See (h) above.

(29) **Charge 29 – Breach of r 35(1)(a), (g), (h), (i) and r 12** – The secretary and assistant secretary attempted to bribe a candidate to withdraw his union election nomination and move to the Philippines by offering an unlimited full time wage and airfares abroad. No authorisation was sought from the members for the funding of this activity and bribe. This is a gross breach of trust and impropriety and contravention of the union rules.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) candidate; and

(b) attempted bribe, including the dates, places and content of conversations.

Answer

(a) Terry McParland.

(b) On 28 September 2000, in Kings Park, Perth, the assistant secretary was recorded offering a bribe to election candidate Terry McParland to withdraw from the election. The assistant secretary offered Mr McParland a full time wage and airfares to go and live in the Philippines. The tape has been digitally enhanced and transferred to DVD format for use in court proceedings. The DVDs and original tapes are stored in a safe location outside of Perth.

Relationship (applicant's submission) – The bribe attempt is an abhorrent departure from the objects of the union and clear misconduct on the part of the assistant secretary reportedly acting on behalf of the secretary who was facing the election challenge. Contravention of the objects of the union's r 3 and r 35 of the CFMEUW and BLPPU and r 2 of the CMETSWU.

(30) **Charge 30 – Breach of r 35(1)(a), (g), (i) and r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The secretary and assistant secretary and former official Bob Wade conspired to have a union member assaulted in his workplace by a hired thug. During this activity other union members were encouraged to take part by union officials. This is a massive breach of trust, abuse of office and contravention of the rules. It could also constitute criminal offences under the *Criminal Code* or the federal *Crimes Act*.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) assault, including the date, place and its nature;

(b) union member assaulted;

(c) alleged conspiracy;

(d) 'hired thug';

(e) other union members encouraged to take part;

(f) alleged contravention of the union rules;

(g) alleged offences under the *Criminal Code*; and

(h) alleged offences under the federal *Crimes Act*.

Answer – Refer to 28 above. The tapes are stored in a safe location outside of Perth. This charge will be litigated in conjunction with charge 28.

(31) **Charge 31 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The secretary used his position to arrange a consultancy contract with his longtime friend, disgraced former premier Brian Bourke [sic] at great expense to the members and in doing so brought the union into disrepute. This is also an abuse of office.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) manner in which the secretary used his position;

(b) consultancy contract;

(c) expense to members;

(d) way in which the union was brought into disrepute;

(e) rule breached by entering into a consultancy contract; and

(f) alleged abuse of office.

Answer

(a) The secretary used his influence over the executive by having them tainted with payments of funny money and then using threats to get his own way with executive decisions.

(b) As widely reported in the news media. Not ascertainable until the union allow a proper book inspection.

(c) Obviously the hiring of an unnecessary consultant because he is a mate of the secretary is an unwarranted expense to the union and therefore the members.

(d) Brian Bourke [sic] was and remains in the news headlines for alleged criminal activity. The relationship between Bourke [sic] and the union has brought the union into disrepute. The public image of the union is widely renowned for thuggery and illegal activity.

(e) Rule 3. It is not in the objects of the union for a secretary to supply employment for a mate who has no prior experience working in a construction union.

(f) Clear abuse of office by the secretary.

Relationship (applicant's submission) – A clear departure from the objects of the union r 3 in the CFMEUW and BLPPU and r 2 in the CMETSWU.

(32) **Charge 32** – Discontinued.

(33) **Charge 33** – Discontinued.

(34) **Charge 34 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The secretary resigned from the ALP in a brazen public display of animosity after his wife was expelled from the party again bringing the union into disrepute as it was widely publicized in the news media.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the resignation;

(b) whether it is alleged the secretary was acting in his personal capacity, union capacity, or otherwise when he resigned;

(c) the 'brazen public display of animosity';

(d) the way in which the union was brought into disrepute; and

(e) how the resignation of a person in the circumstances from a political party relates to a breach of the CFMEUW rules.

Answer

(a) Occurred in 2007 shortly after the assistant secretary was expelled from the ALP.

(b) The secretary allegedly threatened the ALP executive with taking the union support with him. In that context the secretary was acting in his capacity as union secretary at the time.

(c) The secretary ensured the media were informed of his resignation in order to have the affair widely publicised on national television when it could have easily been done privately.

(d) The union was brought into disrepute through the brazen public display of animosity toward the ALP who are affiliated with trade unions and continues to do so with the recent attempts by the secretary and his wife to rejoin the ALP.

(e) As described in (d) above it amounts to a breach of the objects of the union. The secretary has always been a dictator and believes the union is his own entity to do as he pleases with.

Relationship (applicant's submission) – A clear and concise breach of the objects of the union r 3.

(35) **Charge 35 – Multiple breaches of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21), r 35(1)(a)(i) and the *Oaths, Affidavits and Statutory Declarations Act 2005*** – The secretary on numerous occasions knowingly filed annual returns in the Commission with falsified membership quantities and deliberately avoided taking the legal steps to obtain a certificate under s 71 of the Act in order to hide and control enormous cash and assets with little to no accountability to the members. This is also an abuse of office.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the annual returns;

(b) the knowledge of the secretary relating to the alleged falsifications;

(c) the 'falsified membership quantities', and what those 'quantities' should allegedly have been;

(d) the 'numerous occasions';

(e) the 'enormous cash and assets' alleged to be hidden;

(f) the alleged breaches of the *Oaths, Affidavits and Statutory Declarations Act 2005*;

(g) the alleged abuse of office; and

(h) how the allegations concerning the 'steps to obtain a certificate under s 71 of the Act' are reconciled with:

(i) the decision in ***The Construction Forestry Mining and Energy Union of Workers v (Not applicable)*** [2011] WAIRC 01174 (21 December 2011), and

(ii) the applicant's attempt to intervene in FBM 6 and 7 of 2009.

Answer

(a) The secretary filed annual returns for the BLPPU and CFMEUW with the Registrar of the Commission every year for the existence of these unions.

(b) On every occasion the secretary knew there were no members in the CFMEUW and all the members were in the federal union. The secretary was fully aware on these occasions what his obligations were in relation to a certificate under s 71 of the Act and under r 10 of the CFMEUW and BLPPU.

(c) The membership quantities were simplistically substituted with membership quantities from the federal union and should have in fact been zero or close to it as among other things, zero membership applications were produced during the book inspection carried out by the applicant. Evidence adduced in PRES 3-6 of 2008 also determined that subscriptions and joining applications were not taken from members in relation to the CFMEUW, but were in fact in relation to the federal union. All subscriptions were reported to be banked in a federal union bank account and not the account of the CFMEUW.

(d) On every occasion a return was filed with the Commission since the registration of the union in 2001 beginning in 2002.

(e) Property and shares portfolio including the union training centre estimated to be in excess of $26 million at the time of PRES 3-6 of 2008. Other alleged assets and property reported in the media and not ascertainable until the union allow a proper book inspection.

(f) On every occasion an annual return was filed with the Commission commencing with 2002 the statutory declaration was knowingly falsified in terms of the membership quantities of the CFMEUW.

(g) It is a clear abuse of office to manipulate the union membership and its assets in this way and in the way the secretary admitted to doing in his testimony during the proceedings of PRES 3-6 of 2008.

(h) (i) The repeated ignorance of his obligation under s 71 of the Act and r 3 are not deemed to be exonerated or reconciled by the decision pointed out by the respondent as that decision was not retrospective.

(ii) There can be no reconciliation form the applicant's attempts to intervene in FBM 6 and 7 of 2009 as those matters did not proceed to trial and no retrospective decision was made by the Full Bench.

Relationship (applicant's submission) – The actions of the secretary were clearly not in the interests of the union or its members as proved in PRES 3-6 of 2008 and a clear departure from the objects of the union r 3 and misconduct r 35.

(36) **Charge 36 – Multiple breaches of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The union has a recorded history of using the union resources against its own members, particularly for purging any member from the union who has voiced dissent or stood in an election against any incumbent official as the union did to the applicant in 2010 and to Kevin Aitkin and Terry McParland in 2002 which are just three examples of many. This is a serious departure from the ethics of democracy and the objects of the union. It may also constitute misconduct under r 35.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the 'recorded history' of using the union resources against its own union members;

(b) the purging of the applicant, including the date and circumstances;

(c) the purging of Kevin Aitkin and Terry McParland, including the date and circumstances;

(d) how the allegation of 'purging' of Terry McParland in 2002 is reconciled with the decision in ***McParland v The Construction, Forestry, Mining and Energy Union of Workers*** [2002] WAIRC 06935 (12 September 2002);

(e) any members 'purged' for 'dissent' or standing in an election including their names, and details of the purging; and

(f) the alleged misconduct under r 35.

Answer

(a) In every application brought before the Commission by members against the union since 2001 the union has engaged expensive outside lawyers at great expense and ambiguity to the members. The union did this despite already directly employing paid lawyers.

(b) Refer to 23 above.

(c) Kevin Aitkin was purged from the union shortly after the 2000 general election in retaliation for supporting the election bid of Terry McParland. This was widely reported in the media. Terry McParland was unfairly purged from the union following his election bid during the 2000 general election.

(d) It is not reconciled with the decision in PRES 30 of 2002 as that decision was incorrect and should have been taken to the court of administrative appeal. The union used its power and financial position to gain an advantage over Mr McParland.

(e) Terry McParland, Kevin Aitkin, and attempts to purge Darren Kavanagh, Wayne Wildes, Doug Heath, Kevin Ennor, and the applicant.

(f) If it is proved the union purged these members in retaliation for dissent or standing in elections then there are clear breaches of r 35 for misconduct against the officials responsible for the victimisations.

Relationship (applicant's submission) – The act of victimising members of the union by the union is a clear departure from the objects r 3.

(37) **Charge 37 – Breach of r 3(1) through (26) and r 35** – In paragraphs 15, 17 and 19 of volume 1 of the summary of findings handed down in the Cole Royal Commission in February 2003 it is stated that the union is engaging in conduct of the nature complained about in these proceedings including but not confined to:

(a) Disregard for the rule of law.

(b) Blackmail.

(c) Disguising of payments of money.

(d) Inadequate accounting procedures.

(e) Using industrial power to raise money for the unions own purposes.

(f) Disregard of lawful court orders by the union.

(g) Attempts to regulate the industry.

These are also some of the actions complained of by the applicant which took place post 2005 showing the union officials still think they own the industry and everyone working in it. This is a serious departure from the objects and ethics of unionism and its rules.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the 'actions complained of by the applicant which took place post 2005 showing the union officials still think they own the industry and everyone working in it';

(b) how such actions relate to a breach of the rules;

(c) where in the summary of findings handed down in the Cole Royal Commission in February 2003 is 'blackmail' mentioned, as alleged?;

(d) where in the summary of findings handed down in the Cole Royal Commission in February 2003 is the CFMEUW, a state registered organisation, the subject of adverse findings?

(e) what is the 'serious departure' from the objects and ethics of the union alleged.

Answer

(a) Arranging the summary dismissal of the applicant and blacklisting of himself and his stepson and the actions by the president during the 2008 election period and again in his attacks upon the applicant in December 2010 and the actions of official Brad Upton on 1 February 2012 in clearly threatening a large group of union members at Port Hedland with being blacklisted by the union and named and shamed in the union magazine if they accepted a caravan deal on offer by Worley Parsons and the continuing refusals of the union to keep proper accounts and issue receipts for levy money collected.

(b) These actions are clear breaches of the objects and conduct rules of the union.

(c) At 15(y), 17, 18 and 19.

(d) Due to the decision in PRES 3-6 of 2008 and evidence adduced by the secretary in that matter what is done in the name of the federal union is also done in the name of the state union and vice versa. Commissioner Cole did not expand on the differences between the two unions in his inquiries but moreover treated the two unions as one entity, however, the question again gives rise to the fact the union and its hired lawyers still want to have it (the question of separate jurisdiction) both ways at will.

(e) As charged breaches of r 3 and r 35.

Relationship (applicant's submission) – The summary of findings by Commissioner Cole point to a number of serious rule breaches by the union which have for the most part not abated since the Royal Commission.

(38) **Charge 38 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – The secretary and assistant secretary have a long documented history of threatening members and non-members in an angry violent fashion with the statement – 'you will never work in the industry again!' This is a serious breach of r 3 and an unlawful act on each occasion it took place. In recent years the union has been covertly using the ERMS blacklist to carry out these threats against its own members.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the 'long documented history of threatening members and non-members in an angry violent fashion';

(b) the persons involved, together with the dates, places and times for each occasion the secretary and assistant secretary 'threatened members and non-members in an angry, violent fashion with the statement – you will never work in the industry again'; and

(c) manner in which the union has used the ERMS blacklist to carry out threats against its own members.

Answer

(a) The Perth based newspapers have numerous historical examples of these threats being levelled at workers by the secretary and assistant secretary. The assistant secretary made this threat in relation to the applicant in 2006 which was heard by a witness in the union office.

(b) As reported in Perth based newspapers and in October 2006 in the union office in front of witness D1 who will be testifying in the trial of this matter.

(c) By arranging for construction managers to blacken their periodic and termination reports sent to ERMS solutions about particular union members.

Relationship (applicant's submission) – The behaviour of the secretaries is abhorrent and clear breaches of r 3.

(39) **Charge 39 – Breach of r 3(1), (2), (3), (5), (6), (11), (12), (13), (15) and (21)** – In or about September 2011 the ABCC launched an action against the union in relation to the ERMS blacklist. The union failed to mount a forthright defence or any follow up appeal to the action again showing the union is complicit in the blacklisting of its own members. The union executive are clearly happy to wash their hands of the ERMS blacklist issue despite the applicant and numerous other members remaining on the unlawful ERMS blacklist and having serious economic damage wrought upon their families. This is a serious breach of the objects and ethics of the union and its rules.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the action launched by the ABCC;

(b) the outcome of the ABCC's action;

(c) the ERMS blacklist;

(d) the defence that should have been mounted in respect of the proceedings;

(e) how it is said that 'the failure to mount a forthright defence' by the CFMEUW results in a breach of the CFMEUW rules;

(f) the 'serious economic damage' suffered as a result of the blacklist; and

(g) alleged serious breach of the objects and ethics of the union by reference to the rules.

Answer

(a) The action was to obtain a gag order to prevent the union from naming ERMS solutions and its subsidiary Bright People Technologies as a blacklist organisation.

(b) The union went along obligingly and the gag order was granted in the Federal Court.

(c) Is a well known blacklist organisation that has allegedly victimised hundreds and possibly thousands of members from several unions in the construction industry. The respondent has published facts about ERMS in its election propaganda and union magazine, however, this was only ever done reluctantly and under duress from the members as the union conveniently uses the blacklist to victimise dissident members.

(d) The union should have mounted a forthright defence to the proceedings including a national campaign of advertising and industrial action to expose and close down the unlawful blacklisting operation and the ABCC's collusion with it.

(f) A large number of highly skilled union members have suffered serious economic and collateral damage due to being locked out of the resources industry construction boom by the blacklist whilst errant employers continue to claim there is a skills shortage in the industry.

(g) The breaches of the objects of the union through the failure to mount a forthright and proper defence to the gag order is clear.

Relationship (applicant's submission) – Failure to defend members and the union itself from attack by ERMS solutions is clearly against the objects of the union r 3.

(40) **Charge 40** – Discontinued.

(41) **Charge 41** – Discontinued.

(42) **Charge 42** – Discontinued.

(43) **Charge 43 – Multiple breaches of r 3(1), (2), (3), (5), (6),(11), (12), (13), (15) and (21) and r 35(1)(a), (g), (h) and (i)** – There are abundant documents available in the matter of APPL 31 of 2011 showing serious breaches of the union rules and the rule of law by the assistant secretary which has brought the union and its members into disrepute.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the 'abundant documents' (or charge 43a can be satisfied by attaching a copy to the answer to this request);

(b) what, if any, matters are now raised that were not dealt with in APPL 31 of 2011;

(c) how charge 43 is able to be reconciled with the outcome in APPL 31 of 2011, including the applicant's unsuccessful attempt to intervene in the proceedings;

(d) the alleged serious breaches of the union rules;

(e) the alleged serious breaches of the rule of law by the assistant secretary; and

(f) the manner in which the union and its members have been brought into disrepute.

Answer

(a) The applicant does not have the file from APPL 31 of 2011 but the respondent does. The applicant has viewed the file at the registry. The respondent lawyers should refer to their own records. The applicant does, however, have a copy of the criminal record of Joseph McDonald for the period 23 February 1994 to 21 March 2011 inclusive. The record is extensive and appalling.

(b) The prima facie case of multiple rule breaches was not dealt with in APPL 31 of 2011.

(c) It cannot be reconciled through the outcome in APPL 31 of 2011 which itself was a further negative outcome for the assistant secretary who was refused the reissue of a right of entry permit.

(d) The criminal record alone is testament to a notorious offender who has total disregard for the rule of law let alone rules of his own union. Multiple breaches of r 3 and r 35 as charged.

(e) As recorded in his own criminal record from 1994 to 2011.

(f) The repeated and continuing unlawful behaviour of the assistant secretary has been widely publicised in the news media bringing the union and its members into disrepute by lowering public opinion of the union and its members.

Relationship (applicant's submission) –The behaviour of the assistant secretary as adduced in APPL 31 of 2011 define clear and multiple breaches of r 3 and r 35.

(44) **Charge 44 – Multiple breaches of r 1 through to r 39** – Since registration of the CFMEUW in September 2001 the secretary and assistant secretary conspired to keep the truth about the state union and its assets away from the members and worked to dupe the members into thinking there was only ever one federal union that owned everything whilst they operated the entity as a benevolent society for a select few. This is a massive breach of trust by the officials and conducive to gross maladministration.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) the alleged conspiracy to keep the truth about the state union and its assets away from members;

(b) the alleged breach of trust by officials;

(c) any representation made by the secretary and assistant secretary to the effect that there was 'only ever 1 federal union that owned everything';

(d) how the secretary and assistant secretary 'operated the entity as a benevolent society for a select few';

(e) the particular rule relied on in the charge and the manner of breach; and

(f) how charge 44 is able to be reconciled with the evidence and findings in inter alia ***Thompson v Reynolds*** [2009] WAIRC 00024 (23 January 2009) including that the CFMEUW:

(i) held elections for offices every four years,

(ii) filed annual returns in the Commission, and

(iii) issued joint membership cards to members.

Answer

(a) By leaving off or removing all mention of the state union from printed material distributed to the members, including, but not limited to, all receipts for subscriptions, union tickets, advertising, posters, and the union magazine and by the secretary always signing himself as secretary of the federal union on all material distributed en mass [sic] to the membership.

By not clearly holding separate monthly meetings or keeping separate records and minutes of general meetings and executive meetings. By not obtaining separate joining applications for the CFMEUW as defined in the rules, but instead cleverly disguising the application underneath the heading on the federal union joining cards.

(b) The breach of trust relates to the duping of the membership into thinking that the two unions are in fact one single union and all the assets and funds were being controlled by one single entity. In

corroboration of this the membership were clearly confused at the onset of two separate elections in 2008 causing the secretary to send out an explanation to the members at huge cost to the union.

(c) Refer to (a) and (b) above.

(d) By taking control of the funds away from the trustees and siphoning levies and other money out of the union coffers. By setting up other entities such as the Building Trades Association of Unions of Western Australia (Association of Workers) with small despotic rule books that allow for secret ballots and wages and payments to be made to members from union funds and business deals with private enterprises such as printers.

(e) The entire rule book as the whole nature of the entity has been corrupted.

(f) It is not able to be reconciled by the decision in PRES 3-6 of 2008.

Relationship (applicant's submission) – See 44(e) above.

(45) **Charge 45 – Breach of r 3(1), (2), (3) and (13) and r 35(1)(a), (g) and (i)** – On 23 March 2010, the assistant secretary addressed a large public rally in Perth and clearly blamed union members employed at the Pluto construction project for an unlawful strike. The Federal Court later found the assistant secretary guilty of inciting the unlawful strike and fined him and the union a large sum of money. This is serious misconduct by the assistant secretary.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for each of the following:

(a) manner in which union members were blamed;

(b) how charge 45 relates to a breach of any rule of the CFMEUW; and

(c) how this charge 45 is reconciled with the matters in issue in the following proceedings:

(i) ***Woodside Burrup Pty Ltd v Construction, Forestry, Mining & Energy Union*** [2011] FCA 949 (22 August 2011) which involved industrial action 1 and 2 December 2009 at the Pluto Project by the CFMEU (and not the CFMEUW), and

(ii) ***United Group Resources Pty Ltd v Calabro (No 5)*** (includes corrigendum dated 16 December 2011) [2011] FCA 1408 (8 December 2011) which involved industrial action in the period 22 to 30 January 2010 by employees on the Pluto Project (but not the CFMEU or CFMEUW).

Answer

(a) At this link http://www.youtube.com/watch?v=jIMM71QzuUQ is a video filmed on 23 March 2010 where at 7m30s the assistant secretary blames 2000 construction workers at Pluto for 'taking industrial action on their own without the union'. The assistant secretary was later blamed by the Federal Court for inciting the industrial action.

(b) Due to the decision in PRES 3-6 of 2008 and testimony in that matter by the secretary any action done in the name of the federal union is also done in the name of the state union and vice versa.

(c) The charge cannot be reconciled by these matters as the fact the assistant secretary blamed union members at a public rally on 23 March 2010 was not a matter being determined in these matters. Also see (b) above.

Relationship (applicant's submission) – The attempts by the assistant secretary to blame innocent union members for an illegal strike which he clearly incited is a gross breach of r 3 and r 35.

(46) **Charge 46 – Breach of r 12** – The executive and or the trustees recently gave an expensive motor vehicle belonging to the union to the retiring secretary. Rule 12 does not allow union property and funds to be given away. The vehicle should have been either inherited by the incoming secretary or sold and the funds invested back into the union in accordance with r 12.

Request for further and better particulars – In respect of this charge specify the usual particulars of the charge, including the usual particulars for the:

(a) manner in which the trustees 'gave' an expensive motor vehicle away;

(b) records showing ownership of the motor vehicle;

(c) the basis upon which the applicant is able to assert that:

(i) the motor vehicle was gifted to the past secretary; and

(ii) the CFMEUW had previously owned the vehicle.

Answer

(a) It is not determined, nor is it alleged that the trustees alone gave the union asset away. There needs to be an inquiry to determine this fact.

(b) Obviously the applicant does not have access to those records until the union allow a proper book inspection.

(c) (i) It was widely publicised by the news media that the asset had been given to the secretary who himself disclosed the gift on a Perth radio station.

(ii) Due to the decision in PRES 3-6 of 2008 and the fact the union has now obtained a certificate under s 71 of the Act it is not relevant which union owned the vehicle. What is relevant is that neither union has a rule that allows an official to make off with union property at their alleged retirement.

Relationship (applicant's submission) – Giving away union assets to retiring officials is clearly in breach of r 12.

(47) **Charge 47** – Discontinued.

Orders and remedy sought

(1) **Order 1** – The executive members of the CFMEUW be immediately disqualified from ever holding office in the union.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) to which charge above does this order specifically relate?; and

(b) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) All charges that implicate the union executive and are proved at trial.

(b) Section 14 of the Act.

(2) **Order 2** – Mark Hudston and Bob Wade be immediately disqualified from ever holding office in the union.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) to which charge above does this order specifically relate; and

(b) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) All charges where these officials are implicated and the charges proven at trial.

(b) Section 14 of the Act.

(3) **Order 3** – The union be ordered to apologise to Joshua Daley for discrimination and to terminate the employment of Rod Reynolds for discriminating against Joshua Daley.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) to which charge above does this order specifically relate?; and

(b) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) Charges 2, 7, 8 and 25.

(b) Section 14 of the Act.

(4) **Order 4** – The union be ordered to progress the wage claim of Joshua Daley v Catcon Pty Ltd without further delay.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) to which charge above does this order specifically relate?; and

(b) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) Charges 2, 7, 8 and 25.

(b) Section 14 of the Act.

(5) **Order 5** – The assistant secretary be ordered at his own cost to publish a visible retraction and apology for the derogatory comments made to the news media against the applicant after his arrest in Bali in at least one statewide newspaper and one national newspaper broadsheet.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) the 'derogatory comments' referred to, including date, where published, and the content of the comments;

(b) to which charge above does this order specifically relate?; and

(c) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) Charge 20.

(b) Section 14 of the Act.

(6) **Order 6** – The president be ordered to write to the members at his own cost retracting the falsehoods he published during the 2008/9 election ballot about the applicant standing in elections for the National party.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) the 'falsehoods he published during the 2008/9 election ballot about the applicant';

(b) to which charge above does this order specifically relate?;

(c) which 'National party' is referred to; and

(d) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) Refer to 14 above.

(b) Charge 14.

(c) Section 14 of the Act.

(7) **Order 7** – The executive members and other officials be ordered to repay misappropriated funds to the union and pay tax on under the counter weekly cash payments received at the union office.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) the 'misappropriated funds';

(b) the 'under the counter weekly cash payments';

(c) to which charge above does this order specifically relate?; and

(d) which specific provision of the Act is relied upon to achieve this Remedy?

Answer

(a) All stolen funds as particularised in this document and proven at the trial of this matter.

(b) As adduced in evidence by witness K2 in the Australian Taxation Office investigation and his future testimony at the trial of this matter.

(c) To all charges dealing with misappropriated funds.

(d) Section 14 of the Act.

(8) **Order 8** – The secretary be ordered at his own cost to reinstate the membership of Mr Terry McParland and offer genuine reparation for the years of victimisation he instigated upon this person.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) the 'victimisation' referred to;

(b) the standing of the applicant to see such a remedy;

(c) how this remedy is to be reconciled with the decision in ***McParland v The Construction, Forestry, Mining and Energy Union of Workers*** [2002] WAIRC 06935 (12 September 2002);

(d) to which charge above does this order specifically relate?; and

(e) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) The premeditated expulsion from the union and the stated blacklisting from work in the industry.

(b) On behalf of a former victimised member who was wrongly expelled from the union and cannot afford legal representation.

(c) Cannot be reconciled by PRES 30 of 2002 because the decision was erroneous, the union used its resources and power against Mr McParland in an unfair manner and the matter should have gone to appeal.

(d) Charge 36

(e) Section 14 of the Act.

(9) **Order 9** – The trustees be removed from the control of funds and assets belonging to the union.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) to which charge above does this order specifically relate?; and

(b) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) All charges relating to the misappropriation of funds as proved at the trial in this matter.

(b) Section 14 of the Act.

(10) **Order 10** – The secretary be ordered to return the Range Rover to the property of the union.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) to which charge above does this order specifically relate?; and

(b) which specific provision of the Act is relied upon to achieve this remedy?

Answer

(a) Charge 46

(b) Section 14 of the Act.

(11) **Order 11** – The Commission deregister the CFMEUW under s 73 of the Act and order all assets, funds and liabilities to be transferred to the control of the members of the CFMEU Construction and General Division, Western Australian Divisional Branch including all reimbursements of misappropriated funds.

Request for further and better particulars – In respect of this remedy sought, please provide the usual particulars of the following:

(a) to which charge above does this order specifically relate?

(b) the standing of the applicant to seek an order under s 73 of the Act?

Answer

(a) All or any of the charges as proved at the trial of this matter.

(b) Under s 73(1) and s 14 of the Act the applicant can request the President make such an order.

Evidence on affidavit

9 In support of its application to dismiss the substantive application, the CFMEUW filed an affidavit of Shannon Nora Walker made on 30 April 2012. Ms Walker is employed by the CFMEUW and its counterpart federal body, the CFMEU Construction and General, WA Division (CFMEU Branch), as an in-house solicitor. She has held that position since 3 November 2009. Prior to being employed as a solicitor she was employed by the CFMEUW and the CFMEU Branch as an industrial officer from 8 July 2008.

10 Ms Walker, after examining the amended statement of particulars and answers to request for further and better particulars filed by the applicant, made inquiries into the following matters:

(a) When Kevin Noel Reynolds ceased to be secretary of the CFMEUW;

(b) When Timothy Kucera ceased to work as an in-house solicitor for the CFMEUW;

(c) When Robert 'Bob' Wade ceased to be employed by the CFMEUW;

(d) Whether a levy was placed on all CFMEUW members in accordance with r 11 of the CFMEUW rules in 2011; and

(e) Any correspondence received by the applicant relevant to the charges made by the applicant in the documents stated in 5(a) – (d) of her affidavit.

11 Ms Walker states in her affidavit that from her inquiries from the records of the CFMEUW and the CFMEU Branch and other inquiries that:

(a) Mr Reynolds resigned as secretary of the CFMEUW on 21 December 2011 and Michael Buchan was appointed to the vacancy on 22 December 2011.

(b) Mr Kucera was employed as an in-house solicitor by the CFMEUW and the CFMEU Branch on or from 16 September 2002 until on or around 21 June 2007. As at 11 September 2008, Mr Kucera acted for the CFMEUW in PRES 3-6 of 2008.

(c) As to the allegations made which raised matters in respect of former official, Robert Wade, in charges 28 and 30, Mr Wade was an employee and elected organiser for the CFMEUW in 2004. On or around 27 July 2007, Mr Wade resigned from his employment and shortly thereafter moved to the Northern Territory to establish a branch of the CFMEU. Documents filed in the Commission state, however, that Mr Wade ceased to hold office before 1 January 2009.

(d) As to the issue whether a levy was placed on the CFMEUW's members in 2011, the executive minutes for 2011 show that no levy was placed on the members of the CFMEUW pursuant to r 11 in 2011.

12 The applicant filed an affidavit in response to Ms Walker's affidavit on 18 May 2012. His affidavit also deals with issues which he says provide evidence to support the matters alleged in respect of a number of the charges. When the statements made in his affidavit are examined, however, it can be seen that the statements made in the affidavit are largely in the nature of submissions unsupported by evidence or not supported by the documentary material annexed to his affidavit.

13 In relation to the matters set out in Ms Walker's affidavit, the applicant disputes the statement in Ms Walker's affidavit that the CFMEUW is 'an organisation'. He makes a submission that the CFMEUW is not an organisation by the true meaning of the word as it has been proved that the CFMEUW did not keep proper records, accounts, or minutes of general meetings and executive meetings. He also says it has been proved that the CFMEUW did not have any bona fide members, and for these reasons it cannot be legally referred to as 'an organisation'. He then goes on to say whether or not a levy was placed on members in 2011 under the rules of the CFMEUW, or under the rules of the CFMEU Branch, or under no rule at all, is not evidence of anything because:

a) Anything done in the name of the federal registered union is done in the name of the State registered union and vice versa. See paragraphs 37 and 38 of the attached Outline of submissions from the applicant.

b) It is not relevant if a rule was used or not used. What is relevant is that there are alleged levies being taken up with little to no accountability for the funds.

c) The allegation if proved would amount to more than just a breach of rule 11 of the CFMEUW rules.

14 The applicant contends in his affidavit it is not relevant that Mr Reynolds resigned on 21 December 2011 as the charges relate to times when Mr Reynolds was the secretary of the CFMEUW or its predecessors, The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (BLPPU) and The Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch (BLF), and the same considerations apply for Mr McDonald in relation to the CFMEUW and the CFMEU Branch.

15 The applicant also makes the submission that it is not relevant as to when Mr Kucera or Mr Wade resigned.

16 The applicant's affidavit then goes on to deal with a number of allegations which relate to the conduct of Mr Reynolds, Mr McDonald, Mr Wade, David King, Terry McParland, persons employed by John Holland Constructions and payments made to the Construction Skills Training Centre.

17 Annexed to the applicant's affidavit is a bundle of audio tapes and corresponding compact disks which contain covert recorded surveillance of events that occurred in 1997 in Port Hedland. It is clear from the applicant's affidavit that the applicant was not personally a witness to any of these events in which he makes allegations. One of the central allegations to a number of alleged charges that the applicant makes is that the Construction Skills Training Centre has been used as a money laundering operation by the CFMEUW.

18 Annexed to the applicant's affidavit are documents which include company searches including a certificate of title for the land on which the Construction Skills Training Centre is located. The certificate of title shows the land is owned by the former BLPPU. In the applicant's affidavit he makes a submission about this fact and says that, in his opinion, this shows the BLPPU has never ceased to exist but moreover amalgamated with the respondent and remained active despite the respondent obtaining a new name as a new entity, the CFMEUW.

19 The applicant then makes an allegation in his affidavit that following the amalgamation of the BLPPU with the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch (CMETSWU) in September 2001 the members were 'stripped away' and moved across to the CFMEU Branch whilst the assets remained behind under the control of Mr Reynolds and Mr McDonald.

20 Annexed to the applicant's affidavit as annexure D is a copy of the application for incorporation of the association of the Construction Skills Centre which was lodged with the Ministry of Fair Trading Business Names Branch under the *Associations Incorporation Act 1987* (WA) on 28 April 1998. In that application, it is stated that the association is not formed for the purpose of trading or securing a pecuniary profit to the members from the transactions of the association. Also annexed as annexure D to the applicant's affidavit is a copy of an application by Mr Reynolds certifying that he is the person authorised to apply for the incorporation of the association under the name Construction Skills Centre and a notice of special resolution made on 5 January 1999 recording a resolution made by the Construction Skills Centre that the name of the incorporated association shall be the Construction Skills Training Centre. From these documents, the applicant draws a conclusion in his affidavit that the name of the person purporting to be profiting from ownership of the training centre is Mr Reynolds. He also makes a submission in his affidavit that a corporation the size of the training centre which employs numerous persons with a high cash flow and high income from other sources cannot claim to be a non-profit organisation as it is a conclusion that beggars belief and warrants a thorough investigation.

21 The applicant then deals with the allegation in charge 46 that the executive and the trustees recently gave an expensive motor vehicle belonging to the CFMEUW to Mr Reynolds when he retired. In 'apparent' support of this contention, the applicant annexes to his affidavit a copy of a letter sent by the CFMEUW's instructing solicitors, Slater & Gordon, dated 27 April 2012. In the letter, which is annexure E, the CFMEUW's solicitor states that the vehicle referred to in the charge is, and has always relevantly been, in the ownership of the Construction Skills Training Centre and not the CFMEUW. Attached to the letter are duplicate copies of the vehicle's registration papers dated 13 December 2011, the vehicle's licence and insurance policy dated 12 March 2012 and the Certificate of Incorporation of the Construction Skills Training Centre. The letter also states:

> Notwithstanding that a retirement benefit was once considered by the combined CFMEU and CFMEUW Executives in 2011, there is no current or operative motion on foot. Similarly, there is no extant Notice pursuant to CFMEUW Rule 16(9) or otherwise to have the matter considered by the General Meeting of CFMEUW members.
>
> It follows that the premise of your Charge is fundamentally misconceived. There has been no gift or transfer of ownership of a vehicle as alleged by you.

22 The applicant in his affidavit says about this document, that the motor vehicle registration documents give the registered address of the vehicle in question as the CFMEUW. The applicant then makes a submission in his affidavit that the training centre has always been marketed to the members as the 'union training centre' so the Range Rover was and is at all material times owned by the CFMEUW and is not something that can just be given away. The applicant then makes an allegation in his

affidavit that the letter is an attempt to deflect the applicant away from anything to do with the training centre and is founded upon the desperate need for the CFMEUW to cover up the alleged money laundering operation going on at the training centre.

23 The applicant then states in his affidavit that until the 2008 election ballot, Les Wellington was both an assistant secretary of the CFMEUW and general manager of the training centre and prior to the tenure of Mr Wellington, Kim Young was both assistant secretary of the CFMEUW and manager of the training centre. The applicant makes a submission that these facts contradict the attempt to claim that the vehicle was not owned by the CFMEUW because it was registered in the name of the training centre. He then asks if the training centre truly is a separate entity to the union, why is a paid union official employed to run it? The applicant also makes the submission again that either scenario requires a wider and thorough investigation into the operation of the training centre and who owns the training centre.

24 After making a general statement about various negative articles that have been written in newspapers in the past about the CFMEUW and its leaders, the applicant then goes on to say in his affidavit:

> 73. The evidence of rorting money, bribes, and blackmail and laundering it through the training centre is compelling. There is no doubt that at least 3 of the top 4 officials have brought the union into disrepute and the evidence filed here is certainly compelling enough to warrant a thorough and wide ranging investigation into the running of the union and the training centre since it's move to Radium St. Welshpool.
>
> 74. The evidence filed in these proceedings establishes both a prima facie case for criminal prosecution for fraud and misrepresentation in the way the training centre has been portrayed to the union Rank & File membership in respect of who owns it and who shares in the profits from it. There is also a potential prima facie case for deregistration of the CFMEUW until such time as it can prove authentic membership and accountability prior to hitching a ride on the back of the Federal union which is a different organisation.
>
> 75. The evidence filed in these proceedings also has a strong indication of a prima facie case of fraud and misrepresentation in the way the ownership of the land in Radium St Welshpool which the Training Centre is situated on, has been portrayed to the members. The BLPPU must be immediately extinguished properly as it is clearly still being used as a vehicle to cloak ownership of land and assets. In accordance with law the title deed for the land must now be transferred and become an asset in the control of the Federal union and its full executive powers.

25 The applicant's affidavit is littered with numerous allegations which relate to complaints against the CFMEUW and its related predecessors being made by other members which extend from about 1999. The applicant also deals at some length with his complaints about being dismissed by Downer Energy Systems Pty Ltd in 2006 and a complaint that the CFMEUW failed to promptly and honestly prosecute his claim for unfair dismissal.

26 Other documentary material the applicant refers to in his affidavit is in annexure J to his affidavit where is attached a chronological graph of a chart showing an alleged criminal record of Mr McDonald from February 1994 to March 2011. This document purports to set out a record of 18 criminal offences. The applicant makes a submission in his affidavit that based on the 'evidence' which is generally set out in his affidavit in respect of past events which he alleges have occurred and the criminal record of Mr McDonald, Mr McDonald is not a fit person to hold office and should be disqualified from ever holding office in a trade union immediately.

Respondent's submissions in support of the application to have the proceedings summarily dismissed

27 The CFMEUW's application seeks to have the application summarily dismissed. Counsel for the CFMEUW firstly points out that the application, filed on 16 December 2011, by the applicant for orders under s 66(2) of the Act on the ground of alleged breaches of rules of the union, is not confined to r 3. He specified those grounds as threats, violence, bribery, misappropriation of members' funds and tax evasion by officers of the respondent.

28 At a directions hearing on 16 February 2012, the applicant had at that time received the respondent's written submissions which variously identified the shortcomings in the application and the accompanying further particulars. Those submissions included extracts from the decision of Ritter AP in ***Stacey v Civil Service Association of Western Australia (Inc)*** [2007] WAIRC 00568; (2007) 87 WAIG 1229 [273] – [274] which should have at least put the applicant on notice that:

> (a) His numerous allegations which are many years old would be susceptible to strike out; and
>
> (b) The Commission's jurisdiction under s 66 of the Act was to keep an organisation 'on track' vis a vis its rules. The applicant also at that time had oral submissions from the respondent's counsel which included an invitation to the applicant to attempt to redress some of the vices in his case which had been identified and to remove the prejudice on part of the respondent and to rationalise the disparate allegations that had been made in order to bring some semblance of reason to the application (ts 14).

29 The CFMEUW submits that it should not fall upon it, or the Commission to parse out the allegations which, of themselves, may give rise to a prima facie case. Rather, the application itself, as particularised, should be wholly assessed in order to determine whether s 27(1)(a) of the Act is properly engaged. The CFMEUW says this approach is consistent with case management principles adopted in courts of general jurisdiction which reflect the same objectives as found in s 26 of the Act: see ***Aon Risk Services Australia Ltd v Australian National University*** [2009] HCA 27; (2009) 239 CLR 175. In jurisdictions which are guided by these principles, proceedings are susceptible to summary dismissal where a party fails to properly plead or particularise a case. In such a case, there are a number of possible outcomes where a party faces such a successful challenge to its pleaded case including the following:

> (a) Striking out part of the pleadings which may mean the cause of action survives notwithstanding the removal of the impugned allegations; or

(b) If the court considers there are too many deficiencies to warrant a line by line attack on the pleadings, order that the entire claim be struck out. Such an order can be made notwithstanding that some pleadings in isolation may otherwise withstand close scrutiny. In that event, the court can in its discretion:

(i) give the party leave to re-plead its case; or

(ii) dismiss the proceedings without leave to re-plead.

30 The applicant was provided with an opportunity to correct the deficiencies in his application by furnishing answers to a request for further and better particulars which the applicant was directed to provide pursuant to the Commission's power in s 27(1)(o) of the Act. The CFMEUW points out that this provision is an important power designed to prevent unfairness to a party. The CFMEUW also points out that, as Mason CJ and Gaudron J said in ***Banque Commerciale SA En Liquidation v Akhil Holdings Ltd*** (1990) 169 CLR 279, 286, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The CFMEUW says that the applicant's answers do not clarify the issues in the case. Nor are the allegations put in the further and better particulars, true particulars. They do not state with sufficient clarity the precise case to be met, and, in any event, the applicant disclaims in his written submissions any reliance on the right to re-plead or re-cast his case. He has elected to stand or fall on the case that he has put up.

31 Consequently, the CFMEUW submits that the Commission should dismiss the proceedings in their entirety, if it is satisfied that the matters pleaded are sufficiently defective.

32 The CFMEUW says the application as particularised is defective, poorly drafted, and among other deficiencies, fails to adequately put the CFMEUW on notice as to the precise case it would be required to meet. They say this submission is supported by a minute of proposed orders filed by the applicant on 13 June 2012 in which the applicant seeks summonses to issue to 28 witnesses in his case alone. The CFMEUW says it is clear from the orders sought that the applicant is seeking a vast and wide ranging inquiry based on very general types of allegations. The CFMEUW says that overarching all of the grounds in the application for summary dismissal is the issue of time, cost and effort that would be expended if this matter proceeds to hearing and this is a legitimate fact to be considered in an application under s 27(1)(a) of the Act: ***Kangatheran v Boans Ltd*** (1987) 67 WAIG 1112. In circumstances where the applicant has refused to appropriately rationalise his allegations and has maintained an application replete with specious but serious allegations, if these matters proceed to hearing, the expense to the CFMEUW and to the public will be overwhelming and unrecoverable.

(a) Ground 1 of the objections – Abuse of process

33 In this ground the CFMEUW says the applicant seeks to re-litigate a very large number of matters already raised or determined in other proceedings or raise issues that should have been brought or raised in the proceedings in past matters. This ground also goes to the ulterior motives of the applicant. The CFMEUW says the applicant displays a continual total disregard for previous decisions of this Commission. Not only does he criticise them without gilding his opinion, he ignores them as if the decisions were not made and seeks to run his case again.

34 The CFMEUW points out the applicant contends in his submissions that because his various applications have been summarily dismissed, this does not qualify as litigation per se so he argues that he is able to bring the same matters back before the Commission in further attempts.

35 The true position of the applicant is said to be evident from the following contentions made by the applicant in the following documents filed by him:

(a) Various applicants in the Commission have been 'affronted by the most incredible and baseless decisions from the Bench such as the ruling in Pres 30 of 2002 ..., or the ruling in Pres 3 to 6 of 2008': applicant's submissions (8).

(b) 'Both the Union and the Registrar [of the WAIRC] are responsible for this malfeasance and or crime' – which involves allegations of unauthorised use of union credit cards and corruption (which allegations the applicant admits (in (23)) do not form part of his case): applicant's submissions (24).

(c) 'It has also been proved the organisation did not have any bona-fide members ... the entity known as the CFMEUW cannot be legally referred to as "an organisation"': applicant's affidavit (5).

(d) 'Anything done in the name of the Federal registered Union is done in the name of the State registered Union and vice versa': see (6(a)) of the applicant's affidavit.

(e) 'What followed the amalgamation of September 2001 is the members were stripped away and moved across to the [Federal Union]': applicant's affidavit (21).

(f) 'The Decision in Pres 20 [sic] of 2002 is fundamentally flawed': applicant's affidavit (65).

(g) 'There is also a potential prima facie case for deregistration of the CFMEUW until such time as it can prove authentic membership ...': applicant's affidavit (74).

36 The CFMEUW says these contentions betray the applicant's true intention to re-litigate matters that he has unsuccessfully argued in the past. They say 17 of the 42 charges involve attempts at re-litigating matters and are appropriately characterised as abuses of process. These are charges 11, 12, 13, 14, 17, 23, 26, 27, 28, 35, 36, 40, 41, 42, 43, 44 and 45.

37 The history of litigation commenced by the applicant in PRES 2 of 2008 which was made on 29 August 2008. This was an application for an election inquiry under s 66 of the Act in which he alleged breaches of r 27(7) and r 23(11) of the rules of the respondent. In these proceedings it was variously alleged that candidates:

(a) other than the applicant had commenced campaigning prior to the acceptance of nominations by the Western Australian Electoral Commission;

(b) were using union resources in elections.

38 The application was in effect an application for injunction which would have had the effect of postponing the pending elections of the CFMEUW. The application for urgent orders was dismissed. (**Note: refer to reasons for decision**).

39 In PRES 3-6 of 2008 an issue arose during the course of an election inquiry as to whether the CFMEUW had any members at all: ***Thompson v Reynolds*** [2009] WAIRC 00024; (2009) 89 WAIG 287. In these reasons the matter will be referred to as PRES 3-6 of 2008 and the reasons for decision given in those matters as ***Thompson v Reynolds***. The applicant sought to intervene in an election inquiry. Contrary to the position the applicant took in PRES 2 of 2008, he sought to intervene in PRES 3-6 of 2008 to argue that the Western Australian Electoral Commission should not postpone the ballot. The CFMEUW makes two points about the application to intervene. First of all it says that the applicant in PRES 3-6 of 2008 took a diametrically opposed view to the position he had taken a month earlier in PRES 2 of 2008 in that in PRES 2 of 2008 he was seeking to postpone the election and in PRES 3-6 of 2008 he was seeking to make a submission that the election should not be postponed. The CFMEUW says this action shows the vexatious nature of the matters the applicant seeks to raise. The second issue the CFMEUW raises in relation to PRES 3-6 of 2008 is that although the applicant made an application to intervene at the commencement of the proceedings, he failed to renew his submission until the end of the hearing. This was despite the fact that the applicant was present in court during the entire proceedings. The CFMEUW points out that the applicant's application to intervene in PRES 3-6 of 2008 included grounds that he had been compelled to move to a safe location due to death threats received from parties connected to the CFMEUW election. However, notwithstanding the serious allegations, no such evidence was presented during the proceedings. At the end of the proceedings, the application for intervention was dismissed.

40 On 2 October 2009, the applicant commenced an application for an election inquiry in PRES 7 of 2008. In that application, he sought an urgent order and injunction that all assets and records of the CFMEUW be frozen, pending the outcome of the inquiry. The matter was dealt with by the CFMEUW through the proffering of undertakings given in written submissions filed on 9 October 2008 by Mr Reynolds not to destroy any documents (physical, electronic or otherwise) in the possession, custody or control of the CFMEUW falling in the categories of minute books, documents prepared by the CFMEUW accountants, any files created by the CFMEUW in relation to legal proceedings it had been a party to, any bank records relating to bank accounts controlled by the CFMEUW, any membership roll of the CFMEUW and copies of any documents lodged in the Commission relating to the registration of the CFMEUW as an organisation under the Act, the finances of the CFMEUW, enterprise agreements to which the CFMEUW is a party and the 2008 election of CFMEUW office holders (exhibit 1, tab 21, [34] and tab 22 (ts 249)). Notwithstanding that the application in PRES 7 of 2008 was discontinued on 16 October 2008, on 31 August 2010 the applicant had made a written submission in that matter that he had 'evidence of serious mal-administration by persons on the union executive, pertaining to the destruction of records, manipulation of records, and the acquisition of property and assets belonging to the CFMEUW' (exhibit 1, tab 24).

41 It was also alleged by the applicant in PRES 7 of 2008 that there was an 'alleged theft of cash funds by some officials inside the CFMEUW totaling [sic] somewhere between $5,000,000.00 and $15,000,000.00 over an extended period and, conspiracy to murder and, premeditated murder' (exhibit 1, tab 24). The respondent says that not only are these allegations scandalous, but shows the applicant is willing to make any sort of allegation that would further his cause and is no way circumspect about the allegations that he makes. Notwithstanding those extremely serious allegations, there was no evidence or proceedings commenced in order to further support those allegations.

42 In or around September 2008, the applicant commenced proceedings in the Federal Court of Australia in matter PEG 149 of 2008 in which he sought an application for an election inquiry into the elections of the CFMEU Branch. He also sought, by way of relief, an 'indefinite injunction' against the Australian Electoral Commission to halt the election process (exhibit 1, tab 25). This application was amended on 1 October 2008 and thereafter discontinued on 13 October 2008 (exhibit 1, tab 27).

43 On or about 13 October 2008, the applicant commenced a second application for an election inquiry into the elections of the CFMEU Branch in matter WAD 221 of 2008 in the Federal Court of Australia. As part of that election inquiry, he again sought interlocutory relief in the form of an indefinite injunction to halt the election process. The main ground of the application was that there was an irregularity based on an allegation that union resources (including in the form of the membership register) had been used by candidates other than himself (exhibit 1, tab 28). The application was dismissed without an election inquiry being instituted: ***Mcjannett, in the matter of an application for an inquiry in relation to an election for offices in the Construction, Forestry, Mining and Energy Union, Western Australian Branch*** [2009] FCA 996.

44 On 23 February 2009, the applicant commenced application PRES 2 of 2009 seeking an election inquiry. The thrust of the application involved an issue of disclosure of members' telephone numbers to certain candidates during an election process. An application was made by the CFMEUW to intervene to have the matter summarily dismissed. The applicant opposed the summary dismissal application and alleged that any such order made under s 27(1)(a) of the Act 'could be seen as malfeasance at best, or at worst, official corruption in the form of one State Agency "the WAIRC" using its vested powers to cover up corruption in another State agency "the WAEC"' (exhibit 1, tab 45). The application was summarily dismissed by Ritter AP on the basis that the application was moot, as the 2008 electoral process had been halted by an order made on 16 September 2008 and a new election had been ordered to take place on 29 February 2009. It was also found that the supply of the 2008 electoral roll to Mr Reynolds and Mr Kavanagh prior to 16 September 2008 was not an irregularity in connection with the election which was ordered to take place on 28 January 2009: ***Mcjannett v Reynolds*** [2009] WAIRC 00211; (2009) 89 WAIG 633.

45 On 29 June 2009, the applicant commenced proceedings in PRES 5 of 2009, again seeking an election inquiry and again alleging 'fraudulent registration and administration of the CFMEUW' (exhibit 1, tab 51). In this application the applicant alleged that the CFMEUW has no legal basis for existence and that the union has less than 200 members and therefore should be deregistered. However, the notion that the CFMEUW has no members was a matter that had been squarely dealt with and rejected in PRES 3-6 of 2008: ***Thompson v Reynolds***. This application too was summarily dismissed on two grounds. Firstly, on the basis the application was clearly an attempt at re-litigating issues that had previously been determined by the Commission: ***Mcjannett v Reynolds*** [2009] WAIRC 1282; (2009) 89 WAIG 2395. The second basis upon which the matter

was dismissed was that the applicant had sought to approbate and reprobate in that he sought to bring the application on the basis that he was a member and a candidate in the election and then sought to argue that there were no members of the CFMEUW. The CFMEUW points out that the applicant seeks to raise this issue again in these proceedings in charges 17 and 35. The applicant also raises a similar issue in charge 44.

46 On 15 June 2011, the then secretary of the CFMEUW, Mr Reynolds, commenced APPL 31 of 2011 seeking a right of entry permit for assistant secretary, Mr McDonald. The applicant sought to intervene in those proceedings on the last day of hearing. His grounds for intervention included allegations of 'a money laundering operation … within the CFMEUW' and that 'the CFMEUW has very few and possibly zero bona fide financial members'. The application for leave to intervene was dismissed: ***Re Reynolds*** [2011] WAIRC 00989; (2011) 91 WAIG 2212. The Commission in Court Session found it would be an abuse of process to allow the application to intervene as it was too late for the hearing to be re-opened.

47 On 18 November 2009, the respondent commenced an application in the Commission to alter its rules and to seek a certificate under s 71 of the Act: FBM 6 of 2009. This application arose squarely out of issues revealed and considered by Ritter AP: ***Thompson v Reynolds***. The applicant sought to intervene in FBM 6 of 2009. In an affidavit filed in support of the applicant's application to intervene he alleged that when the CFMEUW applied for transitional registration the evidence they offered was fraudulent because Mr Reynolds substituted the members of the state union with the members of the federal union. The applicant then also made allegations about his employment at the Collgar Wind Farm and made complaints about an alleged failure to accept payment of union dues and threats to expel him. He also alleged that the actions of the CFMEUW were a belligerent and amateurish attempt to get him out of the way before the CFMEUW progressed its application for a s 71 certificate and rule change which amounted to a gross abuse of power.

48 When the applicant's application to intervene in FBM 6 of 2009 was heard, the applicant made a submission that the Full Bench was obligated to adjourn the matter indefinitely whilst the allegations he made were investigated by the Corruption and Crime Commission (exhibit 1, tab 71, [15]).

49 Notwithstanding the findings in PRES 3-6 of 2008 (***Thompson v Reynolds***), the applicant also based his application to intervene in FBM 6 of 2009 on the ground that the CFMEUW was substituting members and finances from and possibly to another union (exhibit 1, tab 75) and made the following submissions from the bar table:

(a) 'The executives from the union are stealing funds. I have no qualms in making that allegation. No hesitation whatsoever. We have the evidence. Senior officials of this union are arranging to interfere in members' employment and arranging to have them dismissed because they simply don't like them, or don't like what they've said or whatever. There have been a number of assaults, a number of threats, death threats. Every imaginable type of violent personality is emanating from this union executive' (exhibit 1, tab 76, ts 6).

(b) 'If the Commission today allow [sic] this section 71 certificate, they are adding to the criminal activity' (exhibit 1, tab 76, ts 6).

(c) 'Mr Ritter's decision is somewhat hesitant when you read it in PRES 3 to 6. He had some hesitation in allowing all of this to continue, but again he was constrained by the matters that were before him, and it wasn't an application to determine whether they were legitimate members or not' (exhibit 1, tab 76, ts 6).

(d) 'Your Honour, I've pointed out to you in documents in the past there is somewhere between five and 15 million dollars missing. Now, that's very serious. I've pointed out that there are no legitimate members of the CFMEUW. I've pointed out that the CFMEUW and its training centre are being used as a money-laundering operation' (exhibit 1, tab 76, ts 9).

(e) '… perhaps Mr Ritter will be explaining that to the CCC some time down the track' (exhibit 1, tab 76, ts 10).

(f) 'I should only raise that the allegations that have already been put before this court are criminal allegations – go as far as premeditated murder, and – so this is very serious, and I cannot express that enough' (exhibit 1, tab 76, ts 14).

50 The Full Bench dismissed the applicant's application to intervene. In reasons for decision in ***Re The Construction, Forestry, Mining and Energy Union of Workers*** [2011] WAIRC 01175; (2011) 92 WAIG 6, the Full Bench found at [11] and [13]:

> [11] When the application to intervene was heard on 16 December 2011, Mr Mcjannett outlined particulars of the grounds of his application. In summary the points he made were as follows:
>
> (a) Officers and employees of the State organisation had interfered in contractual relations of members with their employer and had committed criminal offences and amongst other offences had stolen or misappropriated funds;
>
> (b) There were no members of the State organisation;
>
> (c) The State organisation had filed false returns in the Commission.
>
> [13] After hearing submissions from Mr Mcjannett and from counsel for the applicant, the Full Bench dismissed Mr Mcjannett's application to intervene. The reason why the application was dismissed is that the Full Bench was not satisfied that Mr Mcjannett had shown a sufficient interest in the proceedings before the Full Bench. This is because the Full Bench formed the opinion that if the substantive application by the State organisation was to be granted, the ability of Mr Mcjannett to pursue a review of his allegations would not and could not be affected. This is in part because the matters raised in [11](a) by Mr Mcjannett are matters that if Mr Mcjannett wishes to pursue, can only be investigated by the Police or the Corruption and Crime Commission. As to the contention that the State organisation has no members, this issue has been litigated at length and found to have no merit by Ritter AP in ***Thompson v Reynolds*** [2009] WAIRC 00024; (2009) 184 IR 186; (2009) 89 WAIG 287 and ***Mcjannett v Kevin Reynolds, Secretary – The Construction Forestry, Mining & Energy Union of Workers***

[2009] WAIRC 01282; (2009) 89 WAIG 2395. In relation to the issue raised in [11](c), this is not a matter that can be considered by the Full Bench when hearing an application for a declaration under s 71 of the Act. This is a matter, (if it is to be pursued), that may be raised with the Registrar of the Commission.

51 Whilst the applicant argues that some of the previous actions in this Commission may have touched on a small part of the matters raised in this application, it cannot be said with any certainty whatsoever that those particular matters were ever litigated because there was no trial in all of the previous matters referred to apart from PRES 3-6 of 2008. The CFMEUW says this submission must be rejected as a court's jurisdiction to protect a party from an abuse of process constituted by an attempt to re-litigate a case already disposed of is not limited to cases where those technical requirements (such as res judicata or issue estoppel) can be made out: ***Walton v Gardiner*** (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ); ***Spalla v St George Motor Finance Ltd (No 6)*** [2004] FCA 1699 [66] – [69] (French J). Repeated applications for interlocutory orders may also constitute an abuse of process: ***D A Christie Pty Ltd v Baker*** [1996] 2 VR 582. This jurisprudence it says applies to s 27(1)(a) of the Act.

52 The CFMEUW argues that if the applicant's argument is accepted, it could face similar types of applications in the future, notwithstanding it might be successful in relation to the striking out of the application in this matter.

53 In ***D A Christie Pty Ltd v Baker*** Justice Hayne spoke of awarding a cost on an indemnity basis may prove a sufficient deterrent to the making of repeated applications and may offer considerable protection to a respondent. Although Justice Hayne in that matter found that that was not a complete protection in this jurisdiction (602), the CFMEUW says because the Commission is a no legal cost jurisdiction there is no form of protection of the nature that is found in other courts exercising common law jurisdiction, and this is a matter that should be recognised when the Commission exercises its discretion under s 27(1)(a) of the Act.

(b) Ground 2 of the objections – Rules not amendable to breach

54 The respondent says that the following charges fail to identify conduct capable of giving rise to a breach of the respondent's rules; or, alternatively, a rule that is amenable to contravention: 1, 2, 3, 4, 5, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46.

55 The CFMEUW points out that this list amounts to 92% of the alleged charges. In addition, the applicant does not provide any reasonable particulars of the manner in which he contends that the rules of the CFMEUW have been breached, either specifically or generally. This is so notwithstanding the fact that he was ordered on 16 February 2012 to file submissions directed to that very issue.

56 The two main rules that are repeated in the charges are r 3 and r 35. Rule 3 of the rules of the CFMEUW is the objects clause. The CFMEUW says it is incapable of contravention for the purposes of s 66 of the Act as r 3 is aspirational and facultative at best. The CFMEUW argues that r 3 is not mandatory and cannot create obligations susceptible to breach: ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [93].

57 The CFMEUW argues by way of example, r 3(25) provides that an object by which the CFMEUW is established is 'to enrol in the Union all persons eligible to become members'. The CFMEUW has never achieved this objective. That fact, however, was clearly not intended to give rise to an action for breach if it transpired that 'all persons eligible' were not in fact enrolled.

58 The CFMEUW points out that the applicant makes no attempt to reply to the submissions of the CFMEUW. Consequently, the Commission should strike out those charges which are identified in relation to this ground of objection.

(c) Ground 3 of the objections – No standing or jurisdiction

59 Within the charges the applicant alleges breaches of:

(a) the *Defamation Act 2005:* see Charge 14

(b) the 'Electoral Act' (presumably the *Electoral Act 1907):* see Charge 11

(c) the *Oaths, Affidavits and Statutory Declarations Act 2005:* see Charge 35;

(d) "taxation laws" (which laws alleged to have been breached are unknown): see Charge 27;

(e) various criminal offences (see Charges 15; 16; 19; 28 and 30) and a human rights claim (see Charge 24, though this Charge has now been discontinued):

(f) Charge 46 seeks an 'inquiry' absent an election.

60 In the relief sought by the applicant, he seeks orders including:

(i) Disqualifications from office (Prayers 2 and 3)

(ii) Apologies for a person other than the Applicant (Prayer 3);

(iii) Mandatory orders concerning litigating on behalf of a person who is not an applicant in the proceedings (Prayer 4);

(iv) Apologies to the Applicant concerning his arrest in Bali (Prayer 5);

(v) Retractions concerning allegations made during an election in '2008.9' (Prayer 6);

(vi) Repayment of monies based on 'misappropriated funds' (Prayer 7);

(vii) Re-instatement of the membership a person who is not an applicant in the proceedings and who commenced his own proceedings in *Terence McParland v The Construction, Forestry, Mining and Energy Union of Workers* [2002] WAIRComm 6935 (12 September 2002) (Prayer 8);

(viii) Deregistration of the Union (Prayer 11) (s 73(8) and s 73(12) of the Act).

61 The charges which the CFMEUW says there is either no jurisdiction or the applicant has no standing to bring are as follows: charges 4, 7, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23, 26, 27, 28, 30, 34, 35, 37, 39, 46.

62 Counsel for the CFMEUW points out that much of the applicant's affidavit filed in this matter deals with allegations that concern Mr King, a former organiser of the CFMEU, Mr McParland, a former member who ran for election, and Kevin Aitkin, a former member. The CFMEUW says, apart from the fact that these matters involve allegations which are very old and cannot be said to relate to the observance of the rules of the CFMEUW at this particular period of time, these matters are not matters which the applicant is relevantly affected so as to have a sufficient interest to invoke the provisions of s 66 of the Act in respect of those matters.

63 The CFMEUW points out that in ***Stacey*** the concept of observance of an organisation's rules is to keep an organisation on track in accordance with its rules so that this suggests some contemporary connection between a s 66 application and any conduct said to give rise to it and any orders or directions to be made.

64 The CFMEUW also raises the question of whether it is in the public interest for this Commission to entertain charges that date back so far in time that it cannot be said that they can in any way involve the objective of keeping the CFMEUW on track.

(d) Ground 4 – Out of time

65 The CFMEUW points out that over 80% of the charges the applicant seeks to bring are over two years old. It says of the 42 charges:

(a) 1 allegedly took place from 1994 (18 years ago);

(b) 1 allegedly took place from 1995;

(c) 1 allegedly took place in 1997;

(d) 1 allegedly took taken [sic] place in 2000;

(e) 3 are said to have taken place in or from 2001;

(f) 1 allegedly took place in 2002;

(g) 3 are said to have taken place in 2006;

(h) 2 are said to have taken place in 2007;

(i) 7 are said to have taken place in 2008, of the 7 Charges, 4 allegedly relate to the same conduct concerning the "ERMS blacklist";

(j) 3 are said to have taken place in 2009;

(k) 4 are said to have taken place in 2010;

(l) 1 are [sic] said to have taken place in 2011;

(m) only 9 of the Charges refer to a specific date;

(n) 15 are undated. (5 of these 15 Charges have no particularity and are embarrassing);

66 The CFMEUW says the charges which are out of time are as follows: charges 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 25(?), 26, 27, 28, 29, 30, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45.

67 The only charges that fall within the permissible temporal test in ***Stacey*** are charges 39 and 46. These charges, however, are fundamentally misconceived. Charge 39 relates to the 'ERMS blacklist'. ERMS is an acronym for electronic resource management system. It is a logistics electronic data base. Charge 39 is also the subject of charges 1, 2, 8, 9 and 38. Charge 39 is embarrassing; it involves an alleged failure to mount a forthright defence to a Federal Court action. It also suggests the CFMEUW was about to take action in respect of the matters in charges 1, 2, 8, 9 and 38 which is contrary to what was therein alleged. The Federal Court proceedings were apparently instituted in or about September 2011. The CFMEUW says that the submission that an entity is in breach of its rules because it takes a tactical and strategic decision in litigation to defend, or not defend, without more, can only be a charge devoid of particularity, or could not, in any event, amount to a breach of a rule in those circumstances.

68 The other charge which does not suffer from the vice of staleness is charge 46. The allegation is that the executive or trustees recently gave an expensive motor vehicle belonging to the CFMEUW to Mr Reynolds when he recently retired. Charge 46 is misconceived as the applicant bases his assertion on the transfer of ownership of a vehicle from the CFMEUW to the immediate past secretary, Mr Reynolds. The solicitors for the CFMEUW wrote to the applicant providing him with information relevant to this allegation, and inviting him to withdraw the charge. He has refused to do this, notwithstanding the evidence that the vehicle was owned by a separate entity and not the CFMEUW and has not been transferred. The applicant's answers and an email sent to the CFMEUW's solicitors on 27 April 2012 disclose that the applicant does not profess to know who owned the vehicle but rather seeks an inquiry (exhibit 1, tab 103). There is no jurisdiction for an inquiry under s 66 absent an election. He does not know exactly what the factual situation is. In other words, he does not have a prima facie case to put up; he simply has a suspicion and seeks an inquiry as to whether there is a breach of the rules of the CFMEUW.

69 The second issue which is raised in relation to charge 46 is that an inquiry is sought into the Construction Skills Training Centre which would constitute if allowed an inquiry into a separate legal entity, not the CFMEUW. Consequently, if there was an asset that was given away by that entity, that could not amount to a breach of a rule of the CFMEUW.

70 Whilst the applicant argues that some of the allegations of wrongdoing by union officials did not surface until many years later, the CFMEUW points out that there are no particulars as to which charges this contention relates to. To the contrary, however, it appears that all of the matters that the applicant relies upon were either public knowledge many years ago and/or have been raised by the applicant previously. Notwithstanding that the BLPPU no longer exists as its registration was cancelled

following the amalgamation between the BLPPU and the CMETSWU in September 2001, a very substantial part of the applicant's affidavit and submissions is concerned with events that occurred prior to 27 September 2001, and accordingly could not be matters relevant to questions of performance or observance of the rules of the CFMEUW.

71 In relation to the matters that have occurred since 27 September 2001, the applicant has not disclosed any reasons or cogent evidence as to why the otherwise stale matters that have been identified should, in the public interest, be the subject of a hearing. This issue is also raised in grounds 5 and 6.

(e) Grounds 5 and 6 – Not in the public interest

72 The CFMEUW says that these two objections apply to all of the charges which are sought to be brought by the applicant. On any view of the vast majority of the allegations which are put, they seek to scandalise the CFMEUW and its officials. In those circumstances, there is a legitimate expectation that the CFMEUW be informed with a level of precision of the exact nature of the case that is to be met. This application fails to satisfy that requirement.

73 To the contrary, the application presents as a stream of a conscious attempt to throw every conceivable allegation at the CFMEUW and its past and present officials in an attempt to have something stick. It appears that no matter what occurs to the applicant (including a number of dismissals from employment, and an arrest in Bali on drug charges) such matter becomes a ground for litigation.

74 Examples of the applicant's approach to matters before the Commission include the following:

(a) In PRES 2 of 2008, he commenced an application under s 66 and sought orders which would have postponed the election. However, in PRES 3-6 of 2008, he sought to intervene to ensure that the election was not postponed;

(b) In charge 35 he complains that Mr Reynolds deliberately avoided taking legal steps to obtain a certificate under s 71. However, the applicant attempted to intervene in the application for a s 71 certificate in order to oppose the application;

(c) The applicant has in previous proceedings alleged premeditated murder and other serious crimes. None of these matters are now particularised in this application.

75 In these circumstances, the Commission can have no confidence that there is any veracity in any of the applicant's allegations, or his motivation is consistent with the Commission's remit under s 66 to keep the organisation on track vis-à-vis its rules.

76 Other charges are simply trivial. Charge 23 raises an allegation that the president failed to reply to correspondence from the applicant. Charge 20 also raises another trivial issue. It involves an allegation that when the applicant was arrested in Bali on allegations of importing drugs, Mr McDonald told the national news media that he would not assist him.

77 The charges are devoid of particularity. For example, in charge 15 it is alleged that Mr McDonald and Mr Reynolds ordered multiple levies upon members during the period of 2001 to 2011 and the union did not advertise the purpose or ratify the levies in accordance with r 11(1). When asked for further and better particulars in relation to this allegation, the applicant stated in his answers that cash was siphoned off to fund opulent lifestyles for union officials. He does not particularise who, how, when or where, but goes further in his answers and says that no alleged offences have yet been made out, that the charge that relates to possible offences and there needs to be a thorough investigation.

78 The CFMEUW also makes the submission that when all of the charges are examined it is clear that they are vexatious in nature.

79 In addition, the applicant in his answers now discloses a case that extends beyond what is particularised. He now seeks a wider investigation into the operation of the training centre. In his submissions he also refers to the Building Trades Association of Unions of Western Australia (Association of Workers) (BTA). The applicant contends that there needs to be a microscope applied to that organisation and the running of it. This is an entirely new allegation which is not referred to in the charges. This again is a vexation of the respondent. But, in any event, the BTA is a separate entity from the CFMEUW.

80 The CFMEUW argues that where serious allegations are made against an organisation that the standard of proof that must be applied is the Briginshaw standard of proof and that the Briginshaw standard should be applied by the Commission in these proceedings when considering whether a prima facie case can be said to be raised in relation to each of the charges. In particular, the CFMEUW says that once the Commission is aware of the history of inconsistent approaches that the applicant has made in past matters, the Commission should be extremely wary of the assertions and the evidence put forward on behalf of the applicant in considering whether to strike out the applicant's application. The CFMEUW says it is clear that the applicant is prepared to say or do anything to tarnish the reputation of the CFMEUW. This is revealed not only by the number of allegations that are put, but is illustrated by the allegations that he makes about the CFMEUW being involved in serious crimes, in particular premeditated murder. Whilst there is no evidence or particulars of the allegations before the Commission, at no time does the applicant fall back from these allegations, but simply says there are substance to them without providing any particulars of them whatsoever.

81 Although the applicant concedes the Construction Skills Training Centre to be a separate legal entity incorporated under the *Associations Incorporation Act*, the height of the applicant's factual case is that there was some overlap until 2008 between the personnel who ran the Construction Skills Training Centre and the CFMEUW. On the evidence, the training centre may be found to have a close association with the CFMEUW in light of its formation and the obvious overlap between it, the objects and the building and construction industry training that the training centre carries out. However, this could not, on any view, be sufficient to bring the operation of the training centre within the jurisdiction of the Commission under s 66 of the Act unless there is a CFMEUW rule identified which is said to require performance and observance.

82 It is plain that the applicant seeks a wide ranging investigation into the operation of the training centre based on the allegations made. The Commission does not have jurisdiction, in any event, to conduct such an inquiry of the type sought by the applicant under s 66 of the Act when it is dealing with a matter concerning only the performance and observance of the rules. In any

event, the applicant has admitted he does not have evidence of the matters he alleges sufficient to establish even a prima facie case in this respect.

Applicant's submissions

83 The applicant says that the application which he makes under s 66 of the Act for non-observance of the rules is as set out in the form 1 application and the particulars provided do not expand beyond the allegations in the application and is not an attempt to re-litigate any previous matters. In particular, he says any and all evidence from previous matters raised in the material relied upon, are simply for corroborating evidence. He also says his submissions are made on the basis that if he mentions previous litigation it is on the basis that there was evidence adduced in those matters that supports and corroborate the charges and the claims he makes.

84 When the application to strike out was heard, the applicant objected to the tender of exhibit 1. Exhibit 1 comprises three volumes of documents contained under 103 tabs which set out the history of litigation undertaken by the applicant and other persons mentioned in the alleged charges. The applicant argued that the materials contained in exhibit 1 are irrelevant and have no relationship with the matters sought to be litigated in this application and amount to unnecessary expense to the CFMEUW. The applicant also stated in his written submissions that the materials in exhibit 1 represent a damning indictment on the Commission over its reluctance to address the 'rot' in the running of the CFMEUW and its so called training centre. At the hearing of the application to strike out this submission was rejected and the documents were received into evidence as exhibit 1.

85 The applicant contends the matters alleged in the charges have not been previously litigated for the reasons he pleads in his further and better particulars. He does, however, concede that whilst some previous actions in this Commission may have touched on a small part of the matters raised in this application, it cannot be said with any certainty whatsoever that those particular matters were ever litigated because there was no hearing of the merits of the previous matters apart from PRES 3-6 of 2008 (***Thompson v Reynolds***).

86 The applicant says he has put forward a prima facie case that the previous secretary of the CFMEUW, Mr Reynolds, has dodged accountability for the entire duration of the existence of the BLPPU and the CFMEUW, so it follows that it is in the public interest that a prima facie case against this organisation must no longer be avoided.

87 The applicant sets out in detail his submission that the Commission has failed to address what he says are his, other members and former members of the CFMEUW's complaints about the union and its officials. He says that when victims such as Mr McParland, Mr Aitkin, Mr King and himself turned to the Commission for help they were dismissed and abandoned.

88 The applicant is highly critical of a number of previous decisions of the Commission, in particular in PRES 30 of 2002, which was an application involving Mr McParland, and PRES 3-6 of 2008 (***Thompson v Reynolds***).

89 The only basis on which the applicant concedes that there is any deficiency in the pleadings is that he states that certain evidence has not been fully disclosed due to security issues. The applicant says this is an extenuating circumstance so that, even if the application is seriously deficient, the Commission has a duty to the community to ensure that the more serious allegations cannot be proved. He also says that the pleadings are to date not defective, if defective at all. He is not seeking liberty to re-plead. He is seeking a hearing of the triable allegations and the administration of justice and the restoration of accountability in the CFMEUW. The applicant denies that he is re-litigating issues. However, he does say if he was going to try to re-litigate everything he accepts that he would need to re-plead. However, he says there is no necessity for him to do so.

90 The applicant points out that the standard of proof in the charges he seeks to bring must be judged on the balance of probabilities; and that the particularisation in this matter will become protracted when witnesses give testimony and company records are subpoenaed. By this submission, the applicant appears to be saying that particulars of his case will emerge during the evidence. Consequently, he says until such time as they give evidence it is not appropriate for this court to regard the matter with such stringency as a defamation case or a criminal trial. The applicant made an oral submission that when analysing each of the charges, the Commission should look at the allegations at their highest. He also said 'goodness knows what witness testimony we're going to hear from the 29 witnesses' he wishes to call to give evidence (ts 138).

91 As to the complaint by the CFMEUW that some of the allegations had taken place some time ago, the applicant says that in some cases evidence of the wrongdoings by union officials did not surface until many years later. He also says that these complaints should be dealt with now because the same officials are running the CFMEUW.

92 In relation to the submission made by the CFMEUW that anything prior to the registration date of the CFMEUW cannot be litigated, the applicant says it is clear from the evidence that:

(a) The BLPPU are one and the same by way of integration.

(b) The training centre is still purported to be owned by the BLPPU.

(c) The rules of the BLPPU and CFMEUW are identical.

(d) The officials of the BLPPU became officials of the CFMEUW upon amalgamation.

93 Consequently, he argues jurisdiction over the BLPPU has not yet in any way been extinguished. The applicant says it is open for the Commission under s 66 of the Act to review the activities of the former BLPPU as Mr Reynolds was the secretary of the BLPPU and Mr McDonald was the assistant secretary of the BLPPU. Although he accepts it was a different union than the CFMEUW, it was a union that became the CFMEUW. He argues it did not just cease to exist and a separate group of people formed the CFMEUW. The same people brought the same assets with them, much of the same office staff and are occupying the same premises. The applicant points out the only difference in the rules of the BLPPU and the CFMEUW is that the front page states the name of the union.

94 The applicant claims that the evidence that he puts forward in his affidavit and attachments clearly shows a pattern by Mr Reynolds to use the rules of the CFMEUW at will, in order to purge the CFMEUW of what he (Mr Reynolds) deems to be undesirables. The applicant also makes a claim that in PRES 3-6 of 2008 that admissions were made by Mr Reynolds that they did not purge the register of members. Consequently, he says it can be concluded from that evidence that Mr Reynolds only ever used the rules to purge members that he did not like because they asked too many questions or ran in elections against him.

95 In relation to the CFMEUW's assertion that r 3 is not amenable to breach, the applicant argues that r 3 appears to be the most fundamental rule of the whole of the rules of the CFMEUW and forms the basis of the ethics of the CFMEUW. He says to allow departure from this rule is to severely lower the ethics of the CFMEUW.

96 In written submissions, the applicant makes a number of submissions in relation to the Construction Skills Training Centre. He points out that the address of the motor vehicle in question, which the applicant alleges was given to Mr Reynolds on his retirement as secretary, is an issue that needs to be investigated as the address of the vehicle on the registration papers produced by the CFMEUW's solicitors shows that the address is that of the CFMEUW and no evidence has been provided which shows who purchased the vehicle. The applicant complains that whilst the Construction Skills Training Centre has been marketed as either the 'union training centre' or as 'our training centre' it was incorporated as a non-profit organisation but has been able to turn over a large amount of money and employ a substantial workforce. From this he draws the conclusion that it is not feasible that it could be a non-profit organisation unless money was being siphoned off.

97 The applicant then goes on to make a number of other submissions which raise what he says are important questions to be answered in relation to the running of the Construction Skills Training Centre.

98 The applicant also makes a submission about registration of the BTA which is an association registered under the Act. The applicant contends that there needs to be a microscope applied to the running of that organisation and where it sources its funds and for what purpose, as the secretary of the CFMEUW oversees the BTA. The point he seeks to make about this allegation is the BTA provides another avenue for the spending of union funds. He says this corroborates his claims and charges that something is 'going on' down at the Construction Skills Training Centre and at the CFMEUW. In particular, when making oral submissions, he said (ts 137):

> Perhaps that matter, with others, will be expanded on when Mr Reynolds gives his testimony at the trial of this matter. We can ask him: 'What is this? How much are you paying yourself for this?' Because we can assume that they are because the rules say they can, their own - the rules of that organisation, so they can set themselves a wage. Perhaps Mr Reynolds will be able to produce some minutes of a CFMEUW or CFMEU C&G Division executive meeting where they got - or where they ratified the decision to even form that organisation and register it at the union address and run it from the union address and appoint themselves - we presume the second employee would be Joe McDonald, but we don't know that; we're going to have to get them in the stand and ask them because I'm certain, if I write them a letter and ask them, I'm not going to get a response, so I won't waste any more paper on that, your Honour.

99 The applicant contends that the CFMEUW argues on the one hand that the state and federal entities of the CFMEUW and the CFMEU Branch are one and the same, but they also argue from time to time that they are separate entities when it feels it needs to enforce a particular rule or hide from an action or event taking place in the other jurisdiction. The applicant also says that the CFMEUW makes the same representation about the Construction Skills Training Centre whereby it sometimes says it is a wholly owned asset of the CFMEUW and alternatively sometimes says it is a private enterprise. The applicant argues that the Construction Skills Training Centre appears to have always been used as a source of funds for Mr Reynolds and his close associates. He attempts to make a submission that the Construction Skills Training Centre is owned by Mr Reynolds because the land on which the business of the Construction Skills Training Centre conducted is registered in the name of the BLPPU and Mr Reynolds was the secretary of the BLPPU. He also contends that the Construction Skills Training Centre is a private enterprise listed under the name of Mr Reynolds. He appears to base that submission upon the documents attached to his affidavit in annexure D, which is an application to incorporate the Construction Skills Training Centre under s 5(2)(b) of the *Associations Incorporation Act*. He also claims that the Construction Skills Training Centre does not operate as a non-profit organisation.

100 The applicant also made a submission that because the property on which the Construction Skills Training Centre carries out its business is registered in the name of the BLPPU, this fact constitutes a breach of the rules of the CFMEUW because after the amalgamation officers of the CFMEU did not registered a change of name with the Registrar of Titles.

101 In charge 46 allegations are made about the transfer of a vehicle to Mr Reynolds. The applicant says the issue as to who owns or owned the vehicle in question is still open for determination because the registered address of the vehicle is the address of the CFMEUW. The applicant tries to then put a submission that if the Construction Skills Training Centre was not formed for the purpose of trading or securing a profit to the members, then to give a Range Rover to Mr Reynolds is prima facie a breach of the *Fair Trading Act 2010* (WA) and evidence of fraud.

102 In relation to the issues that were litigated in PRES 3-6 of 2008 (***Thompson v Reynolds***) and PRES 5 of 2009, the applicant says it is now open for him to raise the issue whether there are any members of the CFMEUW, as Ritter AP hesitantly found in PRES 3-6 of 2008 (***Thompson v Reynolds***) and PRES 5 of 2009, that there were members of the CFMEUW, and, on that basis, the findings of Ritter AP can be, or should be reviewed. The applicant also argues that Ritter AP found that no membership application forms for the CFMEUW were ever completed by members.

103 In relation to the criticism that the arguments he now seeks to raise should have been raised in PRES 3-6 of 2008, he says it was not possible for him to raise these issues for various reasons. Firstly, he was not a party to those proceedings. Secondly, his application to intervene was initially set aside and later dismissed. Thirdly, because the evidence showed that there was a duplication in membership in the sense that no s 71 certificate had been issued, the issue whether there were any members was not really revealed until the matter was winding up. Consequently, he did not seek to intervene on the basis that there were no

members, as this issue did not come to light until later. Although, the applicant concedes that he litigated the issue whether there were any members of the CFMEUW in PRES 5 of 2009, he says that the decision in PRES 5 of 2009 was wrong and should not be accepted.

104 The applicant says it was found in PRES 3-6 of 2008 (***Thompson v Reynolds***) that entrance fees had not been charged by the CFMEUW as the testimony of Peta Arnold and Mr Reynolds established that entrance fees had not been properly administered. However, when making oral submissions he conceded that the evidence given in that matter is not sufficient for charge 18 to survive but said that witnesses who are members of the CFMEUW will give testimony that organisers told them that they did not have to pay the entrance fee when they were signed up. Their testimony would be corroborated by their bank records and the records of the CFMEUW. The applicant says that this charge will establish corruption, as such action is a deliberate attempt to disqualify anyone from being able to run for election and overtake the incumbents in their office, as any member would be disqualified from holding office, or running in an election, if they have not paid an entrance fee.

105 In relation to charge 36 and the allegations that relate to Mr McParland, the applicant says that this charge should not be struck out because Mr McParland suffered very similar circumstances to the difficulties the applicant has had with the CFMEUW and its officers, which shows a pattern of behaviour.

106 The applicant says he has a sufficient interest to bring each one of the charges before the Commission under s 66 of the Act, because as a member of the CFMEUW, he has a standing to deal with any breach of the rules of the CFMEUW.

107 The applicant concedes that he does not seek to bring the current secretary of the CFMEUW before the Commission to give evidence in relation to any charge as he has never heard a single negative allegation about the current secretary. These charges are about the actions of the executive as it was constituted until the time of the retirement of Mr Reynolds.

108 In relation to the charges that relate to allegations that are said to have occurred in 1998 and involved Mr King, the applicant says he was aware that these allegations occurred prior to the CFMEUW being formed, but he says this evidence is very compelling, serious and needs to be tested because if that was the behaviour of the people who were officers of the union in 1998 who are still running the CFMEUW today, then such conduct needs to be addressed.

109 In relation to the allegation which raises an alleged conspiracy with John Holland and a payment of $150,000 to the Construction Skills Training Centre, the applicant admits that the Cole Royal Commission heard evidence about this and made some recommendations and further investigations about this payment were held after the conclusion of the Cole Royal Commission. In relation to allegations of under the counter-cash payments, these allegations were investigated by the Australian Taxation Office, but the Australian Taxation Office did not take the matter any further.

110 He also concedes that the allegations of cash payments also arise out of matters investigated by the Cole Royal Commission. He then says (ts 151-152):

> Secondly, if it is proved - Mr King's allegations that he makes later to the Tax Office - that that tape was then used by the secretary to blackmail John Holland out of $150,000 or he was going to hand the tape over to whoever, then we now have a further conspiracy to pervert the course of justice by Mr Reynolds. But of course, none of this had been tested.
>
> What we've had has all just been, for one reason or another - got drifted sideways or shovelled under the carpet and these people are still running the union. Perhaps they're innocent, maybe we're going to find out that the tape from the HBI plant was all a mock-up, that it wasn't even John Anu and it wasn't Mr King and it wasn't the other fellow whose name there is - whose named, the 3rd party names the 4th party who's going to carry out the assaults. Maybe they're all just pretence, maybe it's all theatrics, who knows?

111 When it was put to the applicant that all of these allegations relate to events that occurred well over 10 years ago, the applicant returned to the submission that these people remain at large and the charges relate to the activities they are conducting today under the auspices of the CFMEUW. The applicant says that the evidence of Mr King will go to support his allegation that there is a money laundering operation going on at the training centre. The applicant also says the charges which he seeks to bring are in the public interest and in his interest as the applicant and other past and potential future victims of conduct by the CFMEUW. The applicant concedes that the President acting under s 66 of the Act does not have any jurisdiction to assist past victims, but he says the President under s 66 does have jurisdiction to assist future victims of the CFMEUW.

112 In relation to charge 39, the applicant alleges the CFMEUW failed to mount a defence to an action brought by the ABCC which prevented the CFMEUW from taking any action in respect of the ERMS blacklist. The applicant, however, concedes that the CFMEUW was not a party to the action brought in the Federal Court, as the action was brought against the CFMEU Branch. The applicant, however, argues that although the order of the Federal Court is binding on the Federal union, it also binds the officials of the CFMEUW.

113 In all of the circumstances, the applicant wishes to proceed with the charges and seek orders among other orders that the CFMEUW needs to be deregistered, the assets of the CFMEUW be taken over by the Public Trustee until such time as 10 new persons can form a new union and take back control of the assets of the CFMEUW.

114 The applicant says that he accepts the CFMEUW's submission that the Commission is not a criminal court. However, he says that as the Commission is responsible for the administration of the Act and the registration of the CFMEUW, it has jurisdiction over all the matters he alleges and the power to apply the relief sought, until such time as the Commission desires to transfer matters to a criminal jurisdiction, if it forms a view that there is a prima facie case for criminal prosecution.

115 When it was put to the applicant that the Commission can only make orders which deal with the future functioning of the CFMEUW, the applicant submitted that the President can make orders in relation to misconduct under s 66 of the Act and has the power to refer matters to courts of criminal jurisdiction and even to the police.

Power to summarily dismiss

116 The test to be applied when considering an application to summarily dismiss a substantive application was recently considered by me in ***United Voice WA v Minister for Health*** [2012] WAIRC 319; (2012) 92 WAIG 585 (***Fiona Stanley Hospital (No 2)***) wherein I observed [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].

Jurisdiction conferred by s 66 of the Act

117 Directions for enforcement of rules of a trade union registered under the Act is created solely by statute and is contained in s 66 of the Act. Traditionally, courts have refused to interfere in the internal affairs of voluntary associations where members have sought to challenge non-compliance with the rules of an association, unless the member has a proprietary interest: ***Cameron v Hogan*** (1934) 51 CLR 358; see the discussion in ***Australian Education Union v Australian Principals Federation*** (2006) 158 IR 360 [48] – [51].

118 Under s 66(1) of the Act, a member, a former member, a person who has applied for and not been admitted to a membership in an organisation or the Registrar acting on behalf of a member or of his or her own motion may apply to the President for a direction or order under s 66. Section 66(2) prescribes the orders and directions that can be made. Section 66(2) provides:

> On an application made pursuant to this section, the President may make such order or give such directions relating to the rules of the organisation, their observance or non-observance or the manner of their observance, either generally or in the particular case, as he considers to be appropriate and without limiting the generality of the foregoing may —
>
> (a) disallow any rule which, in the opinion of the President —
>
> (i) is contrary to or inconsistent with any Act or law, or an award, industrial agreement, order or direction made, registered or given under this Act;
>
> (ii) is tyrannical or oppressive;
>
> (iii) prevents or hinders any member of the organisation from observing the law or the provisions of an award, industrial agreement, order or direction made, registered or given under this Act;
>
> (iv) imposes unreasonable conditions upon the membership of a member or upon an applicant for membership; or
>
> (v) is inconsistent with the democratic control of the organisation by its members;
>
> (b) instead of disallowing a rule under paragraph (a), direct the organisation to alter that rule within a specified time in such manner as the President may direct;
>
> (c) disallow any rule which has not been altered by the organisation after a direction to do so pursuant to paragraph (b);
>
> (ca) where the President disallows any rule under paragraph (a) or (c), give such directions as the President considers necessary to remedy, rectify, reverse or alter or to validate or give effect to, any act, matter or thing that has been done in pursuance of the disallowed rule;
>
> (d) declare the true interpretation of any rule;
>
> (e) inquire into any election for an office in the organisation if it is alleged that there has been an irregularity in connection with that election and make such orders and give such directions as the President considers necessary —
>
> (i) to cure the irregularity including rectifying the register of members of the organisation; or

(ii) to remedy or alter any direct or indirect consequence thereof;

and

(f) in connection with an inquiry under paragraph (e) —

(i) give such directions as the President considers necessary to the Registrar or to any other person in relation to ballot papers, envelopes, lists, or other documents of any kind relating to the election;

(ii) order that any person named in the order shall or shall not, as the case may be, for such period as the President considers reasonable in the circumstances and specifies in the order, act or continue to act in and be deemed to hold an office to which the inquiry relates;

(iii) declare any act done in connection with the election to be void or validate any act so done.

119 The President is not in the position of a surrogate manager of an organisation by virtue of the powers conferred by s 66: ***Wauhop v Civil Service Association of Western Australia Inc*** [2003] WAIRC 08021; (2003) 83 WAIG 951.

120 The extent of the jurisdiction of the President to make orders and directions under s 66(2) of the Act was comprehensively reviewed by Ritter AP in ***Stacey***. At [272] – [274] his Honour made the following observations which are relevant to this matter:

> 272 Section 66(2)(a), (b), (c) and (ca) are about the disallowance or alteration of rules which do not meet the standards set out in s66(2)(a). Section 66(2)(d) allows those parties set out in s66(1) to obtain the interpretation and therefore understand the meaning of a rule. This would generally be for the purpose of ensuring or checking if an organisation was acting in accordance with its rules. It is a similar power to s46 of *the Act*, with respect to awards. Section 66(2)(e) and (f) are about inquiries into election irregularities. As held by the IAC in *Harken v Dornan and Others* (1992) 72 WAIG 1727 this is a discrete aspect of the section and contains all of the President's jurisdiction and powers on the topic of election irregularity. Similarly, although not necessary to express any concluded view in this application, s66(2)(a) would seem to set out all of the bases upon which the President could disallow a rule.
>
> 273 A significant touchstone of the general power under s66(2) is the concept of the '*observance*' of an organisation's rules. This demonstrates in my opinion that a key part of the s66 jurisdiction is, to put it colloquially, to keep an organisation '*on track*' – running in accordance with its rules. This also suggests some contemporary connection between a s66 application, any conduct said to give rise to it, and any orders or directions to be made. The parties named in s66(1) can via s66(2) seek the assistance of the President to disallow/alter prohibited rules, to declare the interpretation of rules, inquire into election irregularities and make other orders to assist or require an organisation to observe its rules. The text and context suggests that any corrective orders are limited to those which have some present connection with the activities of the organisation and the observance of its rules.
>
> 274 In my opinion the purpose of s66 is not to correct long ago breaches which now have no relevance to how an organisation is running. Also, the ordering of compensation or damages for old breaches of the rules is beyond the scope and purpose of a s66(2) order.

121 Acting President Ritter then went on in ***Stacey*** to summarise the following principles that can be distilled from decisions of the Industrial Appeal Court [279]:

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

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

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

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

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

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

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

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

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

122 One central issue raised in a substantial number of the charges sought to be brought by the applicant in this application, is that many events that are alleged to have occurred appear to have occurred a long time ago.

123 The President's power to make orders in respect of a past non-observance of a rule was considered in ***The West Australian Locomotive Engine Drivers' Firemen's and Cleaners' Union of Workers v Schmid (No 1)*** (1996) 76 WAIG 639. In ***Schmid (No 1)***, a delegates' conference resolved to increase annual honorarium paid to the general president and the general vice-president. The resolution was ineffective for want of compliance with provisions in the Act governing amendments to union rules. The increased unauthorised honoraria were paid for four years. An application was brought under s 66 of the Act for recovery of the unauthorised payments. The President found the general committee had a duty under the rules to recover the amounts paid by directing the trustees to take legal proceedings against the officers or members guilty of the 'misappropriation'. It was argued that the power to compel observance of the rules of an organisation could only be exercised to secure the performance of existing obligations under the rules and did not extend to the making of orders for the purpose of remedying past breaches of the rules. This principle had been applied in ***Darroch v Tanner*** (1987) 16 FCR 368. In ***Darroch v Tanner*** an application was made under s 141 of the *Conciliation and Arbitration Act 1904* (Cth) to enforce the rules of a union. Section 141(1G) provided:

> An order under this section may give directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.

124 The Industrial Appeal Court in ***Schmid (No 1)*** did not definitively decide to follow ***Darroch v Tanner***, but they did find that in the rules of The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers there was a general obligation upon the general committee of the union to protect the property and funds of the union and a specific provision to direct the general trustee to take legal proceedings against any officer or member guilty of misappropriating any of its funds. These provisions, they found, enabled an order to be made by the President to direct the general committee to direct the general trustees to institute legal proceedings to recover sums paid to officers of the union that they were not entitled to. The Industrial Appeal Court then went on to quash an order that required the union itself to institute proceedings if the general trustees refused to do so, as this order was not supported by an express rule of the union.

125 In ***Stacey***, Ritter AP analysed the decision of the Industrial Appeal Court in ***Schmid (No 1)*** and observed that although the point found in ***Darroch v Tanner*** was not conclusively decided in ***Schmid (No 1)***, he found that an order under s 66 of the Act can only be made where the order has contemporary relevance to the activities of a union or the observance of its rules and in purpose or effect secures the performance of an express existing obligation set out in the rules of a union [301] – [303]. Acting President Ritter also found in ***Stacey*** that there is no scope to enforce an implied rule under s 66 of the Act [326], [329] and [333] – [335].

126 As each charge sought to be brought by the applicant could in effect be considered a separate application under s 66 of the Act, in the sense that many of the matters alleged in the charges raise discrete issues, I will deal with each charge separately when I consider the grounds of objection.

Ground 1 – Abuse of process

127 When regard is had to the matters pleaded in charges 11, 12, 13, 14 and 44, it is clear that each charge raises allegations that have been raised, or should have been raised in election inquiries that were held by the President under s 66 of the Act in PRES 3-6 of 2008, PRES 7 of 2008, PRES 2 of 2009 and PRES 5 of 2009 or in the Federal Court in WAD 221 of 2008.

128 In WAD 221 of 2008, the applicant sought an indefinite injunction on the Australian Electoral Commission to halt the election process and an inquiry into the election process. He also sought that Mr Kavanagh and Mr Reynolds be disqualified from standing for election and/or holding office in the CFMEU Branch on grounds that members of the executive and other officers of the CFMEU Branch had authorised or used union resources for election purposes (exhibit 1, tab 28).

129 PRES 3-6 of 2008 were applications in relation to the process of election of offices in 2008. These applications proceeded as an inquiry into the 2008 elections under s 66(1) and s 66(2) of the Act into alleged irregularities in connection with the election for offices of the CFMEUW in which Mr Kavanagh and Mr Reynolds were candidates: ***Thompson v Reynolds*** [1] – [6].

130 In PRES 7 of 2008, the applicant made an application under s 66 of the Act for an order and injunction to freeze the records and assets of the CFMEUW pending the outcome of the inquiry in PRES 3-6 of 2008.

131 In PRES 2 of 2009, the applicant sought an inquiry into alleged irregularities in connection with the election of Mr Kavanagh and Mr Reynolds in 2008 (exhibit 1, tab 43). The application was dismissed: ***Mcjannett v Reynolds*** [2009] WAIRC 00211; (2009) 89 WAIG 633 (PRES 2 of 2009).

132 In PRES 5 of 2009, the applicant sought an inquiry by filing an application on 29 June 2009 under s 66 and s 73(3)(b) of the Act into alleged irregularities in connection with the conduct of the 2008 election for officers in the CFMEUW and alleged fraudulent registration and administration of the CFMEUW on grounds that there were less than 200 bona fide members of the CFMEUW when ballot papers were sent to over 10,000 persons (exhibit 1, tab 51).

133 In charge 11, the applicant alleges Mr Reynolds and Cam McCulloch in the ballots of 2008 and 2009, without the authority of a general meeting, used members' funds to publish and deliver election flyers. In charge 14, the applicant alleges that during the election in 2009 Mr McCulloch sent to members election material containing negative falsehoods about the applicant. These are issues that were squarely raised in WAD 221 of 2008 and, if they were to be seriously contended, should have been raised by the applicant in PRES 3-6 of 2008, PRES 7 of 2008, PRES 2 of 2009 and/or PRES 5 of 2009.

134 Charge 12 alleges in PRES 3-6 of 2008 that it was proved that the CFMEUW failed in its duty to keep records of general meetings.

135 In charge 13, the applicant alleges the CFMEUW instructed their lawyer to obstruct a book inspection that was carried out on 26 August 2009. The book inspection had been sought to obtain evidence of membership records to be used by the applicant in prosecuting his case in PRES 5 of 2009: see discussion in the interlocutory application made by the applicant in this matter in ***Mcjannett v Construction Forestry Mining and Energy Union of Workers*** [2012] WAIRC 00291; (2012) 92 WAIG 507.

136 In charge 44, the applicant alleges that since the registration of the CFMEUW in September 2001, Mr Reynolds and Mr McDonald conspired to keep the truth about the CFMEUW and its assets from the members and work to dupe the members into thinking that there was only one federal union that owned everything. In the further and better particulars provided by the applicant in respect of this charge, apart from an allegation about the BTA, the essence of the particulars contend that the CFMEUW and the federal union were run as one and the funds were controlled by one single entity.

137 Acting President Ritter dismissed PRES 5 of 2009 on grounds that the applicant was seeking to litigate issues that were decided in PRES 3-6 of 2008. In PRES 5 of 2009, the applicant argued the electoral roll in the 2008 election included people who ought not to have electors as they were not properly enrolled as members of the CFMEUW. The CFMEUW made an application to summarily dismiss the application on three grounds: ***Mcjannett v Reynolds*** [2009] WAIRC 01282; (2009) 89 WAIG 2395 [8] (PRES 5 of 2009):

(a) The argument of the applicant in the substantive application, if accepted, leads to the conclusion that he is not a member of the CFMEUW. At the same time however he makes this application under s66(1)(a) of *the Act* on the basis that he is a member of the CFMEUW. It is submitted that the applicant should not be allowed to 'approbate and reprobate'. Accordingly the application should be dismissed.

(b) The application involves an attack on the findings I made in *Thompson v Reynolds*. Accordingly, it is an abuse of process to seek to re-litigate the issues there decided.

(c) As an alternative to (b), it is argued that the application is an abuse of process of the type described by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. This is usually referred to as *Anshun* estoppel. The CFMEUW asserts that, if the matters which the applicant now wishes to argue were not decided in *Thompson v Reynolds*, it was unreasonable of him not to have then raised them. Accordingly the applicant should not now be permitted to proceed with the substantive application. The applicant applied to become a party in *Thompson v Reynolds*, but after that application was stood over during most of the course of that proceeding, it was ultimately dismissed with the consent of the applicant. I will later set out additional details of this.

138 Acting President Ritter upheld the first two arguments, but had difficulties with the third argument. In respect of the first argument, he found [100]:

> I also accept this contention. It would be pointless to proceed with an inquiry under s66 of *the Act* in which an applicant in effect asserts that they are not a member of the subject organisation when they rely upon that membership to have standing to bring a s66 application in the first place. If, as the applicant asserts, he has become a member of the CFMEUW unlawfully and he does not want to be, then his remedy is simple. He can resign his membership of the CFMEUW.

139 As to the second argument, Ritter AP found that the effect of his decision in ***Thompson v Reynolds*** was that the persons who voted in the 2008 elections were properly enrolled to vote. At [107] he held:

> As to the membership form issue, that was determined in *Thompson v Reynolds*. As I have said earlier, I there held that a person signing the joint application form, albeit it was not in the form of the schedule to the rules of the CFMEUW, could nevertheless become a member of that organisation as well as the CFMEU. Based on my reasons in *Thompson v Reynolds*, the CFMEUW was entitled, and indeed required by those reasons, to treat people who had signed a joint application form or card as members of the CFMEUW. Accordingly, if financial they were entitled to vote and ought to have been included on the electoral roll.

140 Acting President Ritter then said [115] – [118]:

> 115 As earlier set out, in *Thompson v Reynolds* I decided that a person signing the joint application form and paying membership contributions, believing that was all that needed to be done to join and maintain membership of both the CFMEU and the CFMEUW, was and continued to be a member of both organisations. I did not consider in *Thompson v Reynolds* a situation which is agitated in the present case, of a person not intending to become a member of the CFMEUW by the signing of the joint application form and the payment of a single contribution. Despite not deciding that issue in *Thompson v Reynolds*, there is in my opinion no public interest in litigating it in the present proceeding, for the reasons I have earlier outlined. That is, there is no realistic prospect or evidence that a person who voted in the 2009 CFMEUW election did not thereby reaffirm their membership of, and show their intention to be, a member of the CFMEUW.
>
> 116 I also accept that I did not expressly consider, in *Thompson v Reynolds*, the validity of a signed joint application form not being witnessed, or that the joint application form did not say the CFMEUW was registered under *the Act*. These points do not however change my opinion that a person could validity become a member by the signing of the joint application form. The witnessing of a prospective member's signature, whilst an understandable requirement of rule 10, is to large extent a technicality. I do not think the intention of the rules is to omit a person from being a member if this requirement is not satisfied. I have the same opinion about the joint application form not saying that the CFMEUW was registered under *the Act*. Both the CFMEU and the CFMEUW are mentioned in the heading to the joint application form and cards. It would be open for a prospective member to make an enquiry about the act of parliament under which the organisations were registered, if they wished to do so.
>
> 117 I add that my finding in *Thompson v Reynolds* does not mean that the CFMEUW should not require new members to fulfil the requirements of rule 10 and sign a form in accordance with the schedule. This should have occurred in the past and should occur in the future. Additionally, even if a joint application form was used it should not have referred in its body to a 'union' singular. This was symptomatic of the way in which the CFMEUW was

wrongly not administered separately from the CFMEU. My conclusion in *Thompson v Reynolds* was simply that, despite the deficiencies of the joint application form, its signing could nevertheless lead to valid membership.

118 I do not accept the applicant's argument that before a person could become a member of the CFMEUW, the organisation needed to specifically inform them that this was a separate organisation to the CFMEU, operated in a different jurisdiction and 'point' them to the rules of the CFMEUW. There is nothing in the rules of the CFMEUW or the Act which requires this to occur. The joint application form and the tabled cards are addressed to both the CFMEUW and the CFMEU. New members could have sought clarification about what this meant if they so desired. A person, when or after signing the form or card, could also have requested a copy of the rules of the CFMEUW if they wanted one. The signing of the application form was, and could be taken by the CFMEUW to be, the manifestation of an intention to join both organisations. This argument does not in my opinion constitute a claim that an irregularity has occurred in connection with the 2009 CFMEUW election, because people may have voted who were not entitled to.

141 In PRES 5 of 2009, Ritter AP did, however, reject an argument made on behalf of the CFMEUW that the applicant should be prevented from litigating particular issues on grounds of abuse of process because it was unjustifiably unreasonable of him not to have sought to litigate them in PRES 3-6 of 2008. In making this finding, Ritter AP said [135] – [139]:

135 The course of an election inquiry under s66 of *the Act* does not solely depend upon the conduct of the parties and the issues which they wish to raise. *Thompson v Reynolds* is a good example. There, because of the evidence which emerged, the inquiry became broader than the claims of the applicants. An inquiry is not therefore inter partes litigation (*King v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Victorian Branch* (2000) 109 FCR 447 per Gyles J at [54], citing Finkelstein J in *Re Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Victorian Branch* (2000) 99 IR 224 at [24]-[26]; *Ex Parte Ferguson* at 494).

136 Given these considerations, I have some difficulty in readily applying the *Anshun* principle to election inquiries under s66 of *the Act*. If there was a good reason to inquire into whether there had been an irregularity in connection with an election, I do not necessarily think that the inquiry should not proceed because a party, proposed party or intervener to an earlier inquiry had unreasonably not then raised the issue. It would in my opinion ordinarily remain the responsibility of the Commission to ensure that the election of offices in a registered organisation occurred without irregularity.

137 The application of the *Anshun* principle involves an evaluative judgment (*Spalla* at [64]-[65] and *Habib* at [82]). The evaluative judgment will take into account all of the facts and circumstances, including the unreasonableness of the prior conduct, the nature of the litigation and issues sought to be litigated and the degree of oppression to the other parties to the litigation.

138 In the present case such an evaluative judgment is unnecessary because, as I have set out earlier, the application does not raise any substantive issue of an irregularity which should be considered by the Commission.

139 If I were to undertake such an evaluative judgment, I would accept that there has been some unreasonableness in the way in which the applicant has conducted himself. The issue of whether he had become a member of the CFMEUW without his knowledge, intent and agreement could have been raised by him in *Thompson v Reynolds*. As stated he was aware that issues of membership were to be considered and the importance of the terms of a membership card to that issue. The applicant has asserted that, at that time, he did not have evidence from other 'members' of the CFMEUW which he could have led. Whilst that might be so, the applicant could have raised the issue with me and I could have made directions allowing the applicant to gather the relevant evidence.

142 Acting President Ritter was of the opinion that the power of the President to review matters in an election inquiry was not inter partes and should not be restricted as it is the responsibility of the Commission to ensure that the election of offices in a registered organisation occurred without irregularity. However, the matters raised in this application cannot invoke the jurisdiction of the President to inquire into an election. Inquiries into the 2008 elections have been completed. There is no scope to hold any further inquiry into those elections. Also, unlike the application in PRES 5 of 2009 the nature of this application is inter partes and as such the principle in ***Port of Melbourne Authority v Anshun Pty Ltd*** (1981) 147 CLR 589 is applicable. It is now clearly unreasonable for the applicant to attempt to raise any issue that has been previously determined in matters that arose out of the 2008 election of officers of the CFMEUW or raise any matter that could be said to relate to the 2008 election when almost four years has passed since the election was concluded. Any issue now sought to be raised in relation to the 2008 election is now moot as the Full Bench issued a s 71 declaration on 21 December 2011: [2011] WAIRC 01169; (2011) 92 WAIG 11, which then enabled the Registrar on 22 December 2011 to issue the following s 71 certificate (exhibit 1, tab 80):

> I, the undersigned, Registrar of the Western Australian Industrial Relations Commission, acting pursuant to section 71(5) of the *Industrial Relations Act 1979*, hereby declare -
>
> (1) that the provisions of the *Industrial Relations Act 1979*, relating to elections for office within an organisation do not from 9 January 2012 apply in relation to offices in The Construction, Forestry, Mining and Energy Union of Workers; and
>
> (2) that from 9 January 2012 the persons holding office in the Construction and General Division, Western Australian Divisional Branch of the Construction, Forestry, Mining and Energy Union, an organisation registered under the provisions of the *Fair Work (Registered Organisations) Act 2009* shall for all purposes, be the officers of The Construction, Forestry, Mining and Energy Union of Workers.

143 For all of these reasons, charges 11, 14 and 44 will be struck out on grounds of abuse of process.

144 As to charge 12, there is nothing alleged in charge 12 that raises an allegation that since the delivery of the reasons for decision in PRES 3-6 of 2008 in ***Thompson v Reynolds*** on 23 January 2009, that the CFMEUW has not kept minutes of general meetings. In any event, there was no finding in PRES 3-6 of 2008 that no minutes were kept of general meetings; it was simply found that joint meetings of the CFMEUW and the CFMEU Branch were held which was not contemplated in the rules of the CFMEUW: ***Thompson v Reynolds*** [127](f) and [175]. For this reason, charge 12 will be struck out on grounds that it does not disclose a breach of the rules of the CFMEUW and is an abuse of process.

145 The facts alleged in charge 13 also have no contemporary relevance to the observance of the rules of the CFMEUW and are matters that should have been raised in PRES 5 of 2009. In reasons for decision delivered on 10 May 2012, I made the following observations about this charge: [2012] WAIRC 00291; (2012) 92 WAIG 507 [37]:

> In this matter the applicant argues that as no issue of obstruction was raised in PRES 5 of 2009, ergo, it cannot be said that charge 13 is an attempt to relitigate an argument. However, the difficulty with seeking to raise the matters referred to in charge 13 at this time, is that such an allegation is not only stale, but if it was to be seriously raised, the allegation should have been properly and squarely pressed in PRES 5 of 2009. As it is apparent from the applicant's affidavit and the reasons for decision in PRES 5 of 2009 the purpose of the request by the applicant to inspect records in 2009 was to obtain evidence to support his application in PRES 5 of 2009. As that matter was concluded over two years ago, it is difficult to see how there would be any purpose in now seeking compliance with that request.

146 For this reason, charge 13 will also be struck out on grounds of abuse of process.

147 The CFMEUW also argues that charges 16, 17, 23, 26, 27, 28, 35, 36, 43 and 45 should also be struck out on grounds of abuse of process as each matter has been previously litigated.

148 In charges 17 and 35, the applicant alleges the secretary forged membership records of the CFMEUW in order to gain transitional registration of the CFMEUW with Fair Work Australia. When regard is had to the further particulars of charges 17 and 35, the basis of the allegation arises out of a contention by the applicant that at the time of the 2008 election period the CFMEUW had no bona fide enrolled members and that what had been filed was a record of members of the CFMEU Branch. This contention cannot be made out. This is an issue raised by the applicant in PRES 5 of 2009 and squarely rejected.

149 Charge 35 also raises an allegation that Mr Reynolds deliberately avoided the legal steps to obtain a s 71 certificate under the Act. As the CFMEUW points out in their written submissions filed on 30 April 2012, this part of the charge raises an issue that is moot and is embarrassing. A s 71 certificate was granted on 22 December 2011 despite the applicant's unsuccessful attempt to intervene and oppose the making of a declaration under s 71 of the Act on 16 December 2011 that led to the grant of the certificate (exhibit 1, tab 76).

150 For these reasons, charges 17 and 35 will be struck out on grounds of abuse of process.

151 Charge 23 deals with action initiated by the CFMEUW against the applicant in 2010 under r 35 for alleged misconduct. In answers to the request for further and better particulars, the applicant says he raised relevant documents before the Commission in previous matters. However, as it is clear from an examination of all the documents in exhibit 1 that the allegations raised in this charge do not relate directly or indirectly to any relevant issue previously raised in prior litigation, I am not satisfied that ground 1 of the CFMEUW's grounds of objection is made out. This charge will be considered further when considering ground 2 of the CFMEUW's objections.

152 In charge 26, the applicant alleges Mr Reynolds siphoned levies, blackmail payments, bribes and other revenue. In charges 15 and 16, the applicant makes a similar allegation against the executive. In charge 27, the applicant alleges the CFMEUW paid its officials weekly cash payments without deducting taxation. In charge 28, the applicant alleges Mr Reynolds arranged a cash payment of $150,000 to the training centre through the use of covert surveillance, entrapment and blackmail. The CFMEUW says the applicant directly raised the allegations in these charges in 2008 in PRES 7 of 2008, but did not pursue the claims any further. In exhibit 1, tabs 18-24, documents filed in PRES 7 of 2008 record that the applicant made an application under s 66 of the Act for an urgent order and injunction to freeze all assets and records of the CFMEUW pending the outcome of the inquiry in PRES 3-6 of 2008. After an undertaking was given by Mr Reynolds on behalf of the CFMEUW not to destroy particular categories of documents, the application was discontinued by the applicant on 16 October 2008. When exhibit 1, tab 24, is examined it is apparent that allegations made by the applicant of misappropriation of funds and records in PRES 7 of 2008 were vague and were made at the time the applicant advised of his intention to discontinue PRES 7 of 2008. Consequently, I am not persuaded that the allegations in charges 15, 16, 26, 27 and 28 can be said to be an attempt to re-litigate issues raised in PRES 7 of 2008 as such statements were made at the same time advice was given to discontinue. For this reason, I am not persuaded that ground 1 has been made out in respect of these charges. Charges 15, 16, 26, 27 and 28 will be considered further when considering ground 2.

153 In charge 36, the applicant alleges the CFMEUW has a recorded history of using union resources against its members, particularly purging any member who has voiced dissent or stood in an election against incumbent officials. As examples of 'many', the applicant says he was purged, but then says in his answers and further and better particulars an attempt was made to purge him in 2010. He also contends in his answers, Mr Aitkin and Mr McParland were purged in 2000 and attempts were made to purge Mr Kavanagh, Wayne Wildes, Doug Heath and Kevin Ennor. Despite the request for particulars asking for details of members alleged to have been purged, no details other than names have been provided. In respect of this charge, the CFMEUW properly points out insofar as the charge relates to Mr McParland, it is clearly an attempt to re-litigate ***McParland v The Construction, Forestry, Mining and Energy Union of Workers*** [2002] WAIRC 06935; (2002) 82 WAIG 2894. In that matter, Mr McParland made an application under s 66 of the Act after the CFMEUW refused to accept the tender of a membership subscription. After hearing submissions and evidence from the parties, Sharkey P found Mr McParland was at the time of tender of the subscription no longer an employee and thus not eligible for membership of the CFMEUW. For this reason, I am of the opinion that insofar as part of the charge relates to Mr McParland it should be struck out for an abuse of

process as any issue of 'purging' Mr McParland was dealt with by Sharkey P in 2002. I will consider the remaining matters alleged in this charge when considering ground 2.

154 In charge 43, the applicant alleges in APPL 31 of 2011 there are abundant documents showing serious breaches of the rules and the rule of law by Mr McDonald which has brought the CFMEUW into disrepute. Without some difficulty, it can be gleaned from the further and better particulars provided that the 'documents' referred to constitutes Mr McDonald's record of criminal convictions from 1994 to 2011. APPL 31 of 2011 was an application made under s 49J(2) of the Act for the re-issue of an entry permit to Mr McDonald. The applicant made an unsuccessful application to intervene in APPL 31 of 2011 and oppose the application (exhibit 1, tabs 65-67). The CFMEUW says the matters alleged in this charge are a clear attempt to re-litigate the matters in issue in APPL 31 of 2011. The difficulty with this contention is the reputation of the CFMEUW is a matter that could not have been reasonably raised in APPL 31 of 2011 as such a matter would be likely to have been irrelevant to any consideration as to whether Mr McDonald should have been re-issued a re-entry permit and thus is not a matter that could be said to be a matter that should, if seriously contended, have been reasonably raised in these proceedings. Consequently, ground 1 is not made out in respect of charge 43. I will, however, review charge 43 again when I consider ground 2.

155 In charge 45, the applicant alleges that on 23 March 2010, Mr McDonald addressed a large public rally in Perth and blamed union members employed at the Pluto Construction Project for an unlawful strike. The applicant says this constituted serious misconduct as the Federal Court later found Mr McDonald guilty of inciting the unlawful strike. The CFMEUW says this charge involves an attempt to re-litigate insofar as the issues were determined in ***Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union*** [2011] FCA 949 which concerned the CFMEU Branch and not the CFMEUW and ***United Group Resources Pty Ltd v Calabro*** [2011] FCA 1408. In ***Woodside Burrup Pty Ltd***, Gilmour J found that Mr McDonald had addressed a meeting of employees on 27 November 2009 at the Pluto Project and called for a motion for the employees to commence strike action if Woodside did not reverse its decision on modelling [34]. He also found on 30 November 2009, Mr McDonald informed a meeting of employees that they needed to decide whether they would prefer to go on a one, two, three or seven day strike. Mr McDonald later repeated a motion from the floor to take industrial action for 48 hours and called for a vote on that motion which was taken and passed [38]. The CFMEUW accepted it bore responsibility for the conduct of Mr McDonald [44].

156 In charge 45, the applicant attempts to raise the issue whether disciplinary action should have been taken against Mr McDonald as the applicant alleges r 35(1)(a), r 35(1)(g) and r 35(1)(i) of the rules have been breached. Leaving aside whether r 35 can be capable of contravention in the circumstances that are alleged, it is apparent from the reasons for decision in ***Woodside Burrup Pty Ltd*** that Mr McDonald was acting as an official of the CFMEU Branch and not the CFMEUW. Consequently, it cannot be said that any issue of re-litigation arises. Further, criminal proceedings and disciplinary proceedings are separate proceedings and no issue of double jeopardy can arise to bar disciplinary proceedings following the conclusion of criminal proceedings: ***Civil Service Association of WA Inc v Director General of Department for Community Development*** [2002] WASCA 241; (2002) 82 WAIG 2845 [52] (Anderson J). For this reason, ground 1 is not made out in respect of charge 45. I will, however, return to charge 45 when considering ground 2 of the grounds of objection.

157 In charge 18, the applicant alleges multiple breaches of various rules of r 3, including r 3(23) and r 10(1), r 10(2), r 10(3) and r 10(6). The matter alleged is that since 2001, the executive instructed officials not to collect entrance fees from thousands of members. The applicant contends that this conduct exposes the members of the CFMEUW to be ineligible to nominate for elections and forgo their rights to any privileges of bona fide members. The applicant also alleges that this conduct is a breach of r 8 of the national rules. As the CFMEUW points out, any issue whether there has been a breach of 'national rules' is not a matter within the jurisdiction of the President under s 66 of the Act. Although it is not apparent from the particulars provided by the applicant in respect of charge 18, it emerged during oral submissions made by the applicant that part of the evidence the applicant intends to rely upon to support this charge is a contention that evidence was given in PRES 3-6 of 2008 by Mr Reynolds and Ms Arnold that entrance fees had not been charged (ts 138-140). This contention is clearly wrong. In ***Thompson v Reynolds***, one of the possible irregularities raised was whether entrance fees and contributions had been forwarded to and receipted by the CFMEUW [56](4)(b). Evidence was given on affidavit by Mr Reynolds in PRES 3-6 of 2008 that an entrance fee of $60 plus GST was taken as full payment for admission under both CFMEU and CFMEUW rules (exhibit 1, tab 17; [60] of the affidavit of Kevin Noel Reynolds). Following the 2001 amalgamation, the entrance fee was increased to its current rate of $60 at a meeting of the executive on 31 January 2001 (exhibit 1, tab 17; [82] of the affidavit of Kevin Noel Reynolds). There is no contrary evidence by Ms Arnold referred to by Ritter AP in ***Thompson v Reynolds***. The only finding relevant to this issue that Ritter AP makes in ***Thompson v Reynolds*** is at [174] where he states that the CFMEUW had not been satisfactorily run and administered by Mr Reynolds and the executive as an organisation and independently from the CFMEU Branch. Acting President Ritter then identified at [175](b) that, among other matters, there had been a failure to set separate entrance fees and contributions. This finding did not, however, lead his Honour to find that the payment of one entrance fee and contributions resulted in ineligibility of any members to run for election. To the contrary he found there was no irregularity in connection with the 2008 election in respect of this issue [210]. The applicant contends that he does not entirely rely upon the evidence given in PRES 3-6 of 2008, but is in a position to call evidence from members of the CFMEUW who will give evidence that when they signed up to become a member they were told they would be given a discount and did not have to pay what the applicant says is the entrance fee (ts 140). He also says he did not have to pay an entrance fee. If the applicant's contention that such a practice had been occurring since 2001 and it resulted in members being ineligible to run for election, this is an issue that could have and should have been squarely raised in PRES 3-6 of 2008. One of the principal issues for consideration by Ritter AP in the inquiry into the 2008 election was as at 4 September 2008, were there any members of the CFMEUW, any members who were financial, or who were continuously financial and any members who were eligible to vote in the election [56](5)(a)(iii). The applicant sought to intervene in those proceedings, yet in his grounds of intervention he did not seek to raise such an issue. It is also a matter that he could have sought to raise this issue in

PRES 2 of 2008 or in PRES 5 of 2009, and it is unreasonable for the applicant to now seek to raise this issue. For this reason, charge 18 will be struck out on grounds of abuse of process.

Ground 2 of the objections – Do the charges raise an allegation capable of proof of breach of a rule?

(a) Can the principal object rules of a union be capable of breach

158 This issue has been briefly considered in matters that have in the past come before the President under s 66 of the Act.

159 In ***Stacey***, the applicant was employed by the Civil Service Association of Western Australia Inc (CSA). He alleged the CSA had breached r 3(c) of the rules of the CSA by failing to ensure he was properly represented or funded in an application against the CSA, in a claim for overtime. Rule 3(c) of the rules of the CSA provides that it was a principal object of the CSA to promote the interests of the membership by representing the industrial welfare of individual members.

160 Prior to ***Stacey*** being argued, in ***Wyatt v The Civil Service Association of Western Australia (Inc)*** (1997) 77 WAIG 3206 and ***Wauhop*** Sharkey P had held that an object rule of the CSA could not be breached. In making this finding, Sharkey P simply said in ***Wauhop*** [27]:

> There could not be a breach of rule 3 because that is an 'object' rule. The 'object' rule directs the CSA to the objects which it is required to achieve in its activities and by its decision for its members.

161 In ***Singh v The Federated Miscellaneous Workers Union of Australia, WA Branch*** (1993) 73 WAIG 2674, Sharkey P found that an object rule of The Federated Miscellaneous Workers Union of Australia, WA Branch to provide funds to provide legal assistance for members in employment or industrial matters was not mandatory and that the rule could not mean that the union was bound to assist every person who applied for legal assistance (2677).

162 In ***Stacey***, Ritter AP observed at [316] that the proposition that r 3(a) of the rules of the CSA could not be breached as it was an object, could be conceivably too broad in very unusual circumstances. His Honour, however, did not discuss the issue further. When he had regard to the proper construction of r 3(c) of the rules of the CSA, he found the facts alleged did not establish a breach of that rule. In particular, he found [309] – [313]:

> 309 The first problem facing the applicant is the nature and terms of rule 3(c). It is a '*principal objects*' rule. Given that and the way the rule is drafted, the non-observance of the rule is not capable of being readily established. How can you prove an organisation is not following a principal object, particularly when it is simply the actions of the organisation with respect to one member that is brought before the President?
>
> 310 The structure of rule 3 is to firstly say that the principal objects shall be to '*protect and promote the interests of the membership*' by what is set out as (a)-(c). It is implicit that (a)-(c) represents methods by which the interests of the membership are to be promoted.
>
> 311 The reference is to the '*membership*' as a whole at this point and not individual members. Rule 3(c) does however refer to individual members and '*representing [their] industrial welfare*'. The effect of the sub-rule is therefore that by the representation of the industrial welfare of members the interests of the membership as an object will be '*protected and promoted*'.
>
> 312 This meaning of rule 3(c) is understandable, but the rule does not specify what activities constitute '*representing*'. The rule does not require a particular standard of representation of all of the industrial welfare of each member to the extent considered to be appropriate by that member to satisfy the specified method of the carrying out of the object. The difficulty of setting a bar or standard of compliance in what is a broad motherhood type statement of intent shows the difficulty in proving an organisation is not acting in accordance with the rule.
>
> 313 In my opinion *the CSA* in deciding not to fully fund the applicant's legal costs in application 1215 and this application did not fail to act in accordance with this object. Not funding the applications of one member does not show *the CSA* was acting contrary to the purpose specified in rule 3(c).

163 For reasons that follow, similar considerations can be said to arise in the construction of r 3 of the rules of the CFMEUW.

(b) Interpretation of the rules of the CFMEUW

164 I also have doubts about the correctness of the brief observations made by Sharkey P in ***Wauhop*** that an object rule cannot be breached as it is an object. Whilst some object clauses may be drafted in such a way to create mere aspirations or be so broad and/or vague so as to be incapable of breach, other object rules may be more specific and could be capable of breach, depending upon the way the rule is drafted and the circumstances which are relied upon to establish a breach.

165 In analysing the interpretation of an objects clause in union rules, it is of assistance to have regard to the role of objects clauses in legislative instruments. The role of an objects clause in legislation is a statement of intention as to how an Act is to operate and is used as an aid to the construction of words of legislation: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th ed, 2011, LexisNexis Butterworths) [4.49]. However, like any other provision in legislation, an objects clause may be qualified by specific provisions contained in legislation: *Statutory Interpretation in Australia* [2.11]. Whilst the rules of a union are not legislative instruments, these principles are apposite. This does not mean that the rules of the CFMEUW should be interpreted strictly. They are not drafted by skilled draftsmen and are to be interpreted broadly and given a meaning consistent with the intention of the draftsmen: ***Hospital Salaried Officers Association of Western Australia (Union of Workers) v The Hon Minister for Health*** (1981) 61 WAIG 616, 618; ***Stacey*** [92] – [93], ***Delron Cleaning Pty Ltd v The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch*** [2004] WAIRC 12163; (2004) 84 WAIG 2527 [40]. To ascertain the intention of the drafters of the rules, regard should be had to the whole of the rules, including the objects.

(c) The rules of the CFMEUW

166 The rules of the CFMEUW do not prescribe many specific duties to be carried out by its officers. They do, however, establish a democratic structure of bodies who control the affairs of the CFMEUW whereby the supreme governing body of the union resides in monthly general meetings of members. Between these meetings the executive has the control and conduct of the business of the union.

167 Rule 1 sets out the name of the CFMEUW. Rule 2 names the registered office of the CFMEUW. Rule 3 of the rules sets out the objects to which funds of the CFMEUW are to be provided for and distributed and to activities the CFMEUW is to engage in. Rule 3 provides:

> The objects for which the Union is established are, by the provision and distribution of funds, and by all other lawful means:-
>
> (1) To uphold the right of organisation of labour, to improve, protect and foster the best interests of its members, and to regulate the hours of labour.
>
> (2) To propagate the principles of industrial unionism, and to secure the establishment of same.
>
> (3) To promote industrial peace by all amicable means including but not necessarily limited to conciliation, arbitration, collective and enterprise bargaining (including acting as bargaining agent).
>
> (4) To assist in the movement for the socialisation of the means of production, distribution and exchange.
>
> (5) To obtain and maintain just wages and conditions.
>
> (6) To assist by federation or otherwise in upholding the rights and privileges of workers.
>
> (7) To promote education and training in industry.
>
> (8) To promote the rehabilitation and retraining of injured members.
>
> (9) To promote education and training in relation to the retraining and redeployment of members affected by redeployment, redundancy or restructuring in industry.
>
> (10) To manage and maintain a Union library.
>
> (11) To promote equal opportunities for all workers.
>
> (12) To promote consultation and co-operation between all representative and consultative bodies within the Union.
>
> (13) To provide legal assistance in support of and in defence of members.
>
> (14) To establish and maintain a newspaper and any other publication which might assist the Union.
>
> (15) To assist members who are in distress through sickness, accident, unemployment or any other cause over which they have no control.
>
> (16) To subscribe to testimonials or otherwise recognise services rendered to the Union.
>
> (17) To make gifts to other labour organisations for bona fide charitable purposes.
>
> (18) To affiliate with, amalgamate with, co-operate with, or assist any person or body which has any object similar to any of the objects of the Union, including obtaining certificates or entering into agreements pursuant to section 71 of the Industrial Relations Act (WA) 1979 as amended or like provisions, making applications pursuant to the provisions of section 72A of the Industrial Relations Act (WA) 1979 as amended or like provisions and entering into agreements with organisations registered pursuant to Commonwealth Industrial Relations legislation.
>
> (19) To establish, where practicable, sub-branches or sections throughout Western Australia.
>
> (20) To register the Union under any Commonwealth or State Trade Union, Industrial Arbitration, Co-operative or like Act.
>
> (21) To exercise all available powers privileges and advantages provided under any Commonwealth or State Trade Union, Industrial Arbitration, Co-operative, Real Property or like Act.
>
> (22) To purchase, take on lease, hold, sell, mortgage, borrow, exchange, invest, obtain interest on capital and donations, and otherwise acquire, own, possess and deal with any real or personal property including moneys.
>
> (23) To raise funds from members by entrance fees, contributions, levies, other fees or fines.
>
> (24) To secure the provision of reduced cost or free goods and services for members by way of marketing services or any other lawful means.
>
> (25) To enrol in the Union all persons eligible to become members.
>
> (26) To do all such other acts and things which are incidental to or which in any way relate to the carrying out of the above objects.

168 Rule 4 is the eligibility for membership rule. This rule is not material to the matters alleged in this application.

169 Rule 5, r 6, r 7, r 8, r 9 and r 10 provide for procedure for attaining membership, a register of members, payment of an entrance fee and membership fees, termination of membership and payment of outstanding fees, levies and fines.

170 Rule 11 empowers the CFMEUW at a special general meeting to strike a levy on all members. Rule 11 does not require a special general meeting to prescribe the purpose of any levy. However, when regard is had to the objects in r 3, in particular

the statement that funds of the union are to be provided for and distributed for those purposes, it could be said that levies imposed under r 11 should be to further or advance any of the objects in r 3.

171 Rule 12 provides a general rule for the control of the property and funds of the CFMEUW. Rule 12 provides:

> Subject to the control of the Union by General Meeting the funds and property of the Union shall be under the control of the Trustees. They shall be invested in the name of the Union by way of current account or on fixed deposit in the Commonwealth Savings or Trading Bank or such other bank, Building Society, Credit Union or other financial institution, or Government issued securities, or by way of investment in other securities or equities as the Executive may determine and notify to the Secretary.

172 Rule 12 simply nominates the trustees as the officers of the CFMEUW who are to control the funds and property of the CFMEUW. Insofar as r 12 creates a duty on the trustees, r 12 appears simply to be a 'machinery' clause for investment of funds and the holding of property. The determination of how funds are to be expended and property is to be acquired or expended ultimately resides with a general meeting: r 16(8).

173 Rule 13, r 14 and r 15 deal with financial reports and audit requirements.

174 Rule 16 establishes the offices of the executive of the CFMEUW which comprise a president, secretary, two assistant secretaries, senior vice president, vice president, treasurer, two trustees, and two ordinary executive members. Pursuant to r 16(7), subject to the control of general meetings, the executive has control and conduct of the business of the CFMEUW. Rule 16(8) restricts the power of the executive to expend funds on its own motion. Rule 16(8) provides the executive cannot expend funds of the CFMEUW other than for administrative expenses and current wages without approval of a general meeting.

175 Rule 26 requires a general meeting of members of the CFMEUW to be held once each calendar month. Notice of a general meeting to members can be given by various means, including in any journal issued by the union: r 26(1). A minimum number of members for a quorum of a special general meeting or ordinary general meeting is prescribed in r 26(6) to be 30 members.

176 The procedure to be followed for general meetings is set out in r 27.

177 Additional organisers can be appointed by the executive pursuant to r 17 and the executive can establish, abolish or alter sub-committees under r 18.

178 Rule 19, r 20 and r 21 provide for the appointment of delegates by the executive.

179 Rule 22 requires a member of the CFMEUW to inform workplace delegates of certain matters, that are not material to this application.

180 Rule 23 and r 24 prescribe the procedures to be followed for election of offices and casual vacancies of the executive and election of organisers.

181 The duties of the offices of the executive and organisers are prescribed in r 25. The role of the president and vice presidents is to preside over meetings of the CFMEUW: r 25(1). The role of the secretary appears to be substantially administrative, although the secretary is the principal spokesperson for the CFMEUW: r 25(2)(h). The trustees are to sign all cheques in conjunction with the secretary: r 25(5). Organisers and assistant secretaries are to assist the secretary: r 25(4) and r 25(6).

182 Rule 28 enables the executive to appoint any person or persons to represent the union in any court or tribunal.

183 Rule 29 empowers the secretary to recover all fees, fines, levies and contributions payable by members.

184 Rule 30 prescribes the seal of the union and r 31 requires the secretary to furnish returns to the Registrar of the Commission as required by the Act.

185 Rule 32 entitles a member to be supplied with a rule book (copy of the rules of the CFMEUW) upon request to the secretary and r 33 enables a member to inspect the books and register of members of the CFMEUW.

186 Rule 34 deals with procedures to be followed in industrial disputes and disputes between the CFMEUW and its members, or between members.

187 Rule 35 deals with offences of misconduct and penalties. The rule empowers the executive to determine whether a member is guilty of misconduct, the procedures to be followed when a charge of misconduct is laid and a procedure for appeal to a general meeting. As the applicant alleges that the CFMEUW has breached this rule, it is of assistance to set r 35 out in full. Rule 35 provides:

> (1) Any member who:
>
> (a) Fails to observe the rules of the Union or any of them;
>
> (b) Knowingly fails to observe any resolution of a General Meeting or of the Executive;
>
> (c) Fails to carry out or acts in contravention of any award, order or agreement binding on such member whether by or under any law of the Commonwealth or of the State in respect of work within the industry with which the Union is registered;
>
> (d) Obstructs any Special or Ordinary General Meeting or Executive meeting, or any other lawful committee of the Union in any way in the performance of any of its functions;
>
> (e) Wrongfully holds out as occupying any office or position in the Union or as being entitled to represent the Union in any capacity (to which charge it shall be a defence that the member believed bona fide on reasonable grounds that she/he was entitled so to act);

(f) Behaves in a drunken, disorderly or offensive manner at any meeting held under the Rules of the Union or in the office of the Union;

(g) Aids or encourages any other member in any misconduct under this Rule;

(h) Misappropriates the funds of the Union;

(i) Who is grossly neglectful of duty under these Rules;

is guilty of Misconduct.

(2) If the Executive finds any member guilty of misconduct it may:

(a) Reprimand such member;

(b) Fine such member a sum not exceeding the sum of one year's subscriptions for that member;

(c) Suspend such member for a period not exceeding twelve (12) months, or

(d) Expel such member.

(3) Any member of the Union may notify the Secretary that such member alleges another member is guilty of misconduct.

(4) The Secretary may request a notifying member to give such particulars of the alleged misconduct as are reasonably necessary.

(5) In the absence of notification from a member, the Secretary if he considers a member guilty of misconduct may act in accordance with this Rule.

(6) The Secretary shall give a member charged with misconduct written notice of the charge or charges giving sufficient details to give such member a reasonable opportunity to answer such charge or charges.

(7) The notice referred to in subrule (6) hereof shall be sent to the member at his registered address giving not less than twenty-one (21) days' notice of the meeting of the Executive at which such charge or charges will be heard.

(8) Should the charge or charges have been notified by a member of the Executive, such Executive member shall not participate in the consideration nor vote on such charge or charges.

(9) At the hearing, the Secretary shall prosecute and the member charged shall be given reasonable opportunity to answer the charge or charges.

(10) If a member is not present at the meeting at which the decision is given, the Secretary shall forthwith send to the member at his or her registered address, notification of the outcome.

(11) A member found guilty of a charge may appeal to a General Meeting from such finding or from any penalty imposed. Notice of appeal shall be given in writing to the Secretary within two (2) weeks of any decision being communicated to the member and shall set out in full all matters that the member desires to be considered.

(12) Such appeal shall be heard at the next General Meeting after such notice has been given or such other General Meeting as the General Meeting may determine, but in any event the appeal shall be heard within three months of the receipt of the notice of the appeal.

(13) For the purposes of these Rules the principles known as the 'rules of natural justice' or 'procedural fairness' shall be at all times complied with as far as is practicable.

188 Rule 36, r 37 and r 33 provide for procedures to be followed to alter the rules, amalgamate with another registered organisation of employees and dissolution of the CFMEUW. These rules are not material to this application.

189 The applicant's charges contend breaches of r 3 (objects), r 10 (payment of contributions, fees and fines), r 11 (levies and fines), r 12 (property and funds), r 14 (auditor's report), r 15 (presentation of financial report), r 33 (inspection of books) and r 35 (offences and penalties).

190 It is well established that a power conferred by a rule of an organisation may only be exercised by the recipient of the power for the purpose for which the power was conferred: ***Scott v Jess*** (1984) 3 FCR 263; (1984) 56 ALR 379; (1984) 8 IR 317; see the discussion in ***Stacey*** [325] – [331].

191 It is clear that when regard is had to the whole of the rules of the CFMEUW, that the objects set out in r 3 of the rules set the purposes the executive, each of the offices of the executive and the general meeting is to exercise when exercising their powers and functions. As there are no specific duties set out in the rules for the executive and the general meeting other than to conduct the business of the CFMEUW, the parameters of the 'business' of the CFMEUW can be said to be set out in r 3. I use the words 'business' and 'parameters' as r 3 does not in general provide specific tasks or functions, but simply provides broad aspirational goals. That does not mean that the executive or the supreme governing body (the general meeting) of the CFMEUW can act for a purpose outside the scope of r 3 as they must bona fide exercise their powers and functions in accordance with the objects in r 3. Of importance, is that the means undertaken in pursuit of the objects must be lawful. Notwithstanding this construction, some of the objects in r 3 are so vague so as to be incapable of breach by the executive, its members or a general meeting. For example, it is an object to assist in the movement for the socialisation of the means of production, distribution and exchange: r 3(4). Such an object is extremely vague. Other objects are so broad so as to be without qualification. In particular, r 3(22) provides an object for which the CFMEUW is established, is to purchase, take on lease, hold, sell, mortgage, borrow, exchange, invest, obtain interest on capital and donations, and otherwise acquire, own, possess and deal with any real or personal property including moneys. No precondition is prescribed for property to be acquired, dealt with or disposed of for a particular purpose. The only precondition is transactions other than for the payment of administrative expenses and wages must be approved by a general meeting: r 16(8).

192 Also of importance (as Ritter AP pointed out in ***Stacey*** at [310] – [311], in relation to an analysis of the object rule of the rules of the CSA), where the objects are directed at the membership how can it be proved a union is not following an object when it is simply the actions of an organisation with respect to one member. Whilst r 3 is cast in slightly different terms to the objects clause of the rules of the CSA, it is clear that each object in r 3 of the rules of the CFMEUW is an object directed to providing benefits to the members of the CFMEUW as a whole and is not directed to any particular individual member.

193 Even where an object in r 3 is capable of breach, whether a prima facie breach is evident on its face depends upon the circumstances that are alleged and the express terms of the object that is said to have been breached.

194 The CFMEUW contends that 92% of the charges fail to identify conduct capable of giving rise to a breach of the rules of the CFMEUW, or, alternatively, a CFMEU rule which is amenable to contravention.

(d) The charges

195 Charges 1, 3 and 4 arise out of the same alleged series of events arising out of the termination of employment of the applicant by Downer Energy Systems Pty Ltd in October 2006. In charge 1, the applicant alleges Mr Reynolds, Mr McDonald, Mr Hudston and the site manager of Downer Energy Systems Pty Ltd conspired to dismiss and blacklist him. Charge 3 alleges a refusal to mount a proper defence. Charge 4 repeats some of the allegations made in charge 1, in particular the allegation of conspiracy, and adds a claim that the CFMEUW misled the applicant during his request for a wrongful dismissal claim by stating they could not do anything about his termination of employment because of Work Choices. In each of these charges, the applicant alleges breaches of r 3. In respect of each charge, he alleges a breach of r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). In charge 1, a 'conspiracy' is alleged. Whilst each of these sub-rules are cast in general terms and create as Ritter AP described in ***Stacey*** [312] 'motherhood statements' and leaving aside whether actions against one member could constitute a breach of r 4, the conduct alleged, if proven, could, depending upon the circumstances found to be proven, be capable of establishing the object in r 3(1) 'to protect and foster the best interests of its members', if such conduct could be attributed to the CFMEUW itself, as a conspiracy to dismiss a member is an extreme example of conduct that is opposite to this object. For this reason, ground 2 of the grounds of objection has not been made out. However, the applicant simply makes a bare allegation of conspiracy against Mr Reynolds without providing any particulars of the conspiracy. He simply says in the answers to the request for particulars that all the requested particulars are held on file at the CFMEUW office and provides some vague particulars about the conduct of Mr McDonald in his answers to charge 4. These charges will be considered further when grounds 4 and 5 are considered.

196 In charge 2, another allegation of conspiracy is made by the applicant. The applicant contends in this charge that in or around October 2006, Mr Reynolds, Mr McDonald and Mr Hudston also conspired with the site manager of Downer Energy Systems Pty Ltd to blacklist Joshua Daley, the stepson of the applicant. In the answers to the request for particulars, the applicant says that at the time of the alleged event Mr Daley was not a member of the CFMEUW. In light of this particular, no breach of the rules could arise as there is nothing in the rules that raises any obligation to any person who is not a member of the CFMEUW. For this reason, charge 2 will be struck out on grounds that it does not identify conduct capable of giving rise to a breach of the rules of the CFMEUW.

197 In charge 5, the applicant alleges that when Mr McDonald was expelled from the ALP in 2007 after acting in a grossly offensive manner towards a construction manager, the CFMEUW and its members were brought in disrepute. This conduct is said to breach r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). Clearly this conduct cannot amount to a breach of any of these sub-rules as they do not create any obligation on any official of the CFMEUW to be a member of the ALP, or relate to the circumstances of retention of membership of a political party. For this reason, charge 5 will be struck out on grounds that it does not identify conduct capable of giving rise to a breach of the rules of the CFMEUW.

198 Charge 34 raises a similar issue to charge 5. In charge 34, it is alleged that when Mr Reynolds resigned from the ALP in 2007 in a brazen public display of animosity after his wife was expelled from the party, this brought the CFMEUW into disrepute. For the same reasons why charge 5 will be struck out, charge 34 should also be struck out.

199 Charge 31 also raises an issue that does not relate to the following objects in r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). Charge 31 alleges Mr Reynolds brought the CFMEUW into disrepute as he used his position to arrange a consultancy contract with Brian Bourke [sic] at great expense to the CFMEUW. The answers to the request for particulars in respect of this charge pleads a breach arises because it is not in the objects of the CFMEUW to employ a mate who has no experience in the construction industry. Such an allegation is vague and lacking in particularity. The engagement of a consultant would be regarded as an administrative matter for services to be provided. In the absence of any particulars that set out the work to be performed in the consultancy contract, it is difficult to see how a breach of r 3 could arise. What the applicant may be seeking to raise in this charge is that it is an implied term of the rules of the CFMEUW that appointments be free of cronyism or nepotism. However, as Ritter AP discussed in ***Stacey***, there is no jurisdiction under s 66 of the Act to deal with any breach of an implied rule. For these reasons, charge 31 will be struck out on grounds that it does not identify conduct capable of giving rise to a breach of the rules of the CFMEUW and for want of particularity.

200 Charges 7, 8 and 9 raise complaints by the applicant about a 'failure' by the CFMEU to commence litigation in 2008 against ERMS Solutions for conducting an 'illegal blacklist'. In charge 39, the applicant alleges in 2011 the CFMEUW failed to mount a 'forthright defence' to an action in the Federal Court against the union in relation to the ERMS blacklist, which constituted a breach of r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). However, when oral submissions were made about this charge, the applicant stated that the CFMEUW was not a party to the proceedings in the Federal Court. Consequently, charge 39 cannot be capable of raising a contravention of r 3 and will be struck out.

201 Charges 7 and 8 allege that a motion was not allowed and debate was stifled about the blacklist at general meetings on 12 March 2008 (charge 7) and 9 July 2008 (charge 8) and this action constituted a breach of various sub-rules of r 3 and r 26(3).

202 Rule 26(3) provides:

> All questions are to be decided by a majority of the members present, except where otherwise provided for. The Executive shall fix the hours of business, provided however that such meetings shall be of two hours' duration only and that no new business shall be conducted after the expiration of the two hour period and provided that the time of the meeting may be extended an extra fifteen minutes by a majority of the members voting for the purpose of finalising the business before the Chairperson.

203 Rule 27 sets out the procedure to be followed at a general meeting. Rule 27 provides:

(1) Order of Business

The Business at General Meetings of the Union shall, unless otherwise determined by the meeting in accordance with subrule (2) of this Rule, be conducted in the following order, namely:-

(a) Reading of the minutes of the previous General Meeting and their confirmation or disposal of in some manner;

(b) Executive reports for consideration and adoption;

(c) Notices of motion;

(d) Reception of delegates (if any);

(e) Financial report (if any);

(f) Reading, reception and consideration of General correspondence;

(g) Auditor's report (if any);

(h) Adjourned business;

(i) General reports for consideration and adoption;

(j) Questions and replies (no discussion thereon)

(k) Deputations; and

(l) General Business.

(2) Suspension of the Order of Business

It shall be competent by a vote of two thirds (2/3rds) of the members present for the meeting to suspend the Order of Business PROVIDED that the minutes of the previous meeting have been read and dealt with and PROVIDED that the effect of such suspension shall not be the rescission of any resolution previously adopted by the Union or the Executive.

(3) Notice of Motion to take Precedence

Any notice of motion shall take precedence in the order in which it stands in the Minute Book in relation to other similar notices, unless otherwise agreed to by the meeting in accordance with subrules (2) and (4) of this Rule and will lapse if the member who moved the motion or some member on his or her behalf be not present when the order of the day for such notice is read.

(4) Motion for Adjournment Cannot be Abrogated

When a motion for the adjournment of a debate to any stated night or time has been carried, such motion shall not in any way be abrogated unless with the consent of the mover of the motion for adjournment.

(5) Notices of Motion: How Given

Any member may, at any meeting of the Union or Executive, give notice of motion of a resolution to be discussed at a future meeting by handing the copy thereof to the President, who shall at once read it to the meeting.

(6) Adjournment of a Meeting

When a motion for the adjournment of a meeting has been carried, or the meeting adjourns through effluxion of time, the business then undisposed of shall have precedence at the next ordinary meeting after Executive reports have been dealt with unless otherwise agreed to in accordance with subrules (2) and (4) of this Rule.

(7) No Member to Obtain a Discussion, etc.

(a) No member shall be allowed to obtain a discussion on any subject through the medium of personal correspondence. All correspondence having reference to any matter that has been remitted to the Executive for consideration and report shall, for the time being, be deemed to be the property of the Executive as the case may be.

(b) Such correspondence shall, however, be read in open meeting at the time the report is presented, if any member so desire.

(8) Rules of Debate

Member Rising to Speak

(a) Any member desiring to speak shall rise in his or her place and address the Chairperson. If two or more members rise at the same time the Chairperson shall call upon the member who, in his or her opinion, first rose to speak.

Member to Resume his or her Seat

(b) Any member speaking shall at once resume his or her seat-

(i) If the Chairperson rises to speak; or

(ii) If a point of order be raised and shall not resume his or her speech until the point of order be decided.

Member to Speak only Once

(c) A member may speak only once upon any question before the meeting except-

(i) In reply to an original motion;

(ii) In explanation of or correction to some matter during the debate;

(iii) Upon a point of order raised during the debate; or

(iv) Upon a resolution being carried that 'he/she be now heard'.

Motions May be Amended

(d) A motion may be amended at any time during debate thereon by:

(i) Striking out certain words;

(ii) Adding certain words; or

(iii) Striking out certain words and inserting others in their place.

Amendment Becomes the Motion

(e) Upon an amendment being carried it shall take the place of the original motion and may be further amended until a decision is arrived at.

Motions May be Superseded

(f) A motion may be superseded at any time:

(i) By another motion that it be discharged from the notice paper; or

(ii) By a motion that the next business be proceeded with is resolved in the affirmative.

No More Than Two Members to Speak

(g) Not more than two members shall speak in succession either for or against any question before the meeting and if at the conclusion of the second speaker's remarks no member rises to speak on the other side, the Motion or amendment shall be at once put to the meeting.

Time Allowed for Speaking

(h) The mover of any original motion shall be allowed five minutes to introduce it and, notwithstanding the closure motion 'that the question now be put' being carried, the member shall be allowed five minutes to reply. No member shall be allowed to speak for more than five minutes at any one time, unless a two-thirds majority of the members present (by resolution) agree to the time limit of any speaker being extended to such length as shall be specified in such resolution. The time limit for discussion on any one subject shall be half an hour.

Motions Cannot Again be Moved

(i) Any motion agreed to or rejected by the Union cannot again be dealt with unless a motion of recommittal is carried by a two-thirds majority of members present.

Motions: How Put

(j) The Chairperson shall put all questions in a distinct and audible voice to the meeting by asking the 'Ayes' to vote first and afterwards the 'Noes', and shall declare his or her opinion as to which has the majority. Any seven members rising may demand a division when the Chairman shall take the vote by asking the 'Ayes' to go to the right and the 'Noes' to the left.

Motion to Disagree with Chairperson's Ruling

(k) When a motion to disagree with a ruling of the Chairperson has been duly proposed and seconded, the Chairperson shall leave the Chair until the motion has been disposed of by the meeting.

No Member to Speak

(l) No member may speak to any question after it has been put by the Chairperson, nor during a division, except to a point of order.

No Member May Vote

(m) No member shall be allowed to vote who was not present when the question was first put.

Members Must Vote on Division

(n) Every member present during a division must vote and his or her vote will be counted with the side on which he or she is sitting.

Adjournment of Debate

(o) A motion for the adjournment of the meeting or for the adjournment of the debate may be proposed at any time during such debate and shall be at once put to the meeting by the Chairperson, unless time be mentioned. When time is mentioned in a resolution for adjournment of the debate, the discussion shall be strictly confined to the question of time, and any amendment in connection therewith.

Interrupting Business

(p) Should any member strike or threaten to strike another member, or make use of obscene language, or come into the room in a state of intoxication, he or she shall be fined not less than $2.00 and not more than $20.00. Should any member refuse to be silent upon the call to order by the Chairperson he or she shall be fined not less than $2.00 and not more than $20.00 and such fine shall be first call on that member's subscription. No member shall be admitted to any meeting until such fines are paid. The fines referred to in this Rule may be summarily imposed by the Chairperson.

204 The CFMEUW points out that r 26 requires the procedure in r 27 to be complied with and that r 27(5) provides that a motion can only be raised in writing and read at a meeting and it is then to be considered at the next meeting. When regard is had to the provisions of r 27, it can be seen that the procedure for the order of business at a general meeting is mandatory, except where the order of business is suspended by a vote of two-thirds of the members present at a general meeting in accordance with r 27(2). It appears clear from the applicant's answers to the request for further particulars of this charge that when the applicant sought to raise a motion, he did not comply with the procedure in r 27(5).

205 The sub-rules of r 3 that are alleged to have been breached by this conduct in these charges are r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). As discussed previously, all of these sub-rules establish broad aspirational goals for the whole of the members of the CFMEUW. Whilst taking action on behalf of members generally against any organisation that compiles or maintains a blacklist may be said to be not consistent with those goals, it is difficult to see how the stifling of a debate about such a matter at a general meeting could be said to be a breach of any of the sub-rules of r 3 that are relied upon by the applicant. However, even if such a case could be made out, any debate of a motion at a general meeting must comply with the procedures set out in r 27 and compliance has not been pleaded. For these reasons, charges 7 and 8 will be struck out on grounds that these charges fail to identify conduct capable of giving rise to a breach of the rules.

206 Charges 9 and 10 also deal with the applicant's complaints about the blacklist. In charge 9, the applicant alleges Mr Reynolds wrote an ambiguous letter to him on 11 July 2008 enclosing a letter from Ms Helen Creed, WA Fair Employment advocate, in response to issues raised with her regarding ERMS. The applicant alleges the letter instructed Mr Reynolds to take his concerns about the blacklist to the federal jurisdiction and the CFMEUW did not do so. In failing to do so, the CFMEUW is alleged to have breached r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). In charge 10, the applicant alleges the same sub-rules of r 3 were breached when he wrote to the state executive pointing out the issues with ERMS and breaches of the rules and received no reply. As discussed, in respect of charges 7 and 8, it is difficult to see how the broad aspirational goals in r 3 could be construed to require the specific action the applicant alleges should have been taken. For this reason, I am not satisfied that charges 9 and 10 identify conduct that is capable of giving rise to a breach of the rules. Consequently, these charges will be struck out.

207 In charges 15, 16, 26 and 28, the applicant makes a number of allegations of misuse of union funds. In charge 15, the applicant alleges that r 11(1) and r 35(1)(h) were breached by Mr Reynolds and Mr McDonald who ordered multiple levies from 2001 to 2011 and did not advertise the purpose or ratify the levies in accordance with r 11(1). He also alleges cash was siphoned off and largely used for purposes other than that stated at the time of the imposition of the levies, which constitutes a breach of r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). The applicant also states this conduct amounts to possible offences against the *Criminal Code* and *Crimes Act*. However, when considering an application under s 66 of the Act, the President has no jurisdiction to consider or determine whether conduct amounts to a breach of any provision of any legislative enactment. The jurisdiction of the President under s 66 is confined solely to dealing with orders and directions relating to the rules of an organisation. Nor does the President have any power to inquire into whether offences have been committed under any enactment and refer any matters to prosecution authorities. Consequently, these reasons do not deal with any allegation made of a breach of any statutory enactment.

208 As to charge 15, there is no requirement in r 11(1) to advertise the purpose of a levy. It is the case, however, that only a special general meeting has the power to strike a levy under r 11(1). Consequently, the CFMEUW concedes that r 11(1) may be amenable to breach. This concession, in my opinion, is properly made as charge 15 alleges in part that the levies were not ratified in accordance with r 11(1). For this reason, ground 2 fails in respect of this charge. Charge 15 will be considered further when grounds 4 and 5 are considered.

209 In charge 16, the applicant alleges that since 2001 the executive did not seek authorisation from general meetings to take control of money derived from levies and donations away from the trustees. This conduct is said to be contrary to r 35(1)(a), r 35(1)(g), r 35(1)(h), r 35(1)(i), r 12, r 14(2) and r 15. One difficulty with this allegation is pursuant to r 16(1) the trustees form part of the executive. Charge 16 also contains an allegation contrary to those provisions of the rules that the CFMEUW failed to keep proper accounts in relation to levies, donations and bribes and submit those to the auditor and this also amounts to multiple breaches of r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(24). The applicant also alleges this conduct constitutes gross breaches of trust, criminal offences of stealing, fraud and misrepresentation to gain a benefit. In the answers to the request for particulars, it is alleged that the officers who committed the offences were Mr Hudston and a list of junior officials who are not named. It is clear that these allegations cannot amount to a breach of r 12, r 14(2) or r 15. Rule 14(2) simply requires the officers of the CFMEUW to provide the auditor with access to the books and documents of the CFMEUW and r 15 requires the secretary to provide a financial report to a general meeting after the receipt of the auditor's report. When regard is had to the allegations expressed in charge 16, it can be seen that non-compliance with the obligations in r 14(2) or r 15 is not alleged.

210 Although r 35(1)(h) creates an offence of misconduct for misappropriation of funds of the CFMEUW, the procedure for dealing with misconduct is by the executive under r 35(2). Whilst the conduct alleged in this charge by some of the members as individuals could constitute a breach of r 35(1)(i), r 35 only applies to the members as individuals and not to the CFMEUW

as a body. In relation to the allegation that there was a failure to keep proper accounts constitutes a breach of the nominated sub-rules of r 3, there is no clear particularisation of conduct which could be said to be a breach of any object in r 3. Also, this charge does not contain sufficient particulars. In charge 16, the issue arises whether the applicant has pleaded with sufficient particularity breaches of:

(a) rule 35(1)(h) which creates an offence of misconduct for misappropriation of funds of the CFMEUW; and

(b) rule 12 is raised in that contained in this allegation is that funds and property of the CFMEUW have been under control of the trustees, in particular levies and donations as it is alleged that the executive did not seek authorisation from general meetings to take the control of money away from the trustees.

211 In respect of r 35(1)(h), only vague allegations of misappropriation of funds have been given and some of these allegations must be very old as the particulars state relevant allegations were made in the Cole Royal Commission. As to r 12, no particulars have been provided as to when the trustees have not had control of the funds of the CFMEUW. For this reason, charge 16 will be struck out on grounds that it fails to identify conduct capable of giving rise to a breach of the rules and on grounds of insufficient particularity.

212 In charge 26, the applicant states Mr Reynolds committed multiple breaches of r 3(22) and r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21) by siphoning levies, blackmail payments, bribes and other revenue from small private enterprises from the CFMEUW cash stream to acquire massive personal portfolio of property, real estate and assets. In further and better particulars, the applicant says that without a proper book inspection the figure is unascertainable, but he estimates funds that have been missing from 1994 is between $5 million to $15 million. Among the property stated to have been acquired by Mr Reynolds is the 'union training centre'. This charge is defective in a number of material aspects. Firstly, any breach of a rule that raises such allegations, which are perhaps the most serious allegations that could be made against an officer of a union, should be properly particularised. Clearly, it is insufficient to make such vague allegations covering potentially a period of 15 years. Secondly, the documents annexed to the applicant's affidavit show the Construction Skills Training Centre is an association incorporated under the *Associations Incorporation Act*. Mr Reynolds, as chairman of the Construction Skills Centre, made an application under the *Associations Incorporation Act* to incorporate the centre (exhibit A, annexure D). These documents establish that Mr Reynolds is not the owner of the Construction Skills Training Centre. In any event, the allegations in charge 26 are made against Mr Reynolds and not against the executive of the CFMEUW or the CFMEUW. In these circumstances, even if any of the allegations could be made out, no allegation is made that the executive or the governing body of the CFMEUW, the general meeting, authorised any alleged misappropriation of any funds. For these reasons, charge 26 will be struck out on grounds that it does not identify conduct that is capable of giving rise to a breach of the rules and for want of particularity.

213 Charge 28 raises an allegation also raised in charge 26. In charge 28, it is alleged that in 1997 Mr Reynolds arranged a $150,000 payment to the 'union training centre' through the use of covert surveillance, entrapment and subsequent blackmail. This conduct is said to breach various sub-rules of r 3 and r 35(1)(a), r 35(1)(g), r 35(1)(h) and r 35(1)(i). This charge is also materially defective. The factual circumstances alleged cannot in law amount to a breach of the rules of the CFMEUW as it did not exist as an organisation in 1997. Also, this is a charge against Mr Reynolds personally. For this reason, charge 28 will be struck out on grounds that it does not identify conduct that is capable of giving rise to a breach of the rules.

214 In charge 19, the applicant alleges Mr McDonald has since 2001 knowingly and repeatedly committed criminal offences of assault and trespass, mostly whilst not being in possession of a right of entry. The applicant also alleges that the executive committed multiple breaches of r 3(1), r 3(2), r 3(3), r 3(24), r 3(26), r 35(1)(c), r 35(1)(g) and r 35(1)(i) by authorising the behaviour of Mr McDonald and authorising the payment of costs incurred by the repeated unlawful behaviour from members' funds. In the answers to the request for further and better particulars in respect of this charge, the applicant says Mr McDonald was acting in his capacity of assistant secretary of the CFMEUW and the CFMEU. This is said to be a gross departure of trust and accountability to members. He also pleads that the executive failed to curtail the behaviour of Mr McDonald. By this allegation, the applicant raises an argument that the authorisation by the executive of the payment of the defending criminal proceedings brought against Mr McDonald, the payment of fines incurred by Mr McDonald and a failure to curtail Mr McDonald's behaviour, was a breach of a fiduciary duty the executive owed to the CFMEUW and its members.

215 What the applicant appears to seek to argue in this charge is a breach of a fiduciary duty the executive owes to the members of the CFMEUW. Even if such a duty could be said to exist in these circumstances, it could only be implied duty. However, there is no power conferred under s 66 of the Act to enforce implied rules in a s 66 application: ***Stacey*** [308] – [335].

216 The applicant also argues through his particulars that as the executive failed to stop the behaviour of Mr McDonald, this constitutes a breach of trust. This allegation is also an attempt to argue that the CFMEUW through its executive breached an implied duty of trust, which is not a matter that is capable of enforcement proceedings under s 66 of the Act.

217 By payment of Mr McDonald's legal fees and penalties the CFMEUW is said to have breached r 3 and r 35. Whilst the fact of the relevant convictions relied upon by the applicant is sufficient to raise an allegation that Mr McDonald has engaged in unlawful conduct that has been found by various courts to constitute criminal conduct, it does not follow that this conduct by itself constitutes a breach of the rules of the CFMEUW itself. Firstly, r 35 only applies to a member of the CFMEUW as individual members, including officers of the CFMEUW, but not to the constituent bodies of the CFMEUW, that is the executive and the body of members that forms each general meeting. Mr McDonald is not the respondent to this charge, nor could he be, as a s 66 application can only be brought against an organisation registered under the Act.

218 The matters stated in charge 19 and the applicant's further and better particulars cannot, in my opinion, raise an arguable case that the CFMEUW has breached any of the identified objects of the CFMEUW in r 3. No rule is identified by the applicant that prohibits the payment of penalties or costs of an official who is charged and/or convicted of a criminal offence in circumstances where the conduct in question was committed by the official whilst acting as an employee or officer of the CFMEUW. To the contrary, r 3(23) contemplates that it is an object of the CFMEUW to raise funds from levies. Under r 11, the power to strike a levy resides with any special general meeting. The purpose for which levies can be prescribed is not provided for in the rules, other than it can be inferred from the word 'lawful' in the opening proviso to r 3 that any levy struck

by a special general meeting must be for a lawful purpose to further or advance any of the objects in r 3. If levies were struck by a general meeting to fund the defence of prosecution action against Mr McDonald in respect of conduct committed by Mr McDonald in his capacity as assistant secretary of the CFMEUW, no unlawful purpose in the raising of those levies is pleaded by the applicant. Also, the applicant does not plead the levies were not struck by a special general meeting, but simply says Mr McDonald pleaded to the executive to authorise payment from the CFMEUW funds and arranged and participated in the collection of levies from the members. Yet there is nothing in the rules that prohibits that action by Mr McDonald. Nor does the applicant plead that a special general meeting struck a levy for a purpose that did not further or advance the objects in r 3.

219 The applicant also attempts to raise an argument that as the CFMEUW paid penalties and costs incurred by Mr McDonald with 'members' funds' this action removed a deterrent placed upon Mr McDonald by the courts and can be said to encourage recidivism by Mr McDonald. Whilst that may be a proposition that is capable of being accepted, it does not raise a breach of any of the rules of the CFMEUW.

220 In addition, it is difficult to see how the conduct alleged in charge 19 can be said to breach r 3(1), r 3(2) and r 3(3) when each of these objects simply create broad aspirational goals by lawful means and do not create specific obligations. Rule 3(1) creates a vague goal of:

(a) upholding the right to organise labour;

(b) improving, protecting and fostering the best interests of its members; and

(c) regulating the hours of labour.

221 Rule 3(2) is even vaguer. It creates a goal of propagating and securing the principles of industrial unionism. So, too, is r 3(3). This provision establishes the goal of promoting industrial peace by all amicable means, including but not necessary limited to conciliation, arbitration, collective and enterprise bargaining.

222 The objects in r 3(24) cannot be said to be relevant in any respect to the matters alleged in charge 19. Rule 3(24) creates a goal of securing the provision of reduced cost or free goods and services for members. Rule 3(26) is also not relevant. Rule 3(26) simply creates an incidental power to carry out acts and things that relate in any way to carrying out any of the objects in r 3.

223 For these reasons, the objection in ground 2 against charge 19 is made out. Charge 19 will be struck out on grounds that this charge fails to identify conduct giving rise to a breach of the rules of the CFMEUW.

224 Charges 43 and 45 duplicate in part the allegations alleged in charge 19. In charges 43 and 45 the applicant alleges breaches of r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21) and breaches of r 35(1)(a), r 35(1)(g), r 35(1)(h) and r 35(1)(i) by Mr McDonald. No action can, however, personally lie against Mr McDonald under s 66 of the Act. In addition, the applicant has given no particulars of the serious breaches of rules of the CFMEUW in answer to the request for further and better particulars. Also, it is clear the alleged action taken by Mr McDonald in charge 45 was as an official of the CFMEU Branch not the CFMEUW. For this reason, charge 43 will be struck out on grounds that the charge fails to identify conduct giving rise to a breach of the rules of the CFMEUW and on grounds of lack of particularity. Charge 45 will be struck out on grounds that this charge fails to identify conduct giving rise to a breach of the rules of the CFMEUW and for want of particularity.

225 In charge 20, the applicant alleges contrary to r 3(13), Mr McDonald made a public announcement that the CFMEUW would not provide him (the applicant) with legal assistance when he was arrested in Bali on charges of importing drugs. Rule 3(13) provides that it is an object of the CFMEUW to provide legal assistance in support of and in defence of members. Whilst it is doubtful that r 3(13) can be relied upon to support an argument that a failure to provide legal resources to one member of the CFMEUW constitutes a breach, r 3(13) could only be properly construed as an obligation to provide support to members in respect of employment and industrial matters. The defence of drug importation charges in a foreign country is not such a matter. For this reason, charge 20 will be struck out on grounds that the matters alleged in charge 20 fail to identify conduct capable of giving rise to a breach of the rules of the CFMEUW.

226 In charges 21, 22, and 23, the applicant alleges the CFMEUW breached r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21) whilst he was employed at the Collgar Wind Farm in 2010.

227 In charge 21, the applicant alleges a union official, Mr Hudston, delivered a negative newspaper article about the applicant to the site manager with intent to have a negative effect upon the applicant in his workplace. The CFMEUW requested particulars of the newspaper article, but no particulars were provided. Given that a newspaper article is by its nature a document that is published widely in the public arena, it is difficult to see how such conduct could be the subject of a complaint. In any event, such conduct does not appear on its own to have any connection with the objects relied upon in r 3. For this reason, charge 21 will be struck out on grounds that the conduct set out in this charge fails to identify conduct capable of giving rise to a breach of r 3 and for want of particularity.

228 In charge 22, the applicant complains that his subscriptions had been repeatedly refused to be accepted by Mr Hudston during the period of September 2010 to 6 December 2010 and when he complained he was told he had to apply to the executive to retain his membership. The applicant then paid his dues into the union bank account. Although it is not specifically pleaded in this charge, it appears common ground that the applicant retained his membership. In these circumstances, it is difficult to see how such conduct could be said to breach the nominated sub-rules of r 3. In any event, by operation of s 64B(1)(a) of the Act, when the applicant was in prison in Bali in 2009 and ceased to pay dues, at the end of three months from the period of expiry of payment of the last payment of dues his membership of the CFMEUW ceased. Section 64B(1) of the Act provides:

(1) Where —

(a) a period in respect of which a subscription has been paid to an organisation for a person's membership of the organisation expires; and

(b) no subscription to continue or renew that membership has been paid to the organisation before, or within 3 months after, that expiry,

that membership ends by operation of this subsection at the end of that 3 month period.

229 In his answers to further and better particulars, the applicant states his membership dues were paid up until 30 March 2010. Consequently, pursuant to s 64B(1) of the Act, his membership came to an end on 30 June 2010. As at September 2010, when he was seeking to have membership dues accepted, his membership of the CFMEUW had expired and he had ceased to be a member of the CFMEUW. Pursuant to r 10(4) and r 10(5), the executive then had the right to decide whether a candidate for admission should be admitted as a member. For this reason, charge 22 will be struck out on grounds that the matters alleged fail to identify conduct giving rise to a breach of the rules of the CFMEUW.

230 In charge 23, the applicant complains about receiving two letters from Mr McCulloch advising he was going to be expelled for misconduct. The applicant requested particulars of the misconduct and received no response. He says this conduct constitutes a breach of r 35(2)(d) and r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). As no further action was taken by the executive against the applicant in respect of the allegations of misconduct a breach of r 35(2)(d) cannot be said to be raised as this provision simply empowers the executive to expel a member who it finds guilty of misconduct. As no finding of misconduct had been made, r 35(2)(d) has no application to the facts alleged by the applicant. Nor can any relevant connection with the facts alleged in this charge and the objects in r 3 be capable of being established as none of the objects in r 3 deal with the subject matter of alleged misconduct set out in r 35. For these reasons, charge 23 will be struck out on grounds that the facts alleged fail to identify conduct capable of giving rise to a breach of the nominated sub-rules of r 3 or r 35(2)(d).

231 In charge 25, the applicant alleges that Mr Reynolds instructed his son, Rod Reynolds, the union claims officer, not to progress a wage claim for a member, Mr Daley. Mr Daley is the stepson of the applicant. This conduct is claimed to constitute a breach of r 35(a) [sic], r 35(g) [sic] and r 35(i) [sic] and r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). Such conduct cannot constitute a breach of r 35 as the conduct alleged does not raise any defined ground of misconduct in r 35. Nor can such conduct constitute a breach of the nominated sub-rules of r 3. The only relevant sub-rule of r 3 is r 3(13) which provides that it is an object of the establishment of the CFMEUW to provide by the provision of funds and other lawful means legal assistance in support of and in defence of members. As Ritter AP pointed out in ***Stacey***, in relation to a similar objects rule of the CSA which stated that a principal object shall be to 'protect and promote the interests of the membership', the intent in r 3(13) is to provide services to 'members', that is members as a whole and not to an individual member [311]. Consequently, not pursuing a wage claim on behalf of one member cannot show the CFMEUW was acting contrary to the object in r 3(13). For these reasons, charge 25 will be struck out on grounds that the facts alleged fail to identify conduct capable of giving rise to a breach of the nominated sub-rules of r 35 or r 3.

232 In charge 27, the applicant alleges that from 1995 to a date unknown, possibly 2012, the executive approved untaxed weekly cash payments to officials of the CFMEUW. This allegation is said to constitute federal offences under taxation law and multiple breaches of r 12, r 14(2), r 15, r 35(1)(a), r 35(1)(g), r 35(1)(h), r 35(1)(i) and r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). The applicant also alleges this conduct breached the rules of the BLPPU and the CMETSWU. It is apparent from the submissions made by the applicant that (ts 151):

(a) this allegation was investigated by the Australian Taxation Office who took no action.

(b) he seeks an inquiry under s 66 of the Act into whether such payments are still being made.

233 It is clear the President under s 66 of the Act has no power to hold an inquiry into any matter other than an election. Nor does the President have power to determine whether an offence under any law of taxation has, or could be, made out. Rule 12, r 14(2) and r 15 do not deal with the subject matter of cash payments. Consequently, these rules are irrelevant to the conduct alleged in this charge. Rule 35 is not applicable as the conduct alleged does not raise any defined ground of misconduct in r 35. Nor does there appear any relevant connection with the subject matter of alleged cash payments with any of the sub-rules of r 3 that are nominated by the applicant. For these reasons, charge 27 will be struck out on grounds that the charge fails to identify conduct capable of giving rise to a breach of the rules of the CFMEUW.

234 In charge 36, the applicant alleges the CFMEUW has a recorded history of using its resources to purge Mr Aitkin in or about 2000, attempts to purge the applicant in 2010 and Messrs Kavanagh, Wildes, Heath and Ennor on unspecified dates. This conduct is claimed to constitute a breach of r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15), and r 3(21). Whilst the circumstances of the 'purging' are not clear from the applicant's answers to the request for further and better particulars, it appears that it is alleged that the reason for the purging is retaliation from dissent or standing in elections. The difficulty with the subject matter of this charge is that apart from an absence of sufficient particulars, the conduct alleged has no specific or sufficient connection with the nominated objects in r 3 of the rules. For this reason, this part of charge 36 will be struck out on grounds that it fails to identify conduct capable of giving rise to a breach of the rules and for want of particularity.

235 A similar issue arises in respect of charges 37 and 38. The conduct alleged in these charges are also devoid of particularity and have no specific or sufficient connection with the objects in r 3. In charge 37, the applicant alleges that in February 2003, the Cole Royal Commission made a number of adverse findings against the 'union' and that since 2005 the actions identified in the findings have continued to occur 'showing the union officials still think they own the industry' and everyone working in it. The alleged actions identified by the applicant are:

(a) arranging the summary dismissal and blacklisting of himself and his stepson.

(b) the actions of Mr McCulloch during the 2008 election period and attacks upon the applicant in December 2010.

(c) the actions of official, Mr Brad Upton, on 1 February 2012 in threatening to blacklist a group of union members if they accepted a caravan deal on offer by Worsley Parsons.

(d) continuing refusals of the CFMEUW to keep proper accounts and issue receipts for levy money collected.

236 This conduct is said to breach each object in r 3 and breach r 35 which constitutes a serious departure from the objects and ethics of unionism and its rules. The principal deficiencies of this charge are a lack of particularisation of the matters alleged in (b) and (d) and an insufficient connection of the conduct alleged with the objects in r 3. What is the heart of this charge is a

complaint about behaviour that is not consistent with the ethical standards expected of officers and employees of a union or the objects of the CFMEUW. Whilst ethical behaviour could be argued to be implied in the rules of the CFMEUW, it is not the subject of an express rule. As discussed earlier in these reasons, implied rules cannot be enforced by the President under s 66 of the Act. Although the applicant says that the conduct alleged in this charge breaches r 35, the action alleged in (a) to (d) above does not come within any of the specified categories of misconduct set out in r 35 and, in any event, r 35 only applies to the conduct of individual members of the CFMEUW. For this reason, charge 37 will be struck out on grounds that the charge fails to identify conduct capable of giving rise to a breach of the rules and for want of particularity.

237 The same considerations apply to charge 38. In charge 38, the applicant makes a general allegation that Mr Reynolds and Mr McDonald have a long documented history of threatening members and non-members in an angry violent fashion with the statement 'you will never work in the industry again' and the CFMEUW have used the ERMS blacklist to carry out these threats which is abhorrent. This conduct is said to breach r 3(1), r 3(2), r 3(3), r 3(5), r 3(6), r 3(11), r 3(12), r 3(13), r 3(15) and r 3(21). When asked for particulars of the threats, the applicant identified conduct in 2006. Leaving aside the issue whether this allegation is stale, the matters alleged are vague and devoid of sufficient particularity. If particularity is also left aside, it is also apparent that in the charge the applicant also seeks to identify non-ethical behaviour which could be argued to constitute part of an implied rule of ethics. However, the President has no power to deal with any breach of an implied rule. In any event, the conduct alleged in this charge does not have a sufficient connection with any of the nominated sub-rules of r 3. For this reason, charge 38 will be struck out on grounds that the charge fails to identify conduct capable of giving rise to a breach of the rules and for want of particularity.

238 In charge 46, the applicant alleges the executive and/or the trustees recently gave an expensive motor vehicle to Mr Reynolds when he retired and this action constituted a breach of r 12. Leaving aside the evidentiary issues raised in documents attached to annexure E of the affidavit of the applicant, as to the ownership of the vehicle in question, r 12 does not expressly prohibit gifts being made of property of the CFMEUW. Rule 12 simply provides that the funds and property of the CFMEUW shall be under the control of the trustees subject to the control of a general meeting. Although an argument may be capable of being made that it is implied in the rules that property of very substantial value should not be gifted (and I make no judgment about whether such an argument could succeed), the President acting under s 66 of the Act has no power to deal with a breach of an implied rule. For this reason, charge 46 will be struck out on grounds that it fails to identify conduct capable of giving rise to a breach of the rules of the CFMEUW.

Ground 3 – No jurisdiction; no standing

239 No jurisdiction arises under s 66 of the Act to deal with or to consider whether any statutory enactment has been or could be breached by the conduct alleged. However, as all of the charges that allege breaches of legislation also allege breaches of specific rules of the CFMEUW, this issue has been considered in these reasons when the other grounds of objection are considered.

240 I do not, however, agree with the submission made on behalf of the CFMEUW that the applicant does not have standing to bring an application in respect of events that are not within his personal knowledge or relate to events that concern other members or former members of the CFMEUW. To require an applicant under s 66 of the Act to show a sufficient interest in a particular subject matter would be to read down the scope of s 66(1) of the Act. Section 66(1) provides standing to make an application without any pre-condition to members, former members and persons who have applied for membership of an organisation.

241 Under s 27(1)(a) of the Act, the President, as a member of the Commission, has power to dismiss a matter. Section 27(1)(a) provides:

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

242 This power to dismiss is subject to the pre-condition in the opening words of 'Except as otherwise provided in this Act'. Although s 27(1)(a)(iii) enables the dismissal of a matter where the person referring the matter does not have a sufficient interest, s 27(1)(a)(iii) is, in my opinion, rendered inoperative by s 66(1) of the Act which expressly confers power to make an application on specific categories of persons.

Ground 4 – Out of time and Ground 5 – Particulars

243 In ***Stacey***, Ritter AP observed that there must be a contemporary connection between the conduct arising in a s 66 application and any orders or directions to be made. Thus, any corrective orders are limited to those that have a present connection with the activities of the organisation and its rules [272] – [273].

244 The CFMEUW contends there are only two charges that do not fail this temporal test, charges 39 and 46.

245 Although charges 2, 5, 7, 8, 9, 10, 16, 19, 20, 21, 22, 23, 25, 26, 27, 28, 31, 34, part of 36, 37, 38, 39, 43, 45 and 46 have also been found to be deficient on the basis of ground 2 and charges 11, 12, 13, 14, 17, 18, 35, part of 36 and 44 have been found to be deficient on the basis of ground 1, the CFMEUW says all of these charges should also be struck out as not having a temporal connection with the present activities of the CFMEUW and its rules. As I have already determined that these charges should be struck out, I do not intend to consider these charges further. I have also already found that charges 16, 21, 26, 31, 36, 37, 38 and 45 should also be struck out on grounds of want of particularity.

246 The charges that remain to be considered under this ground of objection are 1, 3, 4, 15, 29 and 30.

247 The applicant simply argues that the officials who were in control of the CFMEUW at the time the breaches of the rules occurred, are still in control of the CFMEUW today. When regard is had to the uncontested evidence in the affidavit of Ms Walker, such a contention cannot be entirely made out, as Mr Reynolds ceased to be the secretary on 21 December 2011, Mr Kucera ceased to be employed by the CFMEUW in June 2007, and Mr Wade ceased to be employed in July 2007. Even if the applicant's argument is accepted, many of the charges do not by the lapse of time appear on their face to have a temporal connection with the rules and the current observance by the CFMEUW of the rules and any orders and directions that could be made under s 66 of the Act. Also, many of the charges do not contain sufficient or adequate particulars.

248 The fundamental principle of how far further and better particulars should go to elucidate the nature of a claim for an opposing party was stated by Isaacs J in ***R v The Associated Northern Collieries*** (1910) 11 CLR 738, 740 – 741 as follows:

> [T]he opposite party shall always be fairly apprised of the nature of the case he is called upon to meet, shall be placed in possession of its broad outlines and the constitutive facts which are said to raise his legal liability. He is to receive sufficient information to ensure a fair trial and to guard against what the law terms 'surprise,' but he is not entitled to be told the mode by which the case is to be proved against him …
>
> [W]here I am in any doubt as to the sufficiency of the particulars I resolve it in favour of the defendants, so as to ensure their being in a position to fully understand and prepare for the case alleged against them. As *Buckley* L.J. said in *G. W. Young & Co. Ltd. v. Scottish Union and National Insurance Co.* (24 T.L.R., 73, at p. 74), 'the principle underlying particulars was that they were given in order to make the plaintiff's case plain';

249 Thus, an opponent to an action is entitled to know in advance, that is prior to a hearing, each and every material fact which the opponent relies. It is not sufficient as the applicant asserts when making oral submissions opposing the application to dismiss (ts 138) to allow him to call numerous witnesses to see what evidence emerges in support of the allegations he makes. This application cannot proceed as an inquiry as there is no power to hold an inquiry into whether any rules of the CFMEUW have been breached.

250 In charges 1, 3 and 4, the applicant raises allegations that arose from his dismissal in 2006 by Downer Energy Systems Pty Ltd. In charge 1, the applicant alleges Mr Reynolds and Mr McDonald engaged in a conspiracy with the site manager to dismiss him (the applicant). In charges 3 and 4, the applicant makes a claim that the CFMEUW did not mount a proper defence to his claim for dismissal. These charges are defective for two reasons. Firstly, it is doubtful that the rules of the CFMEUW could have any application to the conduct alleged in charges 3 and 4 as an unfair dismissal application would have been made on behalf of the applicant by the CFMEU Branch not the CFMEUW in the Australian Industrial Relations Commission. The CFMEUW had no standing to bring any application under the *Workplace Relations Act 1996* (Cth) as it was not an organisation registered under that Act. Secondly, although Mr McDonald remains an official of the CFMEUW at this present time, the allegations in charges 1, 3 and 4 are stale. The events alleged in these charges are said to have occurred almost six years ago. In annexure K to the applicant's affidavit sworn on 18 May 2012 is a letter from an industrial officer of the CFMEU to the applicant dated 2 January 2007 in relation to Australian Industrial Relations Commission matter No U 2006/6536 (***McJannett v Downer Energy Systems Pty Ltd***) attaching a cheque for the sum of $1,489.60 and advice stating the amount is in full and final settlement of his unfair dismissal claim (exhibit B). In [60] of the applicant's affidavit he states that in 2009 he spoke to FWA lawyers at the office of David Vale in Sydney who, after reviewing his unfair dismissal case on the system, told him that the union should have made Downer Energy Systems Pty Ltd prove their claimed operational requirement (exhibit B). The applicant also states in his answers to the request for further and better particulars to charge 4, that prior to his dismissal he was warned by union members on site, that union officials were conspiring against him. He also states that following his dismissal he received a written statement from a former union official who says he heard Mr McDonald planning 'the event' from the union office. Despite this information being given to the applicant in 2006 and 2009, he did not seek to raise a complaint in this Commission until the filing of this application. Thirdly, even if these charges could proceed, they lack sufficient particularity of the alleged conspiracy to enable the CFMEUW to have sufficient knowledge of the case it would have to meet and prevent surprise at a trial of the facts and issues. For these reasons, charges 1, 3 and 4 will be struck out on grounds that the charges are out of time and the nature of the complaints are stale and lack sufficient particularity.

251 In charge 15, the applicant alleges a course of conduct has occurred by Mr Reynolds and Mr McDonald from 2001 to 2011 by ordering multiple levies and siphoning off cash collected to fund opulent lifestyles for union officials. As this charge alleges a course of conduct over a long period of time, perhaps it could be said that a contemporaneous connection between this charge and the rules of the CFMEUW arises, but whether any orders or directions could be made would depend upon the construction of any obligation in the rules to recover funds. In ***Schmid (No 1)*** a specific power was contained in the rules of The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers for the executive to direct the general trustee to take legal proceedings against any officer or member guilty of misappropriating funds. The CFMEUW rules do not contain a similar power. Leaving this issue aside, this charge raises one of the most serious charges of impropriety that can be made against a union and its officials. In such circumstances, the CFMEUW is entitled to sufficient particulars of the conduct alleged so as to enable them to know with clarity the case they are to meet. Despite a request for relevant particulars, the answer given to the request is clearly deficient. In any event, it appears from the answers given to the request for particulars that what the applicant is seeking is an inquiry into the financial affairs of the officials of the CFMEUW and an audit of the books of the CFMEUW. However, the President has no power under s 66 of the Act to order an audit or any investigation. For these reasons, charge 15 will be struck out on grounds of insufficient particulars.

252 In charge 29, the applicant alleges Mr Reynolds and Mr McDonald attempted to bribe a candidate in September 2000 contrary to r 35(1)(a), r 35(1)(g), r 35(1)(h), r 35(1)(i) and r 12. This matter cannot be said to constitute conduct in breach of any rule of the CFMEUW as the CFMEUW was not a registered organisation in 2000. Even if s 72(5)(d) of the Act could be called into aid to raise an argument that an application could have been brought against the CFMEUW after the amalgamation of the BLPPU and the CMETSWU and formation of the CFMEUW in 2001, and thus an action under s 66 of the Act could be brought against the CFMEUW, this is a matter which is alleged to relate to an election which has long past. Under s 66(2)(e)

and s 66(2)(f) of the Act, the President can only make orders in respect of an election in which it is alleged that there has been an irregularity. For this reason, charge 29 will be struck out on grounds of being out of time.

253 In charge 30, the applicant alleges Mr Reynolds, Mr McDonald and former official, Mr Wade, conspired to have a member of the CFMEUW assaulted at his workplace. The affidavit of Ms Walker establishes that Mr Wade ceased to be an employee and organiser for the CFMEUW in July 2007. Despite further and better particulars being sought, of among other matters, the date and place of the assault, the name of the member assaulted and details of the alleged conspiracy, no particulars have been provided. As no particulars of this charge have been provided, this charge will be struck out on grounds for want of particularity and on grounds the matters alleged are stale and thus have no contemporary relevance to the CFMEUW and its rules.

Remaining grounds of Ground 5 and Ground 6 – Public Interest

254 As I have found that all of the charges the applicant wishes to press should be struck out, it is not necessary for me to deal with the CFMEUW's argument that the majority of the charges are frivolous, vexatious, scandalous and not in the public interest. I will, however, deal further with this submission when I consider the CFMEUW's application for costs.

Conclusion

255 After considering the particulars provided by the applicant, in respect of each charge, I will make an order granting leave to the applicant to withdraw charges 6, 24, 32, 33, 40, 41, 42 and 47. I will also make an order to strike out charges 1 – 5, 7 – 23, 25 – 31, 34 – 39 and 43 – 46.

256 As those orders will dispose of all of the charges sought to be brought by the applicant, I now turn to consider whether the application should be dismissed or whether the applicant should be granted leave to re-plead all or any of the charges that he has not sought to withdraw. Clearly leave should not be granted to re-plead any of the charges dismissed on grounds of abuse of process (ground 1). These are charges 11, 12, 13, 14, 17, 18, 35, part of 36 that relates to Mr McParland and charge 44. My reasons make it clear that the matters alleged in these charges should not be litigated further.

257 As to the remaining charges, I am not satisfied that the applicant could re-plead the charges coherently and in a way that provides proper particulars. It is apparent from the submissions made by the applicant that what he seeks is an all-encompassing inquiry into the business and conduct of the CFMEUW over at least the last decade. Section 66 of the Act does not provide jurisdiction to hold such an inquiry.

258 It is also apparent that the applicant does not know what evidence will emerge if he is allowed to proceed and call the 29 witnesses he wishes to summons to appear and give evidence (ts 138). He argues that particulars of his case will emerge during a hearing. In light of this submission, the Commission can have no confidence that the applicant can properly re-plead his case.

259 For these reasons, I will not grant leave to the applicant to re-plead and will make an order to dismiss the substantive application.

Respondent's application for costs

260 The Commission is empowered with discretion to make an order requiring any party to a matter to pay costs and expenses other than costs allowed for the services of any legal practitioner, including expenses of witnesses as are specified in the order: s 27(1)(c) of the Act. In ***Brailey v Mendex Pty Ltd*** (1993) 73 WAIG 26, the Full Bench found that it is well settled in industrial law that costs ought not to be awarded, except in extreme cases, for example where proceedings have been instituted without reasonable cause.

261 The CFMEUW filed two bills of costs for the total sum of $1,388.84. The items contained in the bills are as follows:

Item.	Date	Description	Cost	Amount
1.	March 2012	Copying	11c per page	$109.56
2.	1 April - 4 April 2012	Copying	11c per page	$22.00
3.	February 2012	Telephone attendance	20c per call	$0.40
4.	March 2012	Telephone attendance	20c per call	$1.40
5.	1 April - 4 April 2012	Telephone attendance	20c per call	$0.80
6.	28 February 2012	Disbursements - payment for transcript		$62.70
7.	March 2012	Disbursements - files		$16.80
8.	March 2012	Disbursements - divides		$6.58
9.	April 2012	Disbursements - travel -taxi – fares		$53.65
				$273.89
Item.	**Date**	**Description**	**Cost**	**Amount**
1.	30 March 2012	Disbursements - transcripts		$42.90
2.	April - June	Copying	11c	$192.28
3.	April - June	Telephone attendances	20c per call plus ISD rates at 22c per minute	$22.40
4.	8 April 2012	Disbursements - Courier		$15.75
5.	18 April 2012	Disbursements - transcript		$141.90

Item.	Date	Description	Cost	Amount
6.	May 2012	Disbursements - files		$18.90
7.	May 2012	Disbursements - divides		$51.61
8.		Disbursements - CDs		$1.04
9.	4 May 2012	Disbursements - law & order copying		$424.38
10.	June	Disbursements - travel - taxi fares		$203.35
			Sub Total	**$1,114.51**
			Plus subtotal from Bill of Costs filed on 4 April 2012	**$273.89**
			TOTAL DISBURSEMENTS (as at 8 June 2012)	**$1,388.84**

262 Of the total sum claimed it can be seen that a large proportion of that sum is for the preparation of three arch level files containing tender bundles of documents under 103 tabs. These three files were tendered as exhibit 1 during the course of hearing of the CFMEUW's application to summarily dismiss the application. The documents that comprise exhibit 1 include copies of relevant applications, affidavits filed by the applicant, transcripts of proceedings and reasons for decision. These documents provide evidence of the history of litigation the applicant has engaged in against the CFMEUW and the CFMEU Branch since 2008. The preparation and tender of these documents was necessary to support the CFMEUW's grounds of objection, in particular ground 1.

263 It is also notable to consider the fact that the applicant, whilst unrepresented, is no stranger to litigation and has had a previous application summarily dismissed on grounds that the matters sought to be raised by him had previously been litigated (PRES 5 of 2009). After having been a party to that application, the applicant should have had some familiarity with the principles that apply to attempts to re-litigate matters. Yet the applicant is recalcitrant in his efforts to open, re-open and raise every possible vague allegation against the CFMEUW and its past and present officials.

264 Leaving aside many of the serious and unsupported allegations the applicant makes, it is obvious that the charges he has sought to put forward have been made in his quest for an all-encompassing inquiry into the CFMEUW. Such an inquiry is plainly not within the jurisdiction of the Commission under s 66 of the Act. In addition, he has in this application attempted to raise numerous matters that are either irrelevant to the observance of the rules of the CFMEUW. These include his arrest in a foreign country on drug charges and alleged non-compliance with unspecified statutory provisions such as 'taxation offences'. His lack of particularity appears to be borne from a speculative approach that once witnesses are called to give evidence a case against the CFMEUW will emerge. Such an approach is a clear abuse of the process of any litigation.

265 The applicant's attempts to re-litigate matters and to raise matters that have been disposed of many years ago or raise matters that are so old so as to be stale and have no contemporaneous connection with the current operation of the CFMEUW is clearly vexatious.

266 The defence of this application by making an application to strike out has put the CFMEUW to considerable expense because of the extent and breadth of the scope of the allegations made by the applicant. These costs are in the main largely unrecoverable as such costs are for the services of legal practitioners.

267 In my opinion, the CFMEUW's application for an order of payment by the applicant of costs in the sum or $1,388.84 is made out. The application, in my opinion, was instituted without reasonable cause. This factor, together with the fact that the efforts the CFMEUW has been put to in defending this matter because of the breadth and lengthy expanse of the applicant's allegations, puts this matter in the 'extreme' category of cases contemplated by the Full Bench in ***Brailey*** for the award of costs.

268 For these reasons, I will make an order that the applicant pay the respondent the sum of $1,388.84 for costs and expenses. Prior to making the order I will allow the applicant an opportunity to provide a submission as to whether he requires time to pay.

2012 WAIRC 00989

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, 7 NOVEMBER 2012

FILE NO. PRES 3 OF 2011

CITATION NO. 2012 WAIRC 00989

Result	Application dismissed, costs orders made
Appearances	
Applicant	Mr R Mcjannett, in person
Respondent	Mr T Dixon (of counsel)

Order

This matter having come on for hearing before me on 13 and 14 June 2012, and having heard the applicant in person and Mr T Dixon (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 15 October 2012, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. The application be and is hereby dismissed.
2. Within seven (7) days of the date of this order, the applicant is to pay the respondent the sum of $1,388.84 for costs and expenses.

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

2012 WAIRC 00964

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR
	APPLICANT
	-and-
	MR PHIL WOODCOCK, THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
FILE NO.	PRES 7 OF 2009
PARTIES	PAUL ROBINSON
	APPLICANT
	-and-
	MR PHIL WOODCOCK, ACTING SECRETARY INTERIM COMMITTEE, AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES WA BRANCH
	RESPONDENT
FILE NO.	PRES 6 OF 2010
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	WEDNESDAY, 31 OCTOBER 2012
CITATION NO.	2012 WAIRC 00964

Result	Orders revoked and matters discontinued
Appearances	
Applicants	Mr R J Andretich (of counsel) on behalf of the Registrar
	Mr P G Laskaris (of counsel) on behalf of Paul Robinson
Respondents	Mr J Nolan (of counsel) with Mr R Nanva

Order

These matters having come on for hearing before me on 30 October 2012, and having heard Mr R Andretich (of counsel) on behalf of the Registrar, Mr P G Laskaris (of counsel) on behalf of Paul Robinson, and Mr J Nolan (of counsel) on behalf of the respondents, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. Order [2011] WAIRC 00872 issued 6 September 2011, Order [2012] WAIRC 00242 issued 20 April 2012 and Order [2012] WAIRC 00363 issued 15 June 2012 be revoked.
2. Leave be granted to discontinued these applications.

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

AWARDS/AGREEMENTS—Application for—

2012 WAIRC 00948

KINGSWAY CHRISTIAN EDUCATION ASSOCIATION INC. EDUCATION ASSISTANTS ENTERPRISE BARGAINING AGREEMENT 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00948
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	
DELIVERED	**:**	FRIDAY, 26 OCTOBER 2012
FILE NO.	**:**	AG 34 OF 2012
BETWEEN	**:**	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES, KINGSWAY CHRISTIAN COLLEGE AND UNITED VOICE WA
		Applicants

CatchWords	**:**	Application to register agreement – requirement to publish the area and scope provisions – discretion of Chief Commissioner to direct that the provisions need not be published at all if he is of the opinion that it is appropriate to do so in the circumstances
Legislation	**:**	*Industrial Relations Act, 1979* s 29A(1b); s 29A(2A)(b)
Result	**:**	Agreement registered
Representation:		
Applicants	**:**	Mr N Briggs and Ms M Cook, The Independent Education Union of Western Australia, Union of Employees, Ms M Snudden, Kingsway Christian College and Mr B Palmer, United Voice WA

Reasons for Decision

1 This application to register an agreement as an industrial agreement will be granted. It meets the requirements of s 41 and s 41A of the *Industrial Relations Act 1979* (the Act) and in my view should be registered.

2 The reasons why I exercised my discretion under s 29A(2A)(b) of the Act to direct that the area and scope provisions of the proposed industrial agreement need not be published at all are worthy of setting out for future information in similar circumstances.

3 Section 29A(1b) of the Act requires the parts of an industrial agreement that relate to the area of operation and scope of the industrial agreement to be published in the next available issue of the *Industrial Gazette* and either in a newspaper circulating throughout the State or on an internet website maintained by the Commission.

4 One consequence of the publication is that the application for registration is not to be listed for hearing until after 14 days from the date of publication unless the Commission otherwise directs in a particular case: r 55(3) of the *Industrial Relations Commission Regulations 2005*. This will result in a delay before the application is able to be registered which will not occur if the Chief Commissioner directs under s 29A(2A) of the Act that publication need not occur.

5 Since 1 April 2012, when s 29A(2A) was amended by the *Industrial Legislation Amendment Act 2011*, the Chief Commissioner has the power to direct that the area and scope provisions need not be published at all if he is of the opinion that "it is appropriate to do so in the circumstances". Parties wishing the Chief Commissioner to exercise this power will need to provide information at the time the application for registration is lodged sufficient to allow the Chief Commissioner to reach the conclusion that it is appropriate to do so.

6 Some guide to the information which will need to be provided can be seen firstly from an understanding that the purpose of requiring the area and scope provisions of a proposed industrial agreement to be published is to give public notice of what is proposed so that persons whose rights or interests will, or may, be affected if the agreement is registered in those terms are given notice and an opportunity to object. The corresponding restriction on the Commission dealing with the application until after the expiration of 14 days from the date of publication allows time for an objection to be lodged before the application is dealt with.

7 Second, prior to 1 April 2012 the exception to the requirement to publish the area and scope provisions of a proposed industrial agreement was where the agreement to be registered had the same area and scope as the industrial agreement it was to replace (or the area and scope is the same as, and the parties to the agreement are named parties in, an award). In such circumstances, the area and scope provisions will already have been published when registration of the agreement to be replaced was first sought, so that there will be no need to repeat it.

8 Therefore, the information to be provided by a party requesting the Chief Commissioner to direct that publication need not occur will need to include at least:

i. Whether or not the agreement is to replace an existing industrial agreement.

ii. If it is, whether or not the area and scope provisions of the new agreement are the same as the industrial agreement to be replaced.

iii. If the area and scope provisions of the agreement are not the same as the industrial agreement to be replaced, whether the differences are changes of form, in other words, changes which are of an administrative nature such as changes of names or location, or where an existing agreement is being divided or amalgamated by the new agreement, or are changes of substance.

iv. If the agreement is not to replace an existing agreement, such other information to show whether or not the registration will affect persons other than the parties to the agreement.

9 When the application to register this agreement was lodged in the Registry, no request to waive the requirement was made. That does not mean that the area and scope provisions must be published because the exercise of the discretion given in s 29A(2A) does not depend upon a request being made. However, there was no statement in the application, nor a provision in the proposed agreement, to show that it is to be in substitution for an existing agreement.

10 A letter dated 9 July 2012 which accompanied the application stated that "the parties are joint applicants and that the agreement does not affect any other organisation", however such a statement is, and will be, insufficient. The fact that it is a joint application is not relevant to the issue of whether the requirement to publish the area and scope provisions may be waived and there was no information to support the bald statement that in the parties' view, the agreement does not affect any other organisation.

11 It became apparent only after a query from my Associate to the Independent Education Union that:

(a) The proposed agreement is intended to be in part-substitution for AG 103 of 2005.
(b) The employer named in AG 103 of 2005 is the same employer named in the proposed agreement however its name has changed since that agreement was registered.
(c) The area and scope of the proposed industrial agreement is a subset of AG 103 of 2005.
(d) The area and scope of the proposed industrial agreement and the area and scope of the Kingsway Teachers Agreement AG 6 of 2011 together are not greater than the area and scope of AG 103 of 2005.

12 Upon written confirmation of this from the parties, it became apparent that the differences in the area and scope provisions between the agreement and AG 103 are of form rather than of substance. In those circumstances, it is appropriate that the publication of the area and scope provisions need not occur at all.

2012 WAIRC 00960

KINGSWAY CHRISTIAN EDUCATION ASSOCIATION INC. EDUCATION ASSISTANTS ENTERPRISE BARGAINING AGREEMENT 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES, KINGSWAY CHRISTIAN COLLEGE AND UNITED VOICE WA
	APPLICANTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 31 OCTOBER 2012
FILE NO/S	AG 34 OF 2012
CITATION NO.	2012 WAIRC 00960
Result	Agreement registered

Order

WHEREAS the Commission has before it an application pursuant to s 41 of the *Industrial Relations Act 1979* (the Act) to register an agreement as an industrial agreement;

AND WHEREAS I am satisfied that the agreement as amended by the parties on 19 October 2012 meets the requirements of the Act and that it should be registered;

AND WHEREAS the parties have consented to the Commission registering the agreement without the need to attend a hearing for the purpose;

NOW I, the undersigned, pursuant to the powers conferred on me under s 41 of the Act hereby order –

1. THAT the *Kingsway Christian Education Association Inc. Education Assistants Enterprise Bargaining Agreement 2011* as filed on 24 September 2012 and as amended on 19 October 2012 and signed by me for identification be registered under s 41 of the Act as an industrial agreement.

2. THAT the *Kingsway Christian Education Association Inc Teachers Enterprise Bargaining Agreement 2010* (AG 103 of 2005) is hereby cancelled.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2012 WAIRC 00990

KINGSWAY CHRISTIAN EDUCATION ASSOCIATION INC. EDUCATION ASSISTANTS ENTERPRISE BARGAINING AGREEMENT 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES, KINGSWAY CHRISTIAN COLLEGE AND UNITED VOICE WA
	APPLICANTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 8 NOVEMBER 2012
FILE NO/S	AG 34 OF 2012
CITATION NO.	2012 WAIRC 00990

Result	Correction Order issued

Order

WHEREAS an error occurred in the Order dated on the 31st day of October 2012 [2012] WAIRC 00960 in this application;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order:

THAT the Order 2 be corrected by removing the words 'Kingsway Christian Education Association Inc Teachers Enterprise Bargaining Agreement 2010' and replacing them with 'Parent Controlled Education Association Northern Suburbs Inc. Teaching Employees (Enterprise Bargaining) Agreement 2004'.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2012 WAIRC 01007

THE TRUSTEES OF THE MARIST BROTHERS SOUTHERN PROVINCE TEACHERS ENTERPRISE BARGAINING AGREEMENT 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES AND THE TRUSTEES OF THE MARIST BROTHERS SOUTHERN PROVINCE
	APPLICANTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 18 OCTOBER 2012
FILE NO/S	AG 37 OF 2012
CITATION NO.	2012 WAIRC 01007

Result	Agreement registered
Representation	Ms M Cook and with her Mr N Briggs, The Independent Education Union of Western Australia, Union of Employees
	Ms K Kaur, Catholic Education Office, as agent for The Trustees of the Marist Brothers Southern Province

Order

HAVING heard Ms M Cook and with her Mr N Briggs, The Independent Education Union of Western Australia, Union of Employees and Ms K Kaur, Catholic Education Office, as agent for The Trustees of the Marist Brothers Southern Province, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT *The Trustees of the Marist Brothers Southern Province Teachers Enterprise Bargaining Agreement 2012* as filed on 15 October 2012 and amended by the parties on 15 November 2012 is hereby registered under s 41 of the Industrial Relations Act 1979 as an industrial agreement.
2. THAT *The Trustees of the Marist Brothers Southern Province Teachers Enterprise Bargaining Agreement 2009* (AG 69 of 2009) is hereby cancelled.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2012 WAIRC 01038

THE TRUSTEES OF THE MARIST BROTHERS SOUTHERN PROVINCE TEACHERS ENTERPRISE BARGAINING AGREEMENT 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES, THE TRUSTEES OF THE MARIST BROTHERS SOUTHERN PROVINCE
	APPLICANTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 21 NOVEMBER 2012
FILE NO.	AG 37 OF 2012
CITATION NO.	2012 WAIRC 01038

Result Correction Order issued

Order

WHEREAS an error occurred in the Order dated on the 18th day of October 2012 [2012] WAIRC 01007 in this application;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order:

THAT the header of the Order be corrected by removing the words 'THURSDAY, 18 OCTOBER 2012' and replacing them with 'THURSDAY, 15 NOVEMBER 2012'.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

AWARDS/AGREEMENTS—Variation of—

2012 WAIRC 00893

BUILDING TRADES (GOVERNMENT) AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER OF MAIN ROADS AND ZOOLOGICAL PARKS AUTHORITY
	APPLICANTS
	-v-
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS; BUILDING TRADES ASSOCIATION OF UNIONS OF WESTERN AUSTRALIA (ASSOCIATION OF WORKERS); AND THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	APPL 51 OF 2012
CITATION NO.	2012 WAIRC 00893

Result Award varied

Order

HAVING heard from Ms C Holmes on behalf of the applicants and from Mr J Nicholas, of counsel for the Construction, Forestry, Mining and Energy Union of Workers and from Ms N Ireland for the Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, I, the undersigned, pursuant to the powers conferred on me under s 40 of the *Industrial Relations Act 1979*, hereby order –

THAT the Building Trades (Government) Award 1968 be varied in accordance with the following schedule and that such variations shall have effect on and from the 27th day of September 2012.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 2. – Contract of Employment: Delete subclause 2.2.7 Part time employment and insert the following in lieu thereof:

2.2.7 Part time employment

(a) At the time of engagement, or when a full time employee undertakes a period of part time employment, the employer and the part time employee will agree in writing on a regular pattern of work, specifying the hours worked each day, which days of the week the employee will work, and the actual starting and finishing times each day. Rostered employees shall be informed of their minimum hours of engagement and the basis upon which rosters are formulated. An agreement concerning a part time employee's ordinary hours of work shall be consistent with the relevant provisions of Clause 3.1 – Hours.

(b) The employer and employee may agree, in writing, to a temporary variation to an employee's ordinary working hours such that:

(i) time worked up to eight hours on any day is not to be regarded as overtime but an extension of the agreed hours for that day and should be paid at the normal rate of pay;

(ii) additional days worked, up to a total of five days per week, are regarded as an extension of the agreed hours and should be paid at the normal rate of pay;

(iii) additional hours worked for which overtime is not paid shall be considered as part of the employee's ordinary working hours; and

(iv) any time worked beyond the relevant daily spread of hours and/or days of the week as prescribed in Clause 3.1 shall be considered overtime.

(c) Nothing in this Clause prevents the employer and employee from agreeing, in writing, to a permanent variation to the part time employee's ordinary working hours as established under Clause 2.2.7(a).

(d) A part time employee shall be entitled to the same entitlements as a full time employee, to be provided on a pro rata basis according to the hours worked by the employee.

(e) A part time employee shall remain entitled to leave accrued in respect of a previous period of full time employment, in such periods and manner as specified in Clause 6.1 - Annual Leave.

(f) A full time employee shall be paid for and take any annual leave accrued in respect of a period of part time employment under this subclause, in such periods and manner as specified in Clause 6.1 - Annual Leave, as if the employee were working part time in the class of work the employee was performing as a part time employee immediately before resuming full time work.

(g) Provided that, by agreement between the employer and employee, the period over which the leave is taken may be shortened to the extent necessary for the employee to receive pay at the employee's current full time rate.

(h) A part time employee shall have sick leave entitlements which have accrued under Clause 6.2 - Sick Leave (including any entitlement accrued in respect of previous full time employment) converted into hours. When this entitlement is used, whether as a part time employee or as a full time employee, it shall be debited for the ordinary hours that the employee would have worked during the period of absence.

2. Clause 6. – Leave:

(A) Delete subclause 6.1 – Annual Leave and insert the following in lieu thereof:

6.1 - ANNUAL LEAVE

6.1.1 Annual Leave

(a) Except as hereinafter provided, an employee will receive 152 hours annual leave, paid as ordinary wages, for each period of 12 months continuous service.

(i) A full time employee will be credited with a pro rata annual leave entitlement of 2.92 hours for each completed week of service.

(ii) A part time employee's annual leave entitlement will be calculated on a pro rata basis, according to the number of hours worked.

(iii) Untaken pro rata leave will become accrued at the end of each period of 12 months continuous service and be cumulative from year to year.

(b) "Ordinary wages" for an employee other than a shift worker shall mean the rate of wage including service pay the employee has received for the greatest proportion of the calendar month prior to the leave being taken.

(c) "Ordinary Wages" for a shift worker shall mean the rate of wage the shift worker would receive under Clause 3.3 - Shift Work of the award according to the employee's roster or projected roster including Saturday and Sunday shifts.

(d) A seven day shift worker, i.e. a shift worker who is rostered to work regularly on Sundays and holidays shall be allowed one week's leave in addition to the leave to which the employee is otherwise entitled under this clause.

(e) Where an employee with twelve months continuous service is engaged for part of a qualifying twelve monthly period as a seven day shift worker, the employee shall be entitled to have the period of annual leave to which they are otherwise entitled under this clause increased by one-twelfth of a week for each completed month the employee is continuously so engaged.

(f) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day being an ordinary working day for each holiday observed as aforesaid.

(g) When work is closed down for the purpose of allowing annual leave to be taken, employees with less than a full year's service shall only be entitled to payment during such period for the number of days leave due to them.

(h) Provided that nothing herein contained shall deprive the employer of their right to retain such employees during the close down period as may be required.

(i) If an employee lawfully leaves their employment, or their employment is terminated by the employer through no fault of the employee, the employee shall be paid any pro rata annual leave not taken at his or her ordinary rate of wage. Provided that this will include any untaken leave referred to in clauses 6.1.1(d) and (e), which will be paid as an additional 0.73 hours for each completed week of continuous service.

(j) In addition to any payment to which the employee may be entitled under clause 6.1.1(i) of this clause, an employee who terminates shall be given payment in lieu of untaken accrued annual leave unless –

(i) the employee has been justifiably dismissed for misconduct; and

(ii) the misconduct for which the employee has been dismissed occurred prior to that annual leave becoming accrued.

(k) An employee may be granted paid annual leave prior to accumulating sufficient annual leave entitlements. Should the services of that employee terminate or be terminated prior to sufficient annual leave being accrued, the employee shall refund to the employer the difference between the amount received by him or her for wages in respect of that period of annual leave taken and the amount which would have accrued to the employee by reason of the length of his or her service up to their date of termination.

6.1.2 Annual Leave Loadings –

(a) Day Workers: An employee proceeding on annual leave shall be paid, in addition to the ordinary payment for such leave, a loading of 17.5% calculated on the award rate of pay with respect to a maximum of four weeks' leave.

(b) Provided that the maximum loading payment shall not exceed the amount set out in the Australian Bureau of Census and Statistics Publication for "Average Weekly Total Earnings of all Males in Western Australia" for the September quarter immediately preceding the date the leave became due.

(c) Shift Workers: A shift worker who is in receipt of an additional weeks' leave provided for in accordance with clause 6.1.1(d) of this clause, shall receive where the payment on annual leave, including shift and weekend penalties as defined in Clause 6.1.1(c) is less than 20% in addition to the classified rate of pay prescribed in Clause 4.2 - Wages for five weeks' leave, a loading which will produce an amount equal to 20% in addition to the award rate of pay for a maximum of five weeks. Provided that the payment shall not exceed five- fourths of the amount referred to in clause 6.1.2(b) hereof, but this limitation will not affect an employee's entitlement to any additional payment by way of shift or weekend penalties under clause 6.1.1 (b) of this clause should those penalties exceed 20%.

6.1.3 The loading prescribed by this subclause shall apply to proportionate leave on termination.

6.1.4 By agreement between the employer and employee annual or annual and accumulated leave may be taken in not more than two periods but neither of such periods shall be less than two weeks.

6.1.5 In taking annual leave, if an employee's entitlement expires part way through a day, the employee shall have the option of resuming duty for that full day or take the balance of the day as approved leave without pay.

6.1.6 Any annual leave entitlement accumulated to an employee as at April 25, 1982 shall be adjusted in hours in the ratio of 38 to 40.

6.1.7 The provisions of this clause, shall not apply to casual employees.

6.1.8 Employees continue to accrue annual leave while on paid leave for the following purposes:

(a) annual leave;

(b) long service leave;

(c) observing a public holiday prescribed by this award;

(d) sick leave;

(e) carers' leave;

(f) bereavement leave;

(g) parental leave; and

(h) workers' compensation, except for that portion of an absence that exceeds six months in any year.

6.1.9 Employees continue to accrue annual leave while on unpaid sick leave except for that portion of an absence that exceeds three months.

6.1.10 Employees do not accrue annual leave when absent on approved periods of leave without pay that exceed 14 consecutive calendar days.

(B) Delete subclause 6.3 – Carers' Leave and insert the following in lieu thereof:

6.3 – CARERS' LEAVE

6.3.1 An employee is entitled to use, each year, up to ten days of the employee's sick leave entitlement to provide care or support to a member of the employee's family or household who requires care or support because of:

(a) an illness or injury of the member; or

(b) an unexpected emergency affecting the member.

6.3.2 An employee shall, wherever practical, give the employer notice of the intention to take carers' leave and the estimated length of absence. If it is not practicable to give prior notice of absence, an employee shall notify the employer as soon as possible on the first day of absence. Where possible, an estimate of the period of absence from work shall be provided.

6.3.3 An employee shall provide, where required by the employer, evidence to establish the requirement to take carers' leave. An application for carers' leave exceeding two consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.

6.3.4 The definition of "family" shall be the definition of "relative" contained in the *Equal Opportunity Act 1986*. That is, a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee. "Member of the employee's household" means a person who, at or immediately before the relevant time for assessing the employee's eligibility to take leave, lived with the employee.

6.3.5 Carers' leave may be taken on an hourly basis or part thereof.

(C) Delete subclause 6.6 – Bereavement Leave and insert the following in lieu thereof:

6.6 – BEREAVEMENT LEAVE

6.6.1 Employees including casuals shall on the death of:

(a) the employee's partner;

(b) a child, step-child or grandchild of the employee (including an adult child, step child or grandchild);

(c) a parent, step-parent or grandparent of the employee;

(d) the brother, sister, step brother or sister of the employee; or

(e) any other person who, immediately before the relevant time for assessing the employees eligibility to take leave, lived with the employee as a member of the employee's household;

be eligible for up to two (2) days paid bereavement leave, provided that at the request of an employee the employer may exercise a discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.

6.6.2 The two (2) days need not be consecutive.

6.6.3 Bereavement leave is not to be taken during any other period of leave.

6.6.4 An employee shall not be entitled to claim payment for bereavement leave on a day when that employee is not ordinarily rostered to work.

6.6.5 Payment of such leave may be subject to the employee providing evidence, if so requested by the employer, of the death or relationship to the deceased that would satisfy a reasonable person.

6.6.6 An employee requiring more than two (2) days bereavement leave in order to travel overseas in the event of the death overseas of a member of the employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave or leave without pay provided all accrued leave is exhausted.

Travelling Time for Regional Employees

6.6.7 Subject to prior approval from the employer, an employee entitled to Bereavement Leave and who as a result of such bereavement travels to a location within Western Australia that is more than 240 km from their workplace will be granted paid time off for the travel period undertaken in the employee's ordinary working hours up to a maximum of 15.2 hours per bereavement. The employer will not unreasonably withhold approval.

6.6.8 The employer may approve additional paid travel time within Western Australia where the employee can demonstrate to the satisfaction of the employer that more than two days travel time is warranted.

6.6.9 The provisions of this clause are not available to employees whilst on leave without pay or personal leave without pay.

6.6.10 The provisions of 6.6.7 and 6.6.8 - Travelling Time for Regional Employees, apply as follows.

(a) An employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent employee for each full year of service and pro rata for any residual portion of employment.

(b) An employee employed on a fixed term contract for a period less than 12 months shall be credited with the same entitlement on a pro-rata basis for the period of employment.

(c) A part time employee shall be entitled to the same entitlement as a full time employee for the period of employment, but on a pro-rata basis according to the number of ordinary hours worked each fortnight.

(d) For casual employees, the provisions apply to the extent of their agreed working arrangements.

(D) Delete subclause 6.7 - Parental Leave and insert the following in lieu thereof:

6.7 – PARENTAL LEAVE

6.7.1 Definitions

(a) "Employee" includes full time, part time, permanent, fixed term contract and "eligible" casual employees.

(b) A casual employee is "eligible" if the employee -

(i) has been engaged by the public sector on a regular and systematic basis for a sequence of periods of employment during a period of at least twelve (12) months; and

(ii) but for an expected birth of a child to the employee or the employee's spouse or de facto partner or an expected placement of a child with the employee with a view to the adoption of the child by the employee, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

(c) Without limiting 6.7.1(b), a casual employee is also "eligible" if the employee –

(i) was engaged by the public sector on a regular and systematic basis for a sequence of periods during a period (the first period of employment) of less than twelve (12) months; and

(ii) at the end of the first period of employment, the employee ceased, on the employer's initiative, to be so engaged by the public sector employer; and

(iii) the public sector employer later again engaged the employee on a regular and systematic basis for a further sequence of periods during a period (the second period of employment) that started not more than three months after the end of the first period of employment; and

(iv) the combined length of the first period of employment and the second period of employment is at least twelve (12) months; and

(v) the employee, but for an expected birth of a child to the employee or the employee's spouse or de facto partner or an expected placement of a child with the employee with a view to adoption of the child by the employee, would have a reasonable expectation of continuing engagement in the public sector on a regular and systematic basis.

(d) "Primary Care Giver" is the employee who will assume the principal role for the care and attention of a child/children. The employer may require confirmation of primary care giver status.

(e) "Public sector" means an employing authority as defined in Section 5 of the *Public Sector Management Act 1994*.

(f) "Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.

6.7.2 Entitlement to parental leave

(a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:

(i) birth of a child to the employee or the employee's partner; or

(ii) adoption of a child who is not the child or the stepchild of the employee or the employee's partner; is under the age of five (5); and has not lived continuously with the employee for six (6) months or longer.

(b) An employee, other than an eligible casual employee, identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to fourteen weeks paid parental leave which will form part of the 52 week entitlement provided in paragraph 6.7.2(a) of this clause.

(c) An employee may take the paid parental leave specified in paragraph 6.7.2(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled.

(d) A pregnant employee can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed fourteen weeks.

(f) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.

(g) Parental leave may only be taken concurrently by an employee and his or her partner as provided for in subclause 6.7.5 or under special circumstances with the approval of the employer.

(h) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.

(i) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.

(j) An employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.

6.7.3 Birth of a child

(a) An employee shall provide the employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner confirming the pregnancy and the estimated date of birth.

(b) If the pregnancy results in other than a live child or the child dies in the fourteen weeks immediately after the birth, the entitlement to paid parental leave remains intact.

6.7.4 Adoption of a child

(a) An employee seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement in lieu of this leave.

(b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.

6.7.5 Partner leave

(a) An employee who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.

(b) The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.

(c) The employer is to agree to an employee's request to extend their partner leave under 6.7.5(b) unless:

(i) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(ii) there are grounds to refuse the request relating to its adverse effect on the employer's business and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:

- cost;
- lack of adequate replacement staff;
- loss of efficiency; and
- impact on the production or delivery of products or services by the employer.

(d) The employer is to give the employee written notice of the employer's decision on a request for extended partner leave. If the employee's request is refused, the notice is to set out the reasons for the refusal.

(e) An employee who believes their request for extended partner leave under 6.7.5(b) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

(f) The taking of partner leave by an employee shall have no effect on their or their partner's entitlement, where applicable, to paid parental leave under this clause.

6.7.6 Other leave entitlements

(a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.

(b) Subject to all other leave entitlements being exhausted, an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years. The employer is to agree to a request to extend their leave unless:

(i) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(ii) there are grounds to refuse the request relating to its adverse effect on the employer's business and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:

- cost;
- lack of adequate replacement staff;
- loss of efficiency;
- impact on the production or delivery of products or services by the employer.

(c) The employer is to give the employee written notice of the employer's decision on a request for leave without pay under 6.7.6(b). If the request is refused, the notice is to set out the reasons for the refusal.

(d) An employee who believes their request for leave without pay under 6.7.6(b) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

(e) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the employer the total combined period of leave without pay following parental leave will not exceed two (2) years.

(f) An employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in 6.7.6(a) and (g).

(g) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.

(h) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

6.7.7 Notice and variation

(a) An employee shall give not less than four (4) weeks notice in writing to the employer of the date the employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.

(b) An employee seeking to adopt a child shall not be in breach of 6.7.7(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.

6.7.8 Transfer to a safe job

(a) If the employee gives her employer a medical certificate from a medical practitioner containing a statement to the effect that, in the medical practitioner's opinion, the employee is fit to work, but that it is inadvisable for her to continue in her present position for a stated period because of:

(i) illness, or risks, arising out of her pregnancy; or

(ii) hazards connected with that position; then

the employer must modify the duties of the position or alternatively transfer the employee to a safe job at the same classification level for the period during which she is unable to continue in her present position.

(b) If the employee's employer does not think it to be reasonably practicable to modify the duties of the position or transfer the employee to a safe job the employee is entitled to paid leave for the period during which she is unable to continue in her present position.

(c) An entitlement to paid leave provided in 6.7.8(b) is in addition to any other leave entitlement the employee has and is to be paid the amount the employee would reasonably have expected to be paid if the employee had worked during that period.

(d) An entitlement to paid leave provided in clause 6.7.8(b) ends at the earliest of whichever of the following times is applicable:

(i) the end of the period stated in the medical certificate;

(ii) if the employee's pregnancy results in the birth of a living child – the end of the day before the date of birth;

(iii) if the employee's pregnancy ends otherwise than with the birth of a living child – the end of the day before the end of the pregnancy

6.7.9 Communication during Parental Leave

(a) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

(ii) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

(b) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to return to work on a part-time basis.

(c) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with 6.7.9(a).

6.7.10 Replacement employee

Prior to engaging a replacement employee the employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

Nothing in this clause shall be construed as requiring an employer to engage a replacement employee.

6.7.11 Return to work

(a) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four (4) weeks prior to the expiration of parental leave.

(b) An employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.

6.7.12 Work on a modified basis

(a) A pregnant employee may work part time in one or more periods while she is pregnant where part time employment is, because of the pregnancy, necessary or desirable.

(b) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 2.2 – Types of Employment of this award.

(c) An employee may return on a modified basis that involves the employee working on different days or at different times, or both; or on fewer days or for fewer hours or both, than the employee worked immediately before starting parental leave.

6.7.13 Right to revert

(a) An employee who has returned on a part time or modified basis in accordance with 6.7.12 may subsequently request the employer to permit the employee to resume working on the same basis as the employee worked immediately before starting parental leave or full time work at the same classification level.

(b) An employer is to agree to a request to revert made under 6.7.13(a) unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the employer and those grounds would satisfy a reasonable person.

(c) An employer is to give the employee written notice of the employer's decision on a request to revert under 6.7.13(a). If the request is refused, the notice is to set out the reasons for the refusal.

(d) An employee who believes their request to revert under 6.7.13(a) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

6.7.14 Effect of Parental Leave on the Contract of Employment

(a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(b) Paid parental leave will count as qualifying service for all purposes of this award. During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose under this award.

(d) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the requirements of this award.

(e) An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on parental leave but otherwise the rights of the employer in respect of termination of employment are not affected.

2012 WAIRC 00894

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MINISTER FOR EDUCATION AND OTHERS

APPLICANTS

-v-

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH AND THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

RESPONDENTS

CORAM CHIEF COMMISSIONER A R BEECH

DATE FRIDAY, 28 SEPTEMBER 2012

FILE NO/S APPL 52 OF 2012

CITATION NO. 2012 WAIRC 00894

Result Award varied

Order

HAVING heard from Ms C Holmes on behalf of the applicants and from Ms N Ireland for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and from Ms P Lim for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch, I, the undersigned, pursuant to the powers conferred on me under s 40 of the *Industrial Relations Act 1979*, hereby order –

THAT the Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962 be varied in accordance with the following schedule and that such variations shall have effect on and from the 27th day of September 2012.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

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

2. - ARRANGEMENT

Second Schedule - List of Respondents

Third Schedule - Memoranda of Agreement

Fourth Schedule - Definitions of Previous Classifications

Fifth Schedule - Building Management Authority Wages and Conditions

Sixth Schedule - Named Parties to the Award

2. Clause 6 – Contract of Service: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) The contract of service for a casual employee shall be by the hour. Provided that the minimum engagement shall be two hours.

3. Clause 8 – Casual and Part-Time Employees: Delete this clause and insert the following in lieu thereof:

8. – CASUAL AND PART-TIME EMPLOYEES

(1) Casual employees

(a) A "casual employee" shall mean an employee who is engaged on an hourly basis for a period not exceeding four weeks in any workplace.

(b) When an employee is appointed on a casual basis and before they are so engaged, they shall be informed of their casual status and their conditions of employment.

(c) The minimum period of engagement for a casual employee shall be two hours.

(d) A casual employee shall be paid a loading of 20 per cent in addition to the rates prescribed in the First Schedule - Wages of this award, reduced to an hourly basis. This loading shall be in lieu of annual leave, sick leave and public holidays.

(2) Part time employees

(a) “Part time employee” means an employee who undertakes work for less than the hours designated as full time by Clause 13. – Hours of Duty.

(b) At the time of engagement, or when a full time employee undertakes a period of part time employment, the employer and the part time employee will agree in writing on a regular pattern of work, specifying the hours worked each day, which days of the week the employee will work, and the actual starting and finishing times each day. Rostered employees shall be informed of their minimum hours of engagement and the basis upon which rosters are formulated. An agreement concerning a part time employee’s ordinary hours of work shall be consistent with the relevant provisions of Clause 13. – Hours of Duty.

(c) The employer and employee may agree, in writing, to a temporary variation to an employee’s ordinary working hours such that:

(i) time worked up to eight hours on any day is not to be regarded as overtime but an extension of the agreed hours for that day and should be paid at the normal rate of pay;

(ii) additional days worked, up to a total of five days per week, are regarded as an extension of the agreed hours and should be paid at the normal rate of pay;

(iii) additional hours worked for which overtime is not paid shall be considered as part of the employee’s ordinary working hours; and

(iv) any time worked beyond the relevant daily spread of hours and/or days of the week as prescribed in Clause 13 shall be considered overtime.

(d) Nothing in this Clause prevents the employer and employee from agreeing, in writing, to a permanent variation to the part time employee’s ordinary working hours as established under Clause 8(2)(b).

(e) A part time employee shall be entitled to the same entitlements as a full time employee, to be provided on a pro rata basis according to the hours worked by the employee.

(f) A part time employee shall remain entitled to leave accrued in respect of a previous period of full time employment, in such periods and manner as specified in Clause 23. - Annual Leave.

(g) A full time employee shall be paid for and take any annual leave accrued in respect of a period of part time employment under this subclause, in such periods and manner as specified in Clause 23. - Annual Leave, as if the employee were working part time in the class of work the employee was performing as a part time employee immediately before resuming full time work

(h) Provided that, by agreement between the employer and employee, the period over which the leave is taken may be shortened to the extent necessary for the employee to receive pay at the employee’s current full time rate.

(i) A part time employee shall have sick leave entitlements which have accrued under Clause 24. - Sick Leave (including any entitlement accrued in respect of previous full time employment) converted into hours. When this entitlement is used, whether as a part time employee or as a full time employee, it shall be debited for the ordinary hours that the employee would have worked during the period of absence.

4. Clause 23 – Annual Leave: Delete this clause and insert the following in lieu thereof:

23. – ANNUAL LEAVE

(1) (a) Except as hereinafter provided, an employee will receive 152 hours annual leave, paid as ordinary wages, for each period of 12 months continuous service.

(i) A full time employee will be credited with a pro rata annual leave entitlement of 2.92 hours for each completed week of service.

(ii) A part time employee's annual leave entitlement will be calculated on a pro rata basis, according to the number of hours worked.

(iii) Untaken pro rata leave will become accrued at the end of each period of 12 months continuous service and be cumulative from year to year.

(b) In respect of employees who work a 19 day four weekly cycle with the twentieth day being taken as a rostered day off, the calendar year will be divided into thirteen, twenty day work cycles. During the year employees will be required to take one period of their annual leave to include the rostered day off duty for that particular work cycle. There will be no additional pay or leave in lieu of that rostered day off.

(2) (a) "Ordinary wages" for an employee other than a shift worker shall mean the rate of wage including service pay the employee has received for the greatest proportion of the calendar month prior to the leave being taken.

(b) "Ordinary wages" for a shift worker shall mean the rate of wage the shift worker would receive under Clause 15. - Shift Work of the award according to the employee's roster or projected roster including Saturday and Sunday shifts.

(3) (a) A seven day shift worker, i.e. a shift worker who is rostered to work regularly on Sundays and holidays shall be allowed one week's leave in addition to the leave to which the employee is otherwise entitled under this clause.

(b) Where an employee with twelve months continuous service is engaged for part of a qualifying twelve monthly period as a seven day shift worker, the employee shall be entitled to have the period of annual leave to which they are otherwise entitled under this clause increased by one-twelfth of a week for each completed month the employee is continuously so engaged.

(4) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day being an ordinary working day for each such holiday observed as aforesaid.

(5) If an employee lawfully leaves their employment, or their employment is terminated by the employer through no fault of the employee, the employee shall be paid any pro rata annual leave not taken at his or her ordinary rate of wage. Provided that this will include any untaken leave referred to in subclause (3) of this clause, which will be paid as an additional 0.73 hours for each completed week of continuous service.

(6) In addition to any payment to which the employee may be entitled under subclause (5) of this clause, an employee who terminates shall be given payment in lieu of untaken accrued annual leave and the loading prescribed in subclause (11) hereof unless -

(a) the employee has been justifiably dismissed for misconduct; and

(b) the misconduct for which the employee has been dismissed occurred prior to that annual leave becoming accrued.

(7) An employee may be granted paid annual leave prior to accumulating sufficient annual leave entitlements. Should the services of that employee terminate or be terminated prior to sufficient annual leave being accrued, the employee shall refund to the employer the difference between the amount received by him or her for wages in respect of that period of annual leave taken and the amount which would have accrued to the employee by reason of the length of his or her service up to their date of termination.

(8) (a) Employees continue to accrue annual leave while on paid leave for the following purposes:

(i) annual leave;

(ii) long service leave;

(iii) observing a public holiday prescribed by this award;

(iv) sick leave;

(v) carer's leave;

(vi) bereavement leave;

(vii) parental leave; and

(viii) workers' compensation, except for that portion of an absence that exceeds six months in any year.

(b) Employees continue to accrue annual leave while on unpaid sick leave except for that portion of an absence that exceeds three months.

(c) Employees do not accrue annual leave when absent on approved periods of leave without pay that exceed 14 consecutive calendar days.

(9) When operations are closed down for the purpose of allowing annual leave to be taken, as prescribed by subclause (17) hereof, during such period employees with less than a full year of service shall only be entitled to payment for the number of days leave due to them. This payment shall include the loading prescribed in subclause (11) of this clause. Provided that nothing herein contained shall deprive the employer of the right to retain such employees as may be required during the close down period.

(10) Employees regularly working for the Government north of South Latitude 26 shall be allowed to accumulate annual leave for two years, subject to the convenience of the Department. Such employees who proceed to Fremantle and Geraldton during the period of such leave shall be allowed once in each two years reasonable travelling time on the forward and return journeys between the place of their employment and either of the said ports.

(11) In addition to the payment prescribed for annual leave, an employee shall receive a loading calculated on the rate of wage prescribed by subclause (2) hereof. This loading shall be as follows:

(a) Day workers - an employee who could have worked on day work had they not been on leave - a loading of 17.5%.

(b) Shift workers - an employee who could have worked on shift work had they not been on leave shall be paid either:

(i) the shift loadings prescribed by Clause 15. - Shift Work the employee would have received;

or

(ii) a 20% loading on the rate prescribed by subclause (2)(a) of this clause;

whichever is the greater.

The loading prescribed by this subclause shall not apply to proportionate leave on termination.

(12) Any annual leave entitlement accumulated to an employee as at the date of introduction of a 38 hour week shall be adjusted in hours in the ratio of 38 to 40.

(13) In taking annual leave, if an employee's entitlement expires part way through a day, the employee shall have the option of resuming duty for that full day or take the balance of the day as approved leave without pay.

(14) The provisions of this clause shall not apply to casual employees.

(15) (a) Annual leave shall be given and taken in one or two continuous periods. If given in two continuous periods, one such period must be of at least 21 consecutive days, including non-working days. Provided that if the employer and an employee so agree, annual leave may be given and taken in two separate periods, either of 21 consecutive days' duration including non-working days, or in three separate periods.

(b) Provided further that an employee may, with the consent of the employer, take short term annual leave, not exceeding five days in any calendar year, at a time or times separate from any of the periods determined in accordance with this subclause.

(16) (a) Annual leave shall be given at a time fixed by the employer within a period not exceeding six months from the date when the right to annual leave accrued and after not less than four weeks' notice to the employee.

(b) Provided that, by agreement between the employer and an employee, annual leave may be taken at any time within a period of 12 months from the date on which it falls due and with less than four weeks' notice to the employee.

(17) (a) The employer may close down operations for one or two separate periods for the purpose of granting annual leave in accordance with this clause. If the operations are closed in two separate periods, one of those periods shall be for at least 21 consecutive days, including non-working days,

(b) Provided that where the majority of employees concerned agree, the employer may close down a work section, or sections, in one, two or three separate periods for the purpose of granting annual leave in accordance with this subclause. Provided further that if the employer closes down operations on more than one occasion, one of those periods shall be for a period of at least 14 consecutive days, including non-working days. In such cases the employer shall advise employees concerned of the proposed dates of each close down before asking for their agreement.

(c) (i) The employer may close down operations, or a section or sections thereof, for a period of at least 21 consecutive days, including non-working days and grant the balance of annual leave due to an employee in one continuous period in accordance with a roster.

(ii) Provided that, with the agreement of the majority of employees concerned, the employer may close down operations for a period of at least 14 consecutive days, including non-working days and grant the balance of annual leave due by mutual arrangement with an employee.

(18) (a) In addition to the leave prescribed in this clause, an extra five working days as annual leave shall be available to employees working north of the 26° parallel. This additional entitlement shall be available on completion of each year of continuous service in the region.

(b) The additional leave available in paragraph (a) hereof shall be applied under the same conditions provided in this clause, with the exception of the loading prescribed in subclause (11) hereof which will not apply to the extra five days of leave.

5. Clause 30 – Compassionate Leave: Delete this clause and insert the following in lieu thereof:

30. – BEREAVEMENT LEAVE

(1) Employees including casuals shall on the death of:

(a) the employee's partner;

(b) a child, step-child or grandchild of the employee (including an adult child, step child or grandchild);

(c) a parent, step-parent or grandparent of the employee;

(d) the brother, sister, step brother or sister of the employee; or

(e) any other person who, immediately before the relevant time for assessing the employees eligibility to take leave, lived with the employee as a member of the employee's household;

be eligible for up to two (2) days paid bereavement leave, provided that at the request of an employee the employer may exercise a discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.

(2) The two (2) days need not be consecutive.

(3) Bereavement leave is not to be taken during any other period of leave.

(4) An employee shall not be entitled to claim payment for bereavement leave on a day when that employee is not ordinarily rostered to work.

(5) Payment of such leave may be subject to the employee providing evidence, if so requested by the employer, of the death or relationship to the deceased that would satisfy a reasonable person.

(6) An employee requiring more than two (2) days bereavement leave in order to travel overseas in the event of the death overseas of a member of the employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave or leave without pay provided all accrued leave is exhausted.

Travelling Time for Regional Employees

(7) Subject to prior approval from the employer, an employee entitled to Bereavement Leave and who as a result of such bereavement travels to a location within Western Australia that is more than 240 km from their workplace will be granted paid time off for the travel period undertaken in the employee's ordinary working hours up to a maximum of 15.2 hours per bereavement. The employer will not unreasonably withhold approval.

(8) The employer may approve additional paid travel time within Western Australia where the employee can demonstrate to the satisfaction of the employer that more than two days travel time is warranted.

(9) The provisions of this clause are not available to employees whilst on leave without pay or personal leave without pay.

(10) The provisions of (7) and (8) - Travelling Time for Regional Employees, apply as follows.

(a) An employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent employee for each full year of service and pro rata for any residual portion of employment.

(b) An employee employed on a fixed term contract for a period less than 12 months shall be credited with the same entitlement on a pro-rata basis for the period of employment.

(c) A part time employee shall be entitled to the same entitlement as a full time employee for the period of employment, but on a pro-rata basis according to the number of ordinary hours worked each fortnight.

(d) For casual employees, the provisions apply to the extent of their agreed working arrangements.

6. Clause 32 – Deleted: Delete this clause and insert the following in lieu thereof:

32. - CARERS' LEAVE

(1) An employee is entitled to use, each year, up to ten days of the employee's sick leave entitlement to provide care or support to a member of the employee's family or household who requires care or support because of:

(a) an illness or injury of the member; or

(b) an unexpected emergency affecting the member.

(2) An employee shall, wherever practical, give the employer notice of the intention to take carers' leave and the estimated length of absence. If it is not practicable to give prior notice of absence, an employee shall notify the

employer as soon as possible on the first day of absence. Where possible, an estimate of the period of absence from work shall be provided.

(3) An employee shall provide, where required by the employer, evidence to establish the requirement to take carers' leave. An application for carers' leave exceeding two consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.

(4) The definition of "family" shall be the definition of "relative" contained in the *Equal Opportunity Act 1986*. That is, a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the employee. "Member of the employee's household" means a person who, at or immediately before the relevant time for assessing the employee's eligibility to take leave, lived with the employee.

(5) Carers' leave may be taken on an hourly basis or part thereof.

7. Clause 34 – Maternity Leave: Delete this clause and insert the following in lieu thereof:

34. – PARENTAL LEAVE

(1) Definitions

(a) "Employee" includes full time, part time, permanent, fixed term contract and "eligible" casual employees.

(b) A casual employee is "eligible" if the employee -

(i) has been engaged by the public sector on a regular and systematic basis for a sequence of periods of employment during a period of at least twelve (12) months; and

(ii) but for an expected birth of a child to the employee or the employee's spouse or de facto partner or an expected placement of a child with the employee with a view to the adoption of the child by the employee, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

(c) Without limiting (1)(b), a casual employee is also "eligible" if the employee –

(i) was engaged by the public sector on a regular and systematic basis for a sequence of periods during a period (the first period of employment) of less than twelve (12) months; and

(ii) at the end of the first period of employment, the employee ceased, on the employer's initiative, to be so engaged by the public sector employer; and

(iii) the public sector employer later again engaged the employee on a regular and systematic basis for a further sequence of periods during a period (the second period of employment) that started not more than three months after the end of the first period of employment; and

(iv) the combined length of the first period of employment and the second period of employment is at least twelve (12) months; and

(v) the employee, but for an expected birth of a child to the employee or the employee's spouse or de facto partner or an expected placement of a child with the employee with a view to adoption of the child by the employee, would have a reasonable expectation of continuing engagement in the public sector on a regular and systematic basis.

(d) "Primary Care Giver" is the employee who will assume the principal role for the care and attention of a child/children. The employer may require confirmation of primary care giver status.

(e) "Public sector" means an employing authority as defined in Section 5 of the *Public Sector Management Act 1994*.

(f) "Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.

(2) Entitlement to parental leave

(a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:

(i) birth of a child to the employee or the employee's partner; or

(ii) adoption of a child who is not the child or the stepchild of the employee or the employee's partner; is under the age of five (5); and has not lived continuously with the employee for six (6) months or longer.

(b) An employee, other than an eligible casual employee, identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to fourteen weeks paid parental leave which will form part of the 52 week entitlement provided in subclause (2) (a) of this clause.

(c) An employee may take the paid parental leave specified in paragraph (2)(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled.

(d) A pregnant employee can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of

adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed fourteen weeks.

(f) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.

(g) Parental leave may only be taken concurrently by an employee and his or her partner as provided for in subclause (5) or under special circumstances with the approval of the employer.

(h) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.

(i) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.

(j) An employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.

(3) Birth of a child

(a) An employee shall provide the employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner confirming the pregnancy and the estimated date of birth.

(b) If the pregnancy results in other than a live child or the child dies in the fourteen weeks immediately after the birth, the entitlement to paid parental leave remains intact.

(4) Adoption of a child

(a) An employee seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement in lieu of this leave.

(b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.

(5) Partner leave

(a) An employee who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.

(b) The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.

(c) The employer is to agree to an employee's request to extend their partner leave under (5)(b) unless:

(i) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(ii) there are grounds to refuse the request relating to its adverse effect on the employer's business and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:

- cost;
- lack of adequate replacement staff;
- loss of efficiency; and
- impact on the production or delivery of products or services by the employer.

(d) The employer is to give the employee written notice of the employer's decision on a request for extended partner leave. If the employee's request is refused, the notice is to set out the reasons for the refusal.

(e) An employee who believes their request for extended partner leave under (5)(b) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

(f) The taking of partner leave by an employee shall have no effect on their or their partner's entitlement, where applicable, to paid parental leave under this clause.

(6) Other leave entitlements

(a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.

(b) Subject to all other leave entitlements being exhausted, an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years. The employer is to agree to a request to extend their leave unless:

(i) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(ii) there are grounds to refuse the request relating to its adverse effect on the employer's business and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:

- cost;
- lack of adequate replacement staff;
- loss of efficiency;
- impact on the production or delivery of products or services by the employer.

(c) The employer is to give the employee written notice of the employer's decision on a request for leave without pay under (6)(b). If the request is refused, the notice is to set out the reasons for the refusal.

(d) An employee who believes their request for leave without pay under (6)(b) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

(e) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the employer the total combined period of leave without pay following parental leave will not exceed two (2) years.

(f) An employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in (6)(a) and (g).

(g) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.

(h) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

(7) Notice and variation

(a) An employee shall give not less than four (4) weeks notice in writing to the employer of the date the employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.

(b) An employee seeking to adopt a child shall not be in breach of (7)(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.

(8) Transfer to a safe job

(a) If the employee gives her employer a medical certificate from a medical practitioner containing a statement to the effect that, in the medical practitioner's opinion, the employee is fit to work, but that it is inadvisable for her to continue in her present position for a stated period because of:

(i) illness, or risks, arising out of her pregnancy; or

(ii) hazards connected with that position; then

the employer must modify the duties of the position or alternatively transfer the employee to a safe job at the same classification level for the period during which she is unable to continue in her present position.

(b) If the employee's employer does not think it to be reasonably practicable to modify the duties of the position or transfer the employee to a safe job the employee is entitled to paid leave for the period during which she is unable to continue in her present position.

(c) An entitlement to paid leave provided in (8)(b) is in addition to any other leave entitlement the employee has and is to be paid the amount the employee would reasonably have expected to be paid if the employee had worked during that period.

(d) An entitlement to paid leave provided in clause (8)(b) ends at the earliest of whichever of the following times is applicable:

(i) the end of the period stated in the medical certificate;

(ii) if the employee's pregnancy results in the birth of a living child – the end of the day before the date of birth;

(iii) if the employee's pregnancy ends otherwise than with the birth of a living child – the end of the day before the end of the pregnancy

(9) Communication during Parental Leave

(a) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

(ii) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

(b) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to return to work on a part-time basis.

(c) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with (9)(a).

(10) Replacement employee

Prior to engaging a replacement employee the employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

Nothing in this clause shall be construed as requiring an employer to engage a replacement employee.

(11) Return to work

(a) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four (4) weeks prior to the expiration of parental leave.

(b) An employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.

(12) Work on a modified basis

(a) A pregnant employee may work part time in one or more periods while she is pregnant where part time employment is, because of the pregnancy, necessary or desirable.

(b) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 8. – Casual and Part-Time Employees of this award.

(c) An employee may return on a modified basis that involves the employee working on different days or at different times, or both; or on fewer days or for fewer hours or both, than the employee worked immediately before starting parental leave.

(13) Right to revert

(a) An employee who has returned on a part time or modified basis in accordance with (12) may subsequently request the employer to permit the employee to resume working on the same basis as the employee worked immediately before starting parental leave or full time work at the same classification level.

(b) An employer is to agree to a request to revert made under (13)(a) unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the employer and those grounds would satisfy a reasonable person.

(c) An employer is to give the employee written notice of the employer's decision on a request to revert under (13)(a). If the request is refused, the notice is to set out the reasons for the refusal.

(d) An employee who believes their request to revert under (13)(a) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

(14) Effect of Parental Leave on the Contract of Employment

(a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(b) Paid parental leave will count as qualifying service for all purposes of this award. During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose under this award.

(d) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the requirements of this award.

(e) An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on parental leave but otherwise the rights of the employer in respect of termination of employment are not affected.

8. Clause 43 – Adoption Leave: Delete this clause and insert the following in lieu thereof:

43. – DEFENCE FORCE TRAINING LEAVE

(1) Subject to departmental approval and convenience, leave of absence may be granted to an employee who is a volunteer member of the Defence Forces or the Cadet Force for the purpose of attending an annual camp of continuous training, additional approved camp or course of instruction, subject to the conditions set out hereunder.

(2) (a) An employee may be granted two weeks of special leave on full pay in each period of 12 months commencing on 1 July each year. Two weeks means, in the case of five day a week employees, ten days and, in the case of six day a week employees, 12 days' pay.

(b) If the Officer in Charge of a unit certifies that it is essential for an employee to be at the camp in an advance or rear party, a maximum of four extra days on full pay may be granted in the 12 month period.

(3) (a) In addition to leave granted under subclause (2) of this clause, further leave for the purpose of attending an additional approved camp or course of instruction may be granted as leave without pay and the difference between civil and Defence Forces pay made up.

(b) In calculating Defence Forces pay for additional camps or courses, weekends and holidays should be excluded so that employees will have the benefit of any pay with respect of these days. Evidence must be submitted to the employer of the necessity for attendance at such extra camps or courses of instruction.

(4) Employees who are members of the Defence Forces and the Cadet Force may only be granted leave for attendance at one annual camp of continuous training and one additional approved camp or course of instruction.

9. Clause 44 – Defence Force Training Leave: Delete this clause.

2012 WAIRC 00984

FAST FOOD OUTLETS AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN FAST FOODS PTY LTD AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 6 NOVEMBER 2012
FILE NO/S	APPL 59 OF 2012
CITATION NO.	2012 WAIRC 00984

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondents	No appearance

Order

HAVING heard Mr T Pope, for The Shop, Distributive and Allied Employees' Association of Western Australia, as applicant, and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Fast Food Outlets Award 1990 be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 6th day of November 2012.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 13 - Meal Money: Delete this clause and insert the following in lieu thereof:

13. - MEAL MONEY

Any employee who is required to work overtime for more than two hours on any day, without being notified on the previous day or earlier, that he or she will be required to work such overtime, will either be supplied with a meal by the employer or be paid $12.75 meal money.

The meal money amount prescribed in this Clause was established by way of nexus with the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1971 in application 1928 of 2002.

2. Clause 20 - Wages: Delete sub clause (2) of this clause and insert in the following in lieu thereof:

(2) Leading Hands -

An employee who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to the employee's normal wage per week -

(a)	If placed in charge of less than 6 employees	$9.15
(b)	If placed in charge of 6 to 10 employees	$12.45
(c)	If placed in charge of 11 to 20 employees	$14.70
(d)	If placed in charge of more than 20 employees	$23.70

3. Clause 22 - Bar Work: Delete this clause and insert in lieu thereof:

22. - BAR WORK

Any employee, other than a Bar Attendant, who in addition to his or her normal duties is required to dispense liquor from a bar, shall be paid a flat rate of $1.20 per day in addition to the rate prescribed for such normal duties.

4. Clause 24 - Uniforms and Laundering: Delete this clause and insert the following in lieu thereof:

24. - UNIFORMS AND LAUNDERING

Where uniforms are required by the employer to be worn they shall be supplied, laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, the employee shall be paid the following laundry allowance per week -

Class of Employee	Allowance per Week
Employees employed on a casual basis	$1.75
Employees employed on a part time basis	$2.15
Employees employed on a full time basis	$2.80

Provided that any employee employed as a full time Cook shall be paid $3.35 per week for laundry and/or dry cleaning. Provided further that the provisions of this clause may be altered by written agreement between the union and the employer.

5. Clause 25 - Protective Clothing: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances shall be supplied, free of charge by the employer, with rubber gloves or be paid an allowance of $1.75 per week in lieu.

2012 WAIRC 00985

FOOD INDUSTRY (FOOD MANUFACTURING OR PROCESSING) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS

APPLICANT

-v-

ANCHOR PRODUCTS PTY LTD AND OTHERS

RESPONDENTS

CORAM CHIEF COMMISSIONER A R BEECH

DATE TUESDAY, 6 NOVEMBER 2012

FILE NO/S APPL 61 OF 2012

CITATION NO. 2012 WAIRC 00985

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondents	No appearance

Order

HAVING heard Mr T Pope, for The Food Preservers' Union of Western Australia Union of Workers, and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Food Industry (Food Manufacturing or Processing) Award be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 6th day of November 2012.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 19. – Meal Allowance: Delete this clause and insert the following in lieu thereof:

19. - MEAL ALLOWANCE

Where an employee required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid $10.80 for a meal. If owing to the amount of overtime a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $7.35 for each meal so required.

If an employee in consequence of receiving such notice has provided himself/herself with a meal or meals and is not required to work overtime or is required to work less overtime than notified, he/she shall be paid the amounts prescribed above in respect of the meals not then required.

2. Clause 31. – Wages: Delete subclause (3) and insert the following in lieu thereof:

(3) Leading Hands

	Per Week Extra $
A Leading Hand In-Charge of:	
a) Less than three other employees	16.00
b) Not less than three and not more than ten other employees	31.50
c) Not more than ten other employees	46.30

2012 WAIRC 00977

HAIRDRESSERS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	THE MASTER LADIES' HAIRDRESSERS INDUSTRIAL UNION OF EMPLOYERS OF WESTERN AUSTRALIA AND OTHERS
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 6 NOVEMBER 2012
FILE NO/S	APPL 57 OF 2012
CITATION NO.	2012 WAIRC 00977

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondent	Mr O Moon, The Master Ladies' Hairdressers Industrial Union of Employers of Western Australia

Order

HAVING heard Mr T Pope, for The Shop, Distributive and Allied Employees' Association of Western Australia, as applicant and Mr O Moon for The Master Ladies' Hairdressers Industrial Union of Employers of Western Australia; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Hairdressers Award 1989* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 6th day of November 2012.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 16. – Meal Money: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The meal money required to be paid to all employees pursuant to this clause shall be $12.55.

2. Clause 22. – Tools of Trade: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Tool Allowance

In addition to the weekly wage a tool allowance of $8.30 per week shall be payable to full time Seniors, part time Seniors, indentured apprentices, and probationary apprentices.

3. Clause 32. – First Aid Allowance: Delete this clause and insert the following in lieu thereof:

32. - FIRST AID ALLOWANCE

An employee holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $10.00 per week in addition to the employee's ordinary rate.

2012 WAIRC 00982

LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	COMO LIQUOR STORE AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 6 NOVEMBER 2012
FILE NO/S	APPL 58 OF 2012
CITATION NO.	2012 WAIRC 00982

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondents	No appearance

Order

HAVING heard Mr T Pope, for The Shop, Distributive and Allied Employees' Association of Western Australia, as applicant, and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Licensed Establishments (Retail and Wholesale) Award 1979 be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 6th day of November 2012.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 10. - Meal Times and Meal Allowance:

A. Delete subclause (2) of Part I - Retail Establishments of this clause and insert the following in lieu thereof:

(2) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $12.75 for the purchase of any meal required.

B. Delete subclause (3) of Part II - Wholesale Establishments of this clause and insert the following in lieu thereof:

(3) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $12.75 for the purchase of any meal required.

2. Clause 21. - Wages: Delete Part IV - Additional Payments of this clause and insert the following in lieu thereof:

PART IV - ADDITIONAL PAYMENTS

In addition to the rates prescribed elsewhere in this clause the following allowances and rates Shall be paid to a worker where applicable.

(1) (a) An employee required to operate a ride-on power operated tow motor a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 61 cents per hour whilst so engaged.

(b) An employee required to operate a ride-on fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 83 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade I" or a "Storeman Operator Grade II ".

(2) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following: In a cold chamber in which the temperature is:

(i) Below 0 degrees Celsius to -20 degrees Celsius - 90 cents per hour.

(ii) Below -20 degrees Celsius to -25 degrees Celsius - $1.04 cents per hour.

(iii) Below -25 degrees Celsius - $1.19 per hour.

(b) Employees required to work in temperatures less than -18.9 degrees Celsius shall be medically examined at the employer's expense.

2012 WAIRC 00975

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPLICANT

-v-

AUDIOCLINIC NATIONAL HEARING AIDS AND OTHERS

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE TUESDAY, 6 NOVEMBER 2012

FILE NO/S APPL 56 OF 2012

CITATION NO. 2012 WAIRC 00975

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondents	No appearance

Order

HAVING heard Mr T Pope, for The Shop, Distributive and Allied Employees' Association of Western Australia, as applicant, and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 6th day of November 2012.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 7A. – Nightfill Duty: Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) (a) A full-time, part-time or casual worker employed in a "General Retail Shop" or "Special Retail Shop" pursuant to this clause shall be paid an additional loading as prescribed hereunder:

(i) Monday to Saturday prior to 7.00 am

(aa) Full-time and Part-time Workers

- a loading of $3.42 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(bb) Casual Workers

- a loading of $3.42 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(ii) Saturday between 5.00 pm and Midnight

(aa) Full-time and Part-time Workers

- a loading of $4.86 per hour in addition to the ordinary hourly rate of a full-time worker as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(bb) Part-time Workers

- a loading of $10.60 per hour in addition to the ordinary hourly rate of a full-time shop assistant as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(cc) Casual Workers

- a loading of $12.68 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(b) Junior workers shall be paid the appropriate percentage as laid down in Part II of Clause 28. - Wages.

(c) The loadings referred to in (i) and (ii) above shall be paid for the purpose of superannuation calculations.

2. Clause 12. – Meal Money: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) When a worker is required to continue working after the usual finishing time for more than one hour he/she shall be paid $12.75 for the purchase of any meal required.

(2) Late Night Trading Meal Allowance:

A worker who commences work at or prior to 1.00pm on the day of late night trading and is required to work beyond 7.00pm on that day shall be paid a meal allowance of $12.75.

3. Clause 28. – Wages: Delete Part III of this clause and insert the following in lieu thereof:

Part III –

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable:

(1) (a) A worker required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his duties shall be paid an additional 0.73 cents per hour whilst so engaged.

(b) A worker required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his duties shall be paid an additional 0.81 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade 1" or a "Storeman Operator Grade 2".

(2) Any workers, whether a junior or adult, employed as a canvasser and/or collector shall be paid the adult male wage.

(3) Where a canvasser provides his own bicycle he shall be paid an allowance of $1.58 per week.

(4) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following:

In a cold chamber in which the temperature is:

(i) Below 0º Celsius to -20° Celsius - $0.90 per hour

(ii) Below -20° Celsius to -25° Celsius - $1.05 per hour

(iii) Below -25° Celsius - $1.18 per hour.

(b) Workers required to work in temperatures less than -18.9° Celsius shall be medically examined at the employer's expense.

(5) (a) A worker (full time, part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. Monday to Friday inclusive in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

For casual workers such loading shall be paid in addition to the rates prescribed in Clause 7(4) of this award.

(b) A worker (part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. on Saturday in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

(i) A casual worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A part time worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part Time Workers.

(6) (a) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight Monday to Friday inclusive shall be paid a loading of 20% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(b) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight on Saturday shall be paid a loading of 20% for each hour worked after 6.00pm.

(i) A casual employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A full or part-time employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part-Time Workers.

(c) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours before 7.00am on any day Monday to Saturday inclusive shall be paid a loading of 30% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(7) An automotive spare parts or accessories salesman qualified (i.e. one who has passed the appropriate course of technical training) shall be paid the sum of $26.90 per week in addition to the rates prescribed herein.

4. Clause 28A. – Structural Efficiency Agreement: Delete this clause and insert the following in lieu thereof:

P. & O. Cold Stores and Clelands Cold Stores shall pay $26.90 per week in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 November 1989 and $4.50 in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 December 1989 on account of agreement reached for a structural efficiency package which the parties anticipate will result in the creation of a Cold Storage Award being negotiated in accordance with the objectives and content of the Structural Efficiency Principle.

5. Clause 46. – First Aid Allowance: Delete this clause and insert the following in lieu thereof:

A worker holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $10.65 per week in addition to the worker's ordinary rate.

6. Clause 48. – Additional Loading for Late Night Trading Establishments: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) A full-time or part-time worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid a loading of $4.29 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(2) A casual worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid the amount of $4.29 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

NOTICES—Award/Agreement matters—

2012 WAIRC 00987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 49 of 2012

APPLICATION FOR A NEW AGREEMENT TITLED "SHIRE OF HARVEY (MEAT INSPECTORS) UNION COLLECTIVE AGREEMENT 2012"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Administrative, Clerical and Services Union of Employees* under the Industrial Relations Act 1979 for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

3 APPLICATION AND PARTIES BOUND

3.1 The Parties to this Agreement are the

3.1 .1 Shire of Harvey ('the Shire'); and

3.1.2 The Western Australian Municipal, Administrative, Clerical and Services Union of Employees ('the WASU').

3.2 This Agreement shall cover all persons employed under the *Local Government Officers' (Western Australia) Interim Award 2011* who carry out the meat inspection operations at Goodchild's Abattoirs, Rosamel Road Kemerton, and who are members of, or eligible to be members of the WASU.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

29 October 2012

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2012 WAIRC 01030

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEGAN BOND
	APPLICANT
	-v-
	DR LISE M. ASHTON - LEEMING VETERINARY CLINIC
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 16 NOVEMBER 2012
FILE NO/S	U 209 OF 2012
CITATION NO.	2012 WAIRC 01030

Result Application discontinued

Order

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

AND WHEREAS on the 29th day of October 2012 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conference the parties reached an agreement in full and final settlement of all matters arising from the termination of Ms Bond's employment;

NOW THEREFORE, I, the undersigned, pursuant to the powers conferred on me under s27(1)(a) of the Act, hereby order:

THAT this application be, and is hereby discontinued.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2012 WAIRC 00972

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VINCENZO FALSO
	APPLICANT
	-v-
	WINDMILL SMASH REPAIRS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 5 NOVEMBER 2012
FILE NO/S	U 76 OF 2012, B 76 OF 2012
CITATION NO.	2012 WAIRC 00972

Result	Application discontinued
Representation	
Applicant	Mrs E Falso
Respondent	Mrs S Impiazzi

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 01019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01019
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
DELIVERED	**:**	THURSDAY, 15 NOVEMBER 2012
FILE NO.	**:**	U 96 AND B 96 OF 2011
BETWEEN	**:**	MARK GRANITTO
		Applicant
		AND
		THE ROMAN CATHOLIC ARCHBISHOP OF PERTH
		Respondent

CatchWords	**:**	Unfair dismissal – Denied contractual benefits – Informal discovery – Application for further discovery – Alleged culture of bullying – Principle of discovery
Result	**:**	Application granted in part
Representation:		
Applicant	**:**	Mr T Hammond, of counsel
Respondent	**:**	Mr I Curlewis, of counsel

Reasons for Decision

1 The applicant has two claims before the Commission; firstly that he has been harshly, oppressively or unfairly dismissed from his employment with the Catholic Education Office (CEO) and secondly that he has been denied a benefit to which he was entitled under his contract of employment. He seeks reinstatement or compensation and specific performance of the contract.

2 It is common ground that the applicant was employed by the respondent as a Team Leader of the CEO's Resources Team, for a fixed term commencing in March 2008 and expiring on 31 December 2013.

3 The applicant says that in early 2010, he developed a stress related illness due to circumstances involving his work which resulted in his being unable to work for at least 12 months.

4 The respondent says that while the applicant was declared psychiatrically fit to return to work, the psychiatrist, Dr McCarthy, reported that he was not suitable to return to his previous position at his workplace due to what was said to be a continuing grievance and attitude towards the respondent. In May 2011, the respondent advised the applicant that he lacked the capacity or attitude to return to work. As such he had repudiated the contract.

5 In the initial stages of these matters before the Commission, the parties agreed to undertake discovery on an informal basis. However, they were unable to agree on all matters and have reverted to the Commission, by way of an application filed by the applicant, for orders for further discovery. The discovery sought by the applicant was of some 26 categories of documents, however, following proceedings before the Commission the outstanding matters relate to a smaller number of categories. The applicant says that the discovery sought is important so as to be able to look behind the reasons why the respondent says the contract of employment had to come to an end.

6 Evidence has been provided by way of affidavits and statutory declarations of Angus Castley, solicitor for the applicant dated 2 November 2011; Karen Wroughton, legal counsel for the CEO dated 10 November 2011; Mark Granitto, the applicant, dated 13 March 2012; Jonathon Woolfrey, Chief Human Resources Officer of the CEO dated 26 March 2012; and Deborah Maureen Patricia Sayce, Assistant Director of the CEO dated 26 March 2012.

7 The categories of documents sought by the applicant, which have not been resolved, are those at points 5, 6, 8, 17 and 20(c) and (d) and 26 of the applicant's amended revised list of documents sought.

8 It is appropriate to deal with points 5, 6 and 17 together as they relate to similar matters. They are:

> 5. A letter sent to Archbishop Barry Hickey by a staff member of the CEO in April 2009 and the response of Archbishop Barry Hickey to Mr Ron Dullard in relation to this anonymous letter. We are instructed the letter contained allegations of bullying and harassment against Mr Dullard. The Archbishop forwarded this letter to Mr Dullard. Mr Dullard then requested all of the CEO Team Leader (sic) to attend a meeting in the CEO Board room to discuss this allegation. Mr Dullard then asked that each Team Leader prepare a declaration on whether any of the Team Leaders had witnessed any incidences of bullying and harassment by Mr Dullard;
>
> 6. The responses (with respect to item 5) by the Team Leaders and members of the CEO Executive that were prepared, collected and submitted to Archbishop Barry Hickey in relation to the anonymous letter;
>
> 17. The organisational survey results and commentary conducted on the CEO by Data Analysis Australia;

9 The applicant says there were allegations of bullying within the CEO which were the subject of an anonymous letter and an investigation. Point 17 relates to a survey conducted in 2007 relating to an alleged culture of bullying and harassment at the CEO. This relates to circumstances arising before the applicant's employment commenced. If there was a culture of bullying in evidence prior to and during his employment, the applicant says it may lead to an inference that he was subject to that same culture.

10 The applicant says that he seeks copies of the original letter and of the written responses from the senior managers for the purposes of an investigation undertaken by Ms Sayce in her then capacity as Director of Religious Education at the CEO in 2009. Ms Sayce collected all of the responses and the applicant says she submitted them to the Archbishop at the Perth Catholic Archdiocese. He says even if the CEO has destroyed these documents, he believes that the documents are in the possession of the Archbishop and should be discovered.

11 Ms Sayce says she was responsible for collecting the responses from senior managers; that at a meeting at which she was present in 2009, Mr Dullard undertook to the CEO senior managers present that once their responses had been received and considered, the responses would be destroyed. Ms Sayce, as the person responsible for collecting the responses, says that after she had received and perused those responses from the managers she arranged for the responses to be shredded and was present when that was done. She says those responses were not in fact submitted to the respondent, the Archbishop. She says they were destroyed in accordance with Mr Dullard's commitment, and to her knowledge, the responses were never copied. She says neither the CEO nor the respondent is in possession of the responses. They no longer exist. As to the survey, the respondent says it is not relevant because it did not relate or cover the applicant's period of employment.

Conclusion

12 A party is able to discover documents which 'relate to any matter in question in the action, and which may…directly or indirectly enable a party to either advance his own case or to damage the case of his adversary' (*Compagnie Financiere Du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, per Brett LJ at 62-64).

13 In this case, the applicant's case includes, as I understand it, that if he had a sense of grievance towards the CEO, then it was justified due to the conduct of some officers of the CEO, which he asserts constituted bullying or undermining of his authority. Therefore, documents relating to all allegations of, or a culture of, bullying in the period immediately prior to and during his employment, may allow an inference to be drawn as to the behaviour of the same officers towards him.

14 In respect to the anonymous letter and the responses by senior officers, I accept Ms Sayce's evidence that the responses have been destroyed and no copies exist, and there is no evidence to the contrary. Therefore, in respect of the responses, the application for discovery must be dismissed. However, Ms Sayce's affidavit has not addressed the anonymous letter sent to the Archbishop by a staff member in April 2009 or the Archbishop's response to Mr Ron Dullard. Where Ms Sayce's response does not cover the issue of the anonymous letter to Mr Dullard and his response to the Archbishop, it is appropriate for the respondent to respond to that issue.

15 As to the organisational survey results and commentary by Data Analysis Australia, I am inclined to the view that this may contain information of direct or indirect relevance to the applicant's claims as to his own treatment in his employment, within a relatively short time after the report issued, and is therefore discoverable.

16 I note in passing though, that while such a report may comment on a culture within the CEO at a particular time, it would still be necessary for the applicant to demonstrate that it is also applied to his own employment and was in some way associated with the way in which his employment came to an end.

17 Point 8 is as follows:

> 8. Copies of the Minutes of meetings held by the Executive of the Catholic Education Office and/or any other meetings held within the CEO where any reference is made to Dr Granitto's performance and/or any reference to a complaint about Dr Granitto;

18 The applicant says that all performance issues relating to senior staff were discussed at Executive meetings. Therefore, if there were any comments relating to his performance, they would be recorded in the minutes of these meetings. If there are no such comments, then there is no issue with his performance.

19 The applicant also says that part of the question as to Dr McCarthy's comment that the applicant did not have the capacity to return to his position because of a sense of grievance and outrage, if such a sense existed, is whether it was a justified grievance, and whether the applicant was treated in such a way as to undermine his position, leading to a depressive condition. His performance is said to be integral to that.

20 In submissions, the applicant says that issues such as unilateral attempts by the respondent to extend his probationary period; ongoing difficulties with the management of his subordinates; a lack of support from his superiors; and a failed mentoring arrangement all form part of the basis for the applicant's stress condition.

21 The respondent says firstly, that the issue of the applicant's performance is irrelevant to his cause of action. Secondly, it is speculation on the applicant's part to state that any comments relating to his performance would be within the minutes and if they are not, then there is no such issue. Thirdly, the respondent says that during the course of the applicant's employment, there were at least 104 Executive meetings and many others throughout the CEO. It would therefore be oppressive to require the CEO to examine them all to identify any reference to the applicant's performance.

Conclusion

22 I am of the view that the documents sought in this case form a significant part of the background to this matter and will assist in the determination of whether, as the applicant suggests, there were issues with his performance which were at the heart of the problems he says existed within the work place. In that context, they may contain information which either directly or indirectly enables the applicant to advance his case or damage the respondent's case.

23 As the applicant says that the meetings of the Executives are those meetings at which his performance may have been discussed, then notwithstanding that there are a significant number of such documents to be examined, it is appropriate to do so. I am not inclined to require the respondent to go beyond minutes of meetings of the Executive to any other meetings because such would be speculative, indeterminate, unreasonable and oppressive.

24 Therefore, I intend to require the respondent to discover any minutes of meetings held by the Executive of the CEO where reference is made to the applicant's performance or to complaints about him.

25 Point 20 is as follows:

> 20. Internal Catholic Education Office policies:
>
> c. Termination policy (as at 3 March 2010 and 4 May 2011);
>
> d. Staying in Touch with staff (as at 3 March 2010);

26 Mr Woolfrey says as to the termination policy as at 3 March 2010 and 4 May 2011, they are no longer on record at the CEO. The applicant says, in those circumstances, the next best thing would be the discovery of the current policy, and that examination of witnesses regarding the current policy and changes from the previous policy would then suffice.

27 As to the 'Staying in Touch' policy, the applicant asserts that even if it is not so titled, that there is a document, rule or policy of the CEO about maintaining contact with staff away from the office for long periods of time. He says that there was no communication or contact with him during his absence, which adds to his sense of grievance.

28 The respondent's answer is simply that the CEO has no policy entitled 'Staying in Touch'.

Conclusion

29 One would think that in the circumstances, the current termination policy may be of assistance to the applicant in advancing his case and ought to be provided.

30 As to the 'Staying in Touch' document it seems appropriate to rephrase the document sought to be any document which contains a policy, procedure, rule or practice of staying in touch with staff away from the office for long periods of time, and for the respondent to respond to this.

31 Point 26 is as follows:

26. Job duties of the following CEO staff members as at 3 March 2011:

a. Mr Bernie O'Shea;

b. Ms Karen Wroughton;

c. Mr Alec O'Connell

32 The applicant says that Mr O'Shea and Mr O'Connell were continually undermining him in his position giving instructions to his staff and overriding several of his instructions. He says there were issues about maintaining work boundaries. As to Ms Wroughton, the applicant says that her duties included responsibilities in respect of all employees of the CEO including himself.

33 The respondent says the job duties of Messrs O'Shea and O'Connell and Ms Wroughton are not relevant to the applicant's perceived cause of action.

Conclusion

34 Given the basis for the applicant's claim, it seems to me that the relative duties and responsibilities of other officers with whom there is said to be some overlap of responsibilities, is relevant to whether the applicant's authority was undermined, as part of the issue of any sense of grievance he may have had. I would allow the discovery of this matter in so far as job descriptions for Messrs O'Shea and O'Connell are concerned. However, there is no real justification put forward for calling for Ms Wroughton's job description.

35 Directions will issue accordingly.

2012 WAIRC 01020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK GRANITTO
	APPLICANT
	-v-
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 15 NOVEMBER 2012
FILE NO.	U 96 OF 2011 AND B 96 OF 2011
CITATION NO.	2012 WAIRC 01020

Result Application granted in part

Direction

HAVING heard Mr T Hammond of counsel on behalf of the applicant, and Mr I Curlewis of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby directs:

1. THAT the respondent provide to the applicant discovery of the following documents:

(a) The organisational survey results and commentary conducted on the Catholic Education Office (CEO) by Data Analysis Australia;

(b) Copies of the minutes of meetings held by the Executive of the CEO where any reference is made to Dr Granitto's performance, or to a complaint about Dr Granitto, or both;

(c) The current internal CEO termination policy; and

(d) Job duties of the following CEO staff members as at 3 March 2011:

(i) Mr Bernie O'Shea; and

(ii) Mr Alec O'Connell.

2. THAT the respondent respond to the applicant in respect of the following documents:

(a) An anonymous letter sent to Archbishop Barry Hickey by a staff member of the CEO in April 2009 and the response of Archbishop Barry Hickey to Mr Ron Dullard in relation to this letter;

(b) Any document which sets out a policy, procedure, rule or practice of staying in touch with staff who are away from the office for long periods of time.

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

2012 WAIRC 00963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMUEL TREVOR HARRINGTON
	APPLICANT
	-v-
	GUNGGARI CONSTRUCTION MINING SERVICES PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 31 OCTOBER 2012
FILE NO/S	B 187 OF 2012
CITATION NO.	2012 WAIRC 00963

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr S Maika and Mr G Saunders

Order

WHEREAS at the hearing in this matter Gunggari Construction Mining Services Pty Ltd agreed that it owed the sum of $18,900 net of tax to Mr Harrington being for unpaid wages, plus one week's annual leave;

AND WHEREAS no agreement is able to be reached between the parties for the payment of that sum to Mr Harrington,

NOW THEREFORE I, pursuant to the powers in s 23(1) of the *Industrial Relations Act, 1979*, hereby:

1. ORDER THAT the name of the respondent be amended to Gunggari Construction Mining Services Pty Ltd.
2. DECLARE THAT Gunggari Construction Mining Services Pty Ltd owes Mr Harrington $18,900 net of tax being unpaid wages, plus one week's annual leave.
3. ORDER THAT Gunggari Construction Mining Services Pty Ltd forthwith pay Mr Harrington the sum of $18,900 net of tax.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2012 WAIRC 00944

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYDIA HAYDEN
	APPLICANT
	-v-
	PUNTUKURNU ABORIGINAL MEDICAL SERVICE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 22 OCTOBER 2012
FILE NO/S	U 191 OF 2012
CITATION NO.	2012 WAIRC 00944

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr C Renshaw

Order

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

WHEREAS the Commission set down a conference on 17 October 2012 for the purpose of conciliating between the parties; and

WHEREAS on 28 September 2012 the Commission was advised that the matter had settled; and

WHEREAS on 5 October 2012 the applicant filed a Notice of Withdrawal or Discontinuance form in respect of the application; and

WHEREAS on 5 October 2012 the respondent consented to the matter being discontinued; and

WHEREAS on 8 October 2012 the conference date was vacated;

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

THAT this application be, and is hereby discontinued.

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

2012 WAIRC 00937

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN HOPE
	APPLICANT
	-v-
	JAMIE MCALLISTER CONTRACTING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 OCTOBER 2012
FILE NO/S	U 173 OF 2012, B 173 OF 2012
CITATION NO.	2012 WAIRC 00937

Result	Applications discontinued
Representation	
Applicant	Mr K Hope
Respondent	Mr G McCorry

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 00946

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00946
CORAM	**:**	COMMISSIONER J L HARRISON
WRITTEN SUBMISSIONS	**:**	MONDAY, 27 AUGUST 2012, THURSDAY 4 OCTOBER 2012
DELIVERED	**:**	MONDAY, 22 OCTOBER 2012
FILE NO.	**:**	U 103 OF 2012
BETWEEN	**:**	LINGLING HUANG
		Applicant
		AND
		ATWORK PERSONNEL PTY LTD
		Respondent

Catchwords	:	Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether Commission has jurisdiction - Commission satisfied respondent is a trading corporation - Claim beyond Commission's jursidiction - Application dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) 29(1)(b)(i)
		Fair Work Act 2009 s 12, s 13, s 14(1)(a) and s 26
Result	:	Dismissed
Representation:		
Applicant	:	In person
Respondent	:	Mr T Lyons (of counsel)
		Mr G Reid on behalf of Hilton Fresh

Reasons for Decision

1 On 7 May 2012 Lingling Huang (the applicant) lodged an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) claiming she was unfairly dismissed on 16 April 2012 by Atwork Personnel Pty Ltd (the respondent). The respondent disputes this claim and maintains that the respondent is a constitutional corporation and the Commission cannot deal with this application.

2 The applicant was placed by the respondent to work at Hilton Fresh, which may have been a joint employer of the applicant along with the respondent.

3 The respondent submitted sworn affidavits by its manager Mr Garth Smith on 7 August 2012 and 27 September 2012. Attached to the affidavit sworn on 7 August 2012 were the following documents:

(1) Certificate of Registration of a Company in the name of Flashaz Enterprises Pty Ltd;

(2) an Australian Securities and Investment Commission's (ASIC) company extract dated 6 August 2012 showing a change of name to Atwork Personnel Pty Ltd on 23 December 2010;

(3) a brochure explaining the services provided by the respondent;

(4) a copy of the applicant's job application form dated 25 March 2010;

(5) a copy of the applicant's job application form dated 3 December 2009; and

(6) an email sent by the applicant on 2 January 2010 updating her application form information.

4 Hilton Fresh lodged submissions and documents on 3 August 2012 and Mr Graeme Reid, on behalf of Hilton Fresh, lodged a statutory declaration on 26 September 2012. Documents submitted included:

(1) Certificate of Registration of a Company in the name of Rivervalley Enterprises Pty Ltd;

(2) an ASIC business name extract for Hilton Fresh showing Rivervalley Enterprises Pty Ltd conducting this business;

(3) a copy of a trust deed for the Growers Trust; and

(4) a copy of the Australian Business Number registration for Hilton Fresh.

5 By email dated 27 August 2012 the applicant agreed that the respondent and Hilton Fresh are trading corporations.

Findings and conclusions

6 Section 14(1)(a) of the *Fair Work Act 2009* (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 constitutional corporations as corporations which are trading or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies 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 and Hilton Fresh are trading corporations the jurisdiction of the Commission to deal with the applicant's claim is excluded.

7 The issue to be determined when deciding if the respondent and Hilton Fresh are trading corporations is whether they are incorporated, the character of the activities carried out by them at the relevant time and whether or not they engaged in significant and substantial trading activities of a commercial nature such that they can be described as trading corporations.

I find that both the respondent and Rivervalley Enterprises Pty Ltd which trades as Hilton Fresh are incorporated entities and on the undisputed information before me I find that their main purpose is to trade with the aim of generating a profit. I find that the respondent engages in labour hire activities on a commercial basis and it employs approximately 220 employees for this purpose. I find that Hilton Fresh engages in buying and selling fresh produce and groceries to generate a profit and it employs approximately 40 employees to do so. In the circumstances I find that they are trading corporations and the applicant is therefore an employee of a national system employer pursuant to the FW Act. The Commission therefore does not have the jurisdiction to deal with the applicant's claim for unfair dismissal and an order will issue dismissing this application for want of jurisdiction.

2012 WAIRC 00945

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINGLING HUANG
	APPLICANT
	-v-
	ATWORK PERSONNEL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 22 OCTOBER 2012
FILE NO/S	U 103 OF 2012
CITATION NO.	2012 WAIRC 00945

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr T Lyons (of counsel) Mr G Reid on behalf of Hilton Fresh

Order

HAVING HEARD the applicant on her own behalf, Mr T Lyons of counsel on behalf of the respondent and Mr G Reid on behalf of Hilton Fresh, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be and is hereby dismissed.

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

2012 WAIRC 00942

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEATHER MCKASKILL
	APPLICANT
	-v-
	LAKE ADAMS BOARDING & CATTERY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 19 OCTOBER 2012
FILE NO/S	U 79 OF 2011
CITATION NO.	2012 WAIRC 00942

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms N Dowling

Order

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

WHEREAS the Commission set down a conference on 27 June 2011 for the purpose of conciliating between the parties; and

WHEREAS on 24 June 2011 the conference was vacated as the respondent was not willing to participate in conciliation; and

WHEREAS the application was set down for hearing and determination on 2 November 2011; and

WHEREAS on 24 October 2011 the hearing was vacated due to the unavailability of the respondent's representative; and

WHEREAS on 2 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 1 June 2012; and

WHEREAS on 9 May 2012 the respondent made an offer to settle the matter; and

WHEREAS on 12 May 2012 the applicant accepted the respondent's offer; and

WHEREAS on 24 May 2012 the hearing was vacated; and

WHEREAS on 5 October 2012 a Notice of Withdrawal or Discontinuance form was filed in respect of the application; and

WHEREAS on 10 October 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 00976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL MYERS
	APPLICANT
	-v-
	MIDLAND CONSTRUCTIONS PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 6 NOVEMBER 2012
FILE NO/S	B 14/2011
CITATION NO.	2012 WAIRC 00976

Result Application dismissed

Order

WHEREAS this application was listed for mention on 5 November 2012;

AND WHEREAS at the hearing on 5 November 2012 there was no appearance on behalf of or by the applicant;

NOW THEREFORE, I the undersigned, having given reasons for decision extemporaneously and pursuant to the powers conferred on me under section 27(1)(a) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby dismissed for want of prosecution.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2012 WAIRC 00903

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00903
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	TUESDAY, 2 OCTOBER 2012
DELIVERED	**:**	WEDNESDAY, 3 OCTOBER 2012
FILE NO.	**:**	B 49 OF 2012
BETWEEN	**:**	CHARLES (CARMELO) PARRELLA
		Applicant
		AND
		FBM CORPORATION PTY LTD
		Respondent

Catchwords	:	Industrial Law (WA) - Claim of denied contractual benefit - Issues in relation to applicant's conduct under the contract of employment - Whether employee acted in breach of his contract of employment a relevant consideration - Application to adjourn pending the outcome of related Supreme Court proceedings - Whether in the public interest for both jurisdictions to proceed considered
Legislation	:	Industrial Relations Act 1979 (WA) s 27(1)(c), (f)
Result	:	Adjournment granted
Representation:		
Applicant	:	Mr C Parrella
Respondent	:	Mr N Marouchak (of counsel)

Case(s) referred to in reasons:

Myers v Myers [1969] WAR 19 at 21

Registrar v Metals and Engineering Workers' Union – Western Australia and others (1993) 73 WAIG 557

Graham Sargant v Lowndes Lambert Australia Pty Ltd [2001] WAIRC 02603; (2000) 81 WAIG 311

Anthony Joseph Portolesi v Fini Group Management Pty Ltd (1997) 77 WAIG 506

Garth Jason Waters v Taipan Pumps Pty Ltd [2006] WAIRC 04233, (2006) 86 WAIG 1144

Case(s) also cited:

Mr Matthew Valentine De Pledge v Moulding Industries Pty Ltd [2004] WAIRC 11157

Reasons for Decision – Application for Adjournment

The Claim Before the Commission

1 Mr Parrella claims that he has not been paid salary, commissions, expenses and superannuation entitlements by his former employer. FBM Corporation Pty Ltd conceded in a Notice of Answer dated 28 March 2012 that certain monies are owing to Mr Parrella, however the company now disputes that any monies are owing. Further, FBM alleges that Mr Parrella caused damage to the business due to a breach of his duties as an employee and that the damage that he has caused FBM should be offset against any monies to which Mr Parrella may be entitled. Mr Parrella's claim is set down for hearing to commence on 11 October 2012.

FBM Pty Ltd's Application to Adjourn

2 FBM now has filed an application to stay the hearing. In substance it is an application to adjourn the hearing to await the outcome of related Supreme Court proceedings. The application states that on 22 June 2012 FBM initiated an action in the Supreme Court of WA against Mr Parrella and seven other former employees or contractors generally seeking damages for loss said to have been incurred as a result of their actions.

3 Mr Parrella is the second defendant and the claim is that he terminated his employment without notice on 21 February 2012, that he took with him certain property of FBM, that he erased electronic data the property of FBM and that he contacted FBM's customers and potential customers in a way that caused them to cancel or not proceed with contracts. FBM alleges that Mr Parrella caused loss, business disruption, and lost and cancelled contracts, and FBM therefore seeks damages for breach of contract, interest and costs.

4 FBM informed the Commission that the hearing should be adjourned because the Supreme Court proceedings involve the same subject matter as the subject matter of Mr Parrella's claim. In particular, both this Commission and the Supreme Court would need to decide whether Mr Parrella was suspended by FBM or whether he abandoned his employment; whether he took FBM's property and whether he divulged confidential information to third parties.

5 The submission is that Mr Parrella and the other seven defendants colluded. It would be inappropriate, costly, and inconvenient, for the Commission proceedings to continue because of the Supreme Court proceedings. Also, it would be undesirable for those seven defendants to hear the evidence which will need to be given in the Commission before they give evidence in the Supreme Court. It would be contrary to the public interest for two jurisdictions to determine the same facts.

Mr Parrella's Reply

6 Mr Parrella strenuously opposes any adjournment of his claim in this Commission. In his view, whether staff walked out or were suspended has nothing to do with whether he is owed an outstanding commission payment. He points out that his claim in this Commission was made first and that FBM's claim in the Supreme Court contains only allegations. The Supreme Court proceedings may take years and it would be unfair for him to have to wait for his entitlements to be paid to him. The proper process is for him to have his case heard now, and if he is successful in this Commission but unsuccessful at a later date in the Supreme Court, he would be able to re-pay the monies at that time.

The Law

7 The Commission has the power in s 27(1)(f) to adjourn a matter before it. It is well settled that the test to be applied is that where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted, unless in turn this would mean a serious injustice to the other party (*Myers v Myers* [1969] WAR 19 at 21; *Registrar v Metals and*

Engineering Workers' Union – Western Australia and others (1993) 73 WAIG 557). The decided cases indicate that there is no fixed rule that the Commission will adjourn a matter if there is a corresponding matter in the Supreme Court; it will depend upon the circumstances of the case *Portolesi v Fini Group Management Pty Ltd* (1997) 77 WAIG 506; *Waters v Taipan Pumps Pty Ltd (ACN 097 145 527)* [2006] WAIRC 04233; (2006) 86 WAIG 1144.

Consideration

8 The two matters, Mr Parrella's claim against FBM and FBM's claims against Mr Parrella (and seven other former employees or contractors), each turn upon the same set of facts. Both the Commission and the Supreme Court will need to consider the terms of Mr Parrella's contract of employment with FBM and determine the facts of what occurred.

9 Whether Mr Parrella acted in breach of his contract of employment will be an important consideration in both this Commission and in the Supreme Court proceedings. It is directly raised in FBM's Notice of Answer in this matter and it is central to the action taken by FBM in the Supreme Court. Although this Commission will decide whether Mr Parrella has not been allowed by FBM benefits to which he is entitled under his contract of employment, his claim for an order that FBM pay him any benefits will be decided according to equity, good conscience and the substantial merits of the case (*Sargant v Lowndes Lambert Australia Pty Ltd* (2000) 81 WAIG 311; and the appeal which was dismissed: [2001] WAIRC 02603; (2001) 81 WAIG 1149). This means that if Mr Parrella did act in breach of his contract of employment and caused loss and damage to FBM, he does not come here with clean hands. The Commission would be slow to order FBM to pay him a benefit due under the very contract of employment of which he himself was in breach which caused loss and damage to his former employer.

10 Significantly, in this case the allegation that Mr Parrella's alleged breaches were done in collusion with other former employees or contractors leads me to conclude that a proper consideration of Mr Parrella's conduct will be assisted by the knowledge of the conduct of the other former employees or contractors. In my view this is more likely to be established in proceedings to which they all are parties, that is, the Supreme Court proceedings, rather than in these proceedings involving only Mr Parrella.

11 If the adjournment is refused, FBM will be obliged to present much the same case in support of its allegations against Mr Parrella in two different jurisdictions. It will run the risk of having different findings being made in relation to Mr Parrella's conduct. It will be unable to recover its costs of doing so in the Commission because costs are generally not awarded in this Commission and not for the services of a legal practitioner (s 27(1)(c) of the Act). I regard these as a serious injustice.

12 If the adjournment is granted, Mr Parrella's claim will not be heard for some time, and that is a serious injustice to him, however his claim is unlikely to be able to be finally decided by the Commission in the absence of knowledge of the conduct of the other former employees or contractors with whom he is alleged to have colluded. This knowledge will necessarily be known after the Supreme Court proceedings are dealt with, and not by dealing only with Mr Parrella's claim in this Commission.

Decision

13 In my view, the injustice to FBM if the adjournment is not granted is greater that the injustice to Mr Parrella if it is granted. The adjournment will be granted.

14 An order will issue that the hearing date of 11 October 2012 be vacated and the hearing of this matter be adjourned to a date to be fixed. As set out in FBM's application, the order will provide that the matter be listed for mention in three months' time.

15 One consequence of granting the adjournment will be that there will be a delay before the evidence can be brought about whether Mr Parrella is entitled to the payment of the commissions he claims. Neither Mr Parrella nor FBM submitted that an adjournment until the outcome of the Supreme Court matter would have any effect on the evidence to be brought. If that evidence includes oral evidence from third parties, as distinct from documentary evidence, consideration should be given by both FBM and Mr Parrella to having those persons make a statement of their evidence whilst their recollection of events is relatively fresh. If necessary, FBM or Mr Parrella may raise this issue when the matter returns to the Commission in three months.

16 A minute of the Order now issues. FBM and Mr Parrella are requested to advise the Commission by 12 noon on Thursday, 11 October 2012 whether they agree that the Minute accurately reflects the decision in this matter, or whether a change to it is necessary for it to do so; if no change is necessary, the Order will issue in the terms of the Minute.

2012 WAIRC 00931

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLES (CARMELO) PARRELLA
	APPLICANT
	-v-
	FBM CORPORATION PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 15 OCTOBER 2012
FILE NO/S	B 49 OF 2012
CITATION NO.	2012 WAIRC 00931

Result	Adjournment granted
Representation	
Applicant	Mr C Parrella
Respondent	Mr N Marouchak, of counsel

Order

I, the undersigned, having given reasons for decision and pursuant to the powers conferred on me under section 27(1)(f) of the *Industrial Relations Act 1979*, hereby order -

1. THAT the application for adjournment be granted.
2. THAT the hearing dates of 11 and 12 October 2012 be vacated and the hearing of this matter be adjourned to a date to be fixed.
3. THAT the matter be listed for mention in three months' time.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2012 WAIRC 00952

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MYRIAM SCHORN
	APPLICANT
	-v-
	SONOLOGIC PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 26 OCTOBER 2012
FILE NO/S	B 87 OF 2012
CITATION NO.	2012 WAIRC 00952

Result	Application for adjournment granted
Representation	
Applicant	In person
Respondent	Mr R Ewens

Order

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

WHEREAS after conciliation was unsuccessful the matter was set down for hearing on 30 August 2012; and

WHEREAS on 2 July 2012 the respondent sought an adjournment due to the unavailability of Mr Rob Ewens, the respondent's Managing Director, and the applicant consented to the adjournment; and

WHEREAS on 16 August 2012 the application was set down for hearing on 31 October 2012 and the respondent indicated that the respondent's Director/s would be available on that date but some Directors would be unavailable between 5 and 23 November 2012; and

WHEREAS on 17 October 2012 the respondent again requested an adjournment of the hearing as Mr Ewens is to attend a conference in New Zealand between 26 October 2012 and 31 October 2012 and due to a staff issue he is the only person within the respondent's operations who can attend this conference; and

WHEREAS the applicant opposed the adjournment and wishes to have closure with respect to this application which was lodged in April 2012; and

WHEREAS the matter was set down for hearing on 22 October 2012 to deal with the respondent's application for an adjournment; and

WHEREAS at the hearing Mr Ewens stated that the respondent would be financially disadvantaged if he could not attend the conference in New Zealand; and

WHEREAS the Commission indicated to the parties at the hearing that if an adjournment is granted the matter would be relisted for hearing on 2 November 2012; and

WHEREAS the applicant agreed to this course of action; and

WHEREAS the respondent expressed concerns about the timeframe given Mr Ewens is returning to Australia on 31 October 2012 and travelling overseas on 4 November 2012; and

WHEREAS after taking into account the parties' submissions and when considering whether the Commission should exercise its discretion to grant an adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* [1969] WAR 19); and

FURTHER when taking into account the duty on the Commission to deal expeditiously with this application given that this is the second request by the respondent for an adjournment the Commission is of the view that an adjournment of the hearing set down for 31 October 2012 should be granted and the matter relisted on 2 November 2012; and

WHEREAS on 23 October 2012 the Commission issued a Minute of Proposed Order in relation to this matter; and

WHEREAS on 24 October 2012 the respondent requested a Speaking to the Minute; and

WHEREAS at a Speaking to the Minute of Proposed Order on 26 October 2012 the respondent claimed that its concerns about relisting the matter on 2 November 2012 should have been specified in detail and a discussion about possibly listing this application in December 2012 was not included in the recitals; and

WHEREAS the Commission is satisfied that the recitals in the Minute of Proposed Order that issued on 23 October 2012 adequately reflect the respondent's submissions and what took place at the hearing on 22 October 2012; and

WHEREAS the Minute of Proposed Order incorrectly stated that Mr Ewens was returning to Australia on 1 November 2012; and

WHEREAS this date should read 31 October 2012 and the order has been adjusted accordingly;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s 27(1), hereby orders:

THAT the hearing scheduled for 31 October 2012 is adjourned to 2 November 2012.

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

2012 WAIRC 00973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTY SHORT
	APPLICANT
	-v-
	K&A REALTY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 5 NOVEMBER 2012
FILE NO/S	B 47 OF 2011
CITATION NO.	2012 WAIRC 00973
Result	Discontinued

Order

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

WHEREAS the Commission listed a conference on 24 June 2011 for the purpose of conciliating between the parties; and

WHEREAS on 17 June 2011 the applicant advised the Commission that the matter had been resolved; and

WHEREAS on 21 June 2011the conference was vacated; and

WHEREAS on 23 October 2012 the applicant advised the Commission that she wanted the application 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 00951

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD WHEELER
	APPLICANT
	-v-
	SHIRE OF DUNDAS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 26 OCTOBER 2012
FILE NO/S	U 90 OF 2012
CITATION NO.	2012 WAIRC 00951

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr S Roffey (as agent)

Order

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

WHEREAS the application was lodged out of time; and

WHEREAS on 7 June 2012, and with the consent of the respondent, the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS on 5 July 2012 the Commission was advised that the parties had reached an agreement to settle the matter; and

WHEREAS on 9 August 2012 and 20 September 2012 the Commission contacted the applicant about whether the settlement had been finalised; and

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

WHEREAS on 9 October 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,
Commissioner.

[L.S.]

2012 WAIRC 00932

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEANETTE LINDA WILSON
	APPLICANT
	-v-
	HEALTHSCOPE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 OCTOBER 2012
FILE NO/S	U 172 OF 2012
CITATION NO.	2012 WAIRC 00932

Result	Application discontinued
Representation	
Applicant	Mrs J Wilson
Respondent	Mr B Ball

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.

CONFERENCES—Matters arising out of—

2012 WAIRC 00938

DISPUTE RE PROPERTY ALLOWANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	TUESDAY, 16 OCTOBER 2012
FILE NO	PSAC 21 OF 2012
CITATION NO.	2012 WAIRC 00938

Result	Application discontinued
Representation	
Applicant	Mr R Horton
Respondent	Mr J Davis

Order

WHEREAS the applicant filed a notice of discontinuance, the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act 1979, hereby orders –

THAT the application be and is hereby discontinued.

(Sgd.) S J KENNER,
[L.S.] Public Service Arbitrator.

CONFERENCES—Matters referred—

2012 WAIRC 00934

DISPUTE RE ALLEGED REFUSAL TO NEGOTIATE FAIR COMPENSATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 OCTOBER 2012
FILE NO/S	CR 23 OF 2011
CITATION NO.	2012 WAIRC 00934

Result	Application discontinued
Representation	
Applicant	Mr M Amati
Respondent	Ms M Rinaldi

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.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation Industrial Union of Workers Perth	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Harrison C	C 39/2011	14/06/2011	Dispute re alleged misconduct of union member	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Department of Water	Scott A/SC	PSAC 15/2011	2/11/2011 6/12/2011	Dispute re employer not allowing union member to return to work	Concluded
The State School Teachers' Union of W.A. (Incorporated)	Director General of the Department of Education	Scott A/SC	C 43/2011	26/07/2011 7/12/2011	Dispute re fixed term contracts of union members	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	Director General of the Department of Education	Scott A/SC	C 42/2011	7/07/2011 11/08/2011 11/05/2012	Dispute re permanency of long & fixed term contracts of union members	Discontinued

CORRECTIONS—

2012 WAIRC 00974

GOVERNMENT OFFICERS (STATE GOVERNMENT INSURANCE COMMISSION) AWARD, 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 5 NOVEMBER 2012
FILE NO	P 18 OF 2007
CITATION NO.	2012 WAIRC 00974

Result Correction Order issued

Order

WHEREAS an error occurred in the Correcting Order issued on the 20th day of September 2012 in application P 18 of 2007,

NOW THEREFORE, the Public Service Arbitrator, in order to correct this error and pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the correcting order be corrected by replacing the words "instruction numbered 36" with the words "instruction numbered 39".

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

PROCEDURAL DIRECTIONS AND ORDERS—

2012 WAIRC 00958

LEVEL OF DUTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE TUESDAY, 30 OCTOBER 2012

FILE NO. PSACR 21 OF 2010

CITATION NO. 2012 WAIRC 00958

Result Direction amended

Representation

Applicant Mr J Ross

Respondent Mr S Millman of counsel

Direction

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of August 2012 the Public Service Arbitrator (the Arbitrator) issued directions in preparation for the hearing of this matter; and

WHEREAS at a Directions hearing convened on the 30th day of October 2012 the respondent requested an extension of time for Directions 5 and 6; and

WHEREAS the Arbitrator is of the opinion that it is appropriate to amend the directions;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

THAT directions 5 and 6 contained in the Directions which issued on the 8th day of August 2012 be amended as follows:

5. THAT the applicant and respondent file in the Commission a book of agreed documents by Wednesday 31 October 2012.

6. THAT the parties file in the Commission a further Statement of Agreed Facts if any can be agreed by Wednesday 31 October 2012.

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

2012 WAIRC 00995

DISPUTE RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WA INCORPORATED
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 9 NOVEMBER 2012
FILE NO	PSAC 27 OF 2012
CITATION NO.	2012 WAIRC 00995

Result	Order issued
Representation	
Applicant	Ms K Hagan
Respondent	Mr S Gregory and Ms K Worlock (of counsel)

Order

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) on 27 September 2012 whereby the applicant sought the assistance of the Commission with respect to a dispute about the appointment of its member Mr Wayne Snell to the permanent position of Senior Policy Officer (the Position) with the respondent; and

WHEREAS conferences were held in the Commission on 5 and 12 October 2012 however no agreement was reached between the parties; and

WHEREAS prior to the matter being referred for hearing and determination the respondent notified the Commission and the applicant that it intended to advertise the Position forthwith and fill it on a permanent basis; and

WHEREAS on 8 November 2012 the Commission convened a further conference; and

WHEREAS at this conference the applicant opposed the Position being advertised whilst this application is before the Commission and sought an order that the Position not be advertised whilst the matter was before the Commission; and

WHEREAS the respondent argued that it was appropriate to advertise the Position on 10 November 2012 as:

1. the Position was currently filled on a part time basis which was unsatisfactory;
2. the respondent was possibly in breach of the *Public Sector Management Act 1994* by continuing to employ Mr Snell in this role under a fixed term contract; and
3. there was no merit to the applicant's claim that Mr Snell be appointed to the Position; and

WHEREAS the applicant argued that:

1. as Mr Snell met the requirements to work in the Position there was merit to the claim that he be appointed to the Position on a permanent basis;
2. Mr Snell, who is currently on secondment from the Position until 23 January 2013, could return to the Position either on a full time permanent or temporary basis on that date as the respondent will not fill the Position prior to this date;
3. both parties would be disadvantaged if the respondent fills the Position on a permanent basis as there would be two occupants of the Position if the applicant's application is successful; and
4. if the applicant is successful in arguing that Mr Snell should be appointed to the Position on a permanent basis, he would be denied a remedy if another person is appointed to the Position on a permanent basis; and

WHEREAS when deciding whether an order should issue preventing the Position from being advertised and filled on a permanent basis whilst this application is before the Commission I take into account any injustice or disadvantage that would eventuate to either party if the order being sought issues; and

WHEREAS after considering the issues raised by each party, and when taking into account equity and fairness I find that Mr Snell will suffer a greater detriment and disadvantage than the respondent if the order sought by the applicant does not issue. In particular I take into account that if the applicant is successful in arguing that Mr Snell be appointed to the Position on a permanent basis this will have no effect if the respondent fills the Position on a permanent basis prior to this application being heard and determined; and

NOW THEREFORE having heard Ms K Hagan on behalf of the applicant and Mr S Gregory and Ms K Worlock of counsel on behalf of the respondent, the Commission having regard for the interests of the parties directly involved, the public interest and pursuant to the powers vested in it by the Act, hereby orders:

THAT the Senior Policy Officer position (position number 0000 4365) not be advertised and filled on a permanent basis by the respondent whilst this application is being heard and determined by the Commission.

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

2012 WAIRC 01029

DISPUTE RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WA INCORPORATED
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 16 NOVEMBER 2012
FILE NO	PSAC 27 OF 2012
CITATION NO.	2012 WAIRC 01029

Result	Correction order issued
Representation	
Applicant	Ms K Hagan
Respondent	Mr S Gregory

Correction Order

WHEREAS on 9 November 2012 an Order in this matter was deposited in the Office of the Registrar; and

WHEREAS the Order contained an error where it referred to Ms Snell being on secondment until 23 January 2013; and

WHEREAS the date should have read 11 January 2013;

NOW THEREFORE, the Commission, in order to correct this error and pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders -

THAT point 2 contained in the applicant's arguments be replaced with the following:

2. Mr Snell, who is currently on secondment from the Position until 11 January 2013, could return to the Position either on a full time permanent or temporary basis on that date as the respondent will not fill the Position until 23 January 2013;

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
The Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary Teachers Enterprise Bargaining Agreement 2012 AG 42/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and The Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
The Roman Catholic Bishop of Broome Teachers Enterprise Bargaining Agreement 2012 AG 43/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Bishop of Broome	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Norbertine Canons Teachers Enterprise Bargaining Agreement 2012 AG 44/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Norbertine Canons	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Mercy Education Limited Teachers Enterprise Bargaining Agreement 2012 AG 48/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Mercy Education Limited	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Edmund Rice Education Australia Teachers Enterprise Bargaining Agreement 2012 AG 40/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Edmund Rice Education Australia	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
The Congregation of the Presentation Sisters of WA Teachers Enterprise Bargaining Agreement 2012 AG 41/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and The Congregation of the Presentation Sisters of WA	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
The Roman Catholic Bishop of Geraldton Teachers Enterprise Bargaining Agreement 2012 AG 38/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Bishop of Geraldton	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Servite College Council Teachers Enterprise Bargaining Agreement 2012 AG 39/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Servite College Council	(Not applicable)	Chief Commissioner A R Beech	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
John XXIII College Council Teachers Enterprise Bargaining Agreement 2012 AG 45/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees, John XXIII College Council	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Institute of the Blessed Virgin Mary Teachers Enterprise Bargaining Agreement 2012 AG 47/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Institute of the Blessed Virgin Mary	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Sisters of the Holy Family of Nazareth Teachers Enterprise Bargaining Agreement 2012 AG 46/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees and Sisters of the Holy Family of Nazareth	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Shelter (WA) Enterprise Bargaining Agreement 2012 AG 35/2012	(Not applicable)	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shelter WA	Chief Commissioner A R Beech	Agreement registered
Kingsway Christian Education Association Inc. Education Assistants Enterprise Bargaining Agreement 2011 AG 34/2012	31/10/2012	The Independent Education Union of Western Australia, Union of Employees, Kingsway Christian College and United Voice WA	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Roman Catholic Bishop of Bunbury Teachers Enterprise Bargaining Agreement 2012 - The AG 36/2012	15/11/2012	The Independent Education Union of Western Australia, Union of Employees and Bishop of Bunbury	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Trustees of the Marist Brothers Southern Province Teachers Enterprise Bargaining Agreement 2012 The AG 37/2012	18/10/2012	The Independent Education Union of Western Australia, Union of Employees and The Trustees of the Marist Brothers Southern Province	(Not applicable)	Chief Commissioner A R Beech	Agreement registered

NOTICES—Appointments—

2012 WAIRC 00986

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner SM Mayman to be an additional Public Service Arbitrator for a period of one year from the 10th day of November, 2012.

Dated the 5th day of November, 2012.

(L.S.) (Sgd.) A.R. BEECH

CHIEF COMMISSIONER A.R. BEECH

PUBLIC SERVICE APPEAL BOARD—

2012 WAIRC 00971

APPEAL AGAINST REDUCTION IN SALARY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEYED NOOREDDIN ALAVI
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINERAL AND PETROLEUM
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G WASHER - BOARD MEMBER
	MR K TRENT - BOARD MEMBER
DATE	MONDAY, 5 NOVEMBER 2012
FILE NO	PSAB 11 OF 2012
CITATION NO.	2012 WAIRC 00971

Result	Appeal discontinued
Representation	
Appellant	Ms K Hagan of counsel
Respondent	Mr M Danger of counsel

Order

WHEREAS the appellant 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 appeal 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 00980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NOLA MARGARET BRADSHAW
	APPLICANT
	-v-
	ATTORNEY GENERAL,
	DEPARTMENT OF THE ATTORNEY GENERAL
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 6 NOVEMBER 2012
FILE NO	PSA 29 OF 2009
CITATION NO.	2012 WAIRC 00980

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of October 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 00996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL
	DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 12 NOVEMBER 2012
FILE NO/S	PSA 22 OF 2011
CITATION NO.	2012 WAIRC 00996

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 1st day of November 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 00998

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 12 NOVEMBER 2012
FILE NO	PSA 25 OF 2011
CITATION NO.	2012 WAIRC 00998

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 1st day of November 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 00978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GINO CONIGLIO
	APPLICANT
	-v-
	ATTORNEY GENERAL, DEPARTMENT OF THE ATTORNEY GENERAL
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 6 NOVEMBER 2012
FILE NO	PSA 27 OF 2009
CITATION NO.	2012 WAIRC 00978

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of October 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 00997

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 12 NOVEMBER 2012
FILE NO	PSA 28 OF 2011
CITATION NO.	2012 WAIRC 00997

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 1st day of November 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 01000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 12 NOVEMBER 2012
FILE NO	PSA 27 OF 2011
CITATION NO.	2012 WAIRC 01000

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 1st day of November 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 00965

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNY FULLER HILL
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE WA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 1 NOVEMBER 2012
FILE NO	PSA 5 OF 2012
CITATION NO.	2012 WAIRC 00965

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 29th day of October 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 00999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY BRETT HANSEN
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 12 NOVEMBER 2012
FILE NO	PSA 26 OF 2011
CITATION NO.	2012 WAIRC 00999

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 1st day of November 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 00979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPHINE MARGARET KEANE
	APPLICANT
	-v-
	ATTORNEY GENERAL, DEPARTMENT OF THE ATTORNEY GENERAL
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 6 NOVEMBER 2012
FILE NO	PSA 28 OF 2009
CITATION NO.	2012 WAIRC 00979

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of October 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 64/2012	Request for Mediation re notice of termination	Chief Commissioner A R Beech	9/11/2012	Concluded

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2012 WAIRC 00105

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-
	G & F LOGISTICS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 27 FEBRUARY 2012
FILE NO/S	RFT 1 OF 2012
CITATION NO.	2012 WAIRC 00105

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Not applicable

Order

WHEREAS on 10 February 2012 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 on 10 February 2012 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 (7) 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 Industrial Relations Act, 1979, hereby orders –

(1) THAT the time for the filing of a notice of answer by the respondent be and is hereby shortened to seven (7) days from the date of service of the notice of referral on the respondent.

(2) THAT a copy of this order be served on the respondent at the time of service of the notice of referral.

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

2012 WAIRC 00939

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-
	G & F LOGISTICS PTY. LTD.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 OCTOBER 2012
FILE NO/S	RFT 1 OF 2012
CITATION NO.	2012 WAIRC 00939

Result	Referral discontinued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr G Foote

Order

WHEREAS the applicant informed the Tribunal that the parties have resolved the issues between them which were the subject of this referral, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the referral be and is hereby discontinued.

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